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Municipal Civil Rights Legislation--Is the Power Conferred by the Grant of Home Rule

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I. INTRODUCTION

The single most pressing problem facing today's urban centers is the denial of human rights to minority groups. In attempting to cope with this dilemma, several Minnesota municipalities[1] have enacted some form of "civil rights" legislation.[2] Thus far no challenge to these municipalities' authority to take this action has been made. As more municipalities enact such legislation,[3] however, it is appropriate to inquire whether in fact the authority to do so exists. Any uncertainty with respect to this issue must not only call into question the validity of the measures already enacted, but also must serve as a deterrent to the promulgation of similar legislation by other municipalities. Consequently, resolution of this question will facilitate the administration of government at both the municipal and state levels.[4]

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1. MINNEAPOLIS, MINN., CODE chs. 930, 942 (1960); ST. PAUL, MINN., CODE ch. 74 (1965); DULUTH, MINN., CODE ch. 19 (1959); GOLDEN VALLEY, MINN., RES. 68 (1965) FRIDLEY, MINN., RES. 271 (1964).

2. "Municipal corporations" and "municipalities" are generic terms which overlap in some respects but are distinct in others. No attempt to define either is made in this Note. As used herein, the terms are synonymous and refer in part to cities, villages, boroughs, counties and towns.

The phrase "civil rights legislation" is used to refer to all measures designed to prevent any form of discrimination based on race, creed or color.

3. At the present time St. Louis Park, Bloomington, Richfield, Hopkins, Robinsdale and Roseville are contemplating the adoption of civil rights ordinances. Golden Valley is in the process of drafting a new ordinance.

4. H. MCBAIN, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE *passim* (1916) [hereinafter cited as MCBAIN, MUNICIPAL HOME RULE]. For example, Minneapolis has enacted an anti-discrimination ordinance pursuant to the general welfare clause of its home rule charter. MINNEAPOLIS, MINN., CODE ch. 930 (1966). In order to implement the power of the commission established by this ordinance, the city did not simply amend the ordinance pursuant to its welfare powers. Instead, it asked the state legislature for a special grant conferring to the commission those powers it thought necessary. *See* ch. 743 [1967] Minn. Laws 1547.

The argument can be made that this action by the City of Minneapolis—requesting greater power to deal with problems of civil rights—evidences a belief of the municipality that such powers come only from the state. However, this argument does not follow *a fortiori*. The powers conferred by ch. 743 [1967] Minn. Laws 1547 are in the nature of injunctive powers such as the power to issue cease and desist orders and orders of reinstatement. Although a *municipal* ordinance can be enforced by fine or imprisonment, one which conferred injunctive

Any response to the question of whether a municipality has power to legislate in a particular area requires reference to the general principle which serves to distribute powers between state and local governments. In Minnesota, this distribution is accomplished through the principle of "home rule" under which most municipalities operate.[5] The home rule doctrine allows municipal corporations to adopt their own charters and to deal with matters of local concern without specific enabling legislation from the state.[6] The purpose of this Note is to determine whether Minnesota Home Rule municipalities possess the power to enact civil rights legislation and if so, to define the scope of that power.

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powers would not be enforceable in municipal court. *See* note 73 *infra*, and accompanying text. This may be one explanation of the action taken by the municipality.

5. Minnesota municipalities are of two types: (1) those which are incorporated under the laws of the state and adopt these laws as their charters and (2) those which adopt home rule charters pursuant to MINN. CONST. art. 4, § 36 (repealed, ch. 800 [1957] Minn. Laws 1087), MINN. CONST. art. 11, § 3, and MINN. STAT. § 410.07 (1967). The former are strictly regulated by state statute. MINN. STAT. chs. 365, 411, 412 (1965). The latter are also governed by the constitution and state statutes, but their primary limitations are those discussed below.

6. Before the middle of the nineteenth century, state intervention in municipal government took the form of special legislation dealing with limited subjects and directed at particular municipalities. It was thought by those involved in municipal affairs that municipal corporations possessed only those powers specifically granted them by their charters or other legislation. Thus, when new exigencies arose charter amendments or other statutory provisions were required. For example, in 1870 the New York State Legislature passed a total of 808 pieces of legislation, 212 of which were "special" acts for New York City. MCBAIN, MUNICIPAL HOME RULE 8. One way to reduce the need for such intervention is to limit the state's power to legislate with respect to particular municipal affairs. For example, state legislatures have been specifically precluded from imposing taxes for municipal purposes, from compelling municipalities to incur debts and from appointing municipal officers. C. ANTIEAU, MUNICIPAL CORPORATION LAW §§ 2.07-.10 (1967). Another alternative, proposed in dicta in LeRoy v. Hurlbut, 24 Mich. 44, 62 (1871) gives municipalities an inherent right of self government not subject to limitation by the state or other governing body. This approach was adopted in only three jurisdictions. *See* State *ex rel.* Geake v. Fox, 158 Ind. 126 (1901); City of Lexington v. Thompson, 113 Ky. 540 (1902); State v. Barker, 116 Ia. 96 (1902). It was summarily rejected by the great majority of jurisdictions on the ground that it did not conform to the principle that the municipality is a creature of the state. *See, e.g.*, Barnes v. District of Columbia, 91 U.S. 540 (1875); Minneapolis Street Ry. v. City of Minneapolis, 229 Minn. 502, 507, 40 N.W. 2d 353 (1949). *See generally* J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 98 (5th ed. 1911). For a complete discussion of the inherent right theory, including a convincing refutation, *see* McBain, *Doctrine of an Inherent Right of Local Self Government*, 16 COLUM. L. REV. 190, 299-315. (1916).

II. THE EXISTENCE OF THE POWER

In order to determine whether a Minnesota municipality has the power to legislate in a particular area it is necessary to answer three questions: (1) Is legislation with respect to the particular subject a "municipal function?" (2) Does the municipality's home rule charter authorize such legislation? (3) Has the state government preempted the area by enactment of the State Act Against Discrimination?

A. Local Municipal Function

The grant of home rule power is of constitutional origin[7] and thus cannot be withdrawn by the state legislature. Municipal power to legislate, however, is limited by the constitutional requirement that the home rule charter be "consistent with and subject to the laws of the state."[8] Thus, the scope of municipal initiative is subject to definition by state statute.[9]

The first enabling statute defining the scope of municipal power was enacted in 1889.[10] This act was revised to its present form in 1905.[11] The portion relevant to the present discussion provides that a municipal charter:

> . . . may [include] any scheme of municipal government not inconsistent with the constitution, and may provide for . . . the regulation of all local municipal functions, as fully as the legis-

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7. Minn. Const. art. 11, § 3.

8. Minn. Const. art. 4, § 36. This was repealed by ch. 809 [1957] Laws of Minn. It was replaced by article XI, § 3 which provides that "any city . . . may adopt a home rule charter for its government in accordance with this constitution and the laws." The majority of Minnesota home rule municipalities adopted charters pursuant to the former grant. These are expressly validated by Minn. Const. art. 11, § 5. Moreover, the replacement of the words "consistent with and subject to" by the phrase "in accordance with" was probably intended merely to avoid the argument that a state law on any subject will supersede a municipal ordinance dealing with the same matter, made in cases such as those cited in note 51 *infra*.

9. There are two types of grants of home rule authority: those which are purely constitutional and those which are a combination of constitutional and legislative provisions. As far as the scope of the power is concerned, however, it is the particular grant and not the method which is important. Sandalow, *The Limits of Municipal Power Under Home Rule—A Note for the Courts*, 48 Minn. L. Rev. 643 (1964) [hereinafter cited as Sandalow, *Municipal Power*]. When home rule is granted by the latter method the state naturally retains a greater degree of power since municipal authority can be added or deleted by statute.

10. Ch. 351 [1899] Minn. Laws 462.

11. Minn. Rev. Stat. § 750 (1905). Compare Minn. Stat. §§ 410.01-.31 (1967).

> lature might have done before [the adoption of the constitutional provision granting home rule powers] . . . .[12]

This grant of authority clearly does not give municipalities the power to legislate on all subjects not specifically proscribed by the constitution.[13] As the statute indicates, municipalities may legislate only when their actions would constitute "local municipal functions."

The phrase "local municipal function" has not been defined by the Minnesota court. This failure may be due in part to the natural ambiguity of the phrase. It may also be due to the paucity of analytical or philosophical discussion concerning the proper relationship between local and state government.[14] Finally, it may be due to the availability of the nebulous concept of police power which courts tend to discuss at length while ignoring the question of the scope of municipal functions.[15]

Notwithstanding the lack of authority, any definition of "local municipal function" should be broad enough to permit municipal enactment of civil rights measures. Civil rights is an area in which local initiative is particularly appropriate. The type and extent of discriminatory practices in a given community vary in relation to such factors as the depth of local prejudice and the physical environment. These, in turn, are affected by the character of the municipality and the number of citizens against whom discriminatory actions might be expected. The most basic decision turning on the above factors is whether or not to enact a civil rights ordinance in the first place. The importance of familiarity with local conditions, however, does not end there. Such familiarity is also vital to the actual composition of an effective civil rights ordinance. Any decisions about the appropriateness of particular anti-discriminatory provisions or about the overall scope of the ordinance

12. MINN. STAT. § 410.07 (1967).

13. *See* State *ex rel.* Peers v. Fitzgerald, 131 Minn. 116, 154 N.W. 750 (1916); Laird Norton Yards v. City of Rochester, 117 Minn. 114, 134 N.W. 644 (1912); Anderson, *Municipal Home Rule in Minnesota*, 7 MINN. L. REV. 306 (1922).

14. The proper relationship between state and federal government has been the subject of analysis for two centuries. On the other hand, it is only in recent years that writers have undertaken to analyze the relationship between state and local government. One of the best of these is AREA & POWER (A. Maass ed. 1959).

15. In Village of Brooklyn Center v. Rippen, 255 Minn. 334, 96 N.W.2d 585 (1959), the court was faced with the question of whether a municipality could require boats operating within the village limits to obtain licenses. Instead of determining whether such licensing was a municipal function, the court analyzed the case wholly in terms of police power.

must necessarily be strongly influenced by local considerations.

This need for knowledge of the particular locality is one of the factors which originally gave rise to the home rule movement. The movement was intended to remove the evils of special legislation by conferring initiative upon municipal corporations.[16] This course eliminated not only the potential for corruption inherent in special legislation, but also the need for authorizing legislation in general.[17] Because of the variety of factors bearing on civil rights legislation, this area is one in which municipal initiative is most appropriate.[18] Thus, inclusion of civil rights in the home rule power is not only crucial to an effective solution, but is also consistent with the fundamental tenets of the doctrine.

The degree of municipal interest in the regulation of civil rights lends further support for the argument that such legislation should be considered a "local municipal function." It is generally said that although the presence of statewide interest does not prevent a subject from being one of municipal concern,[19] it does mean that a high degree of local interest is necessary for the subject to be held a local municipal function.[20] Clearly municipalities are significantly interested in an end to discrimination. Ninety-nine per cent of Minnesota's Negroes live in cities.[21] Most of the major social evils caused by discrimination, such as hardcore unemployment, are concentrated in the central cities.[22] Centers of unemployment and education—areas in which discrimination affects the greatest number[23]—are located in municipalities. The riots and civil disorders which result from discrimination occur almost exclusively in the cities.[24] These considerations indicate that the degree of municipal interest in the promotion of civil rights legislation is sufficiently high to justify its inclusion as a local municipal function.[25]

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16. *See* note 6 *supra.*
17. *See* Sandalow, *Municipal Power* 649-50.
18. *See* notes 15 & 16 *supra,* and accompanying text.
19. State v. Crabtree Co., 218 Minn. 36, 15 N.W.2d 48 (1944).
20. City of Duluth v. Cerveny, 218 Minn. 511, 16 N.W.2d 779 (1944); Park v. City of Duluth, 134 Minn. 296, 159 N.W. 627 (1916).
21. Conference with Mrs. Viola Kanatz, former Deputy Comm'r of Human Rights, April 26, 1968.
22. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 414 (1968).
23. *Id.*
24. *Id.* at 203.
25. The requirement that municipal legislation be confined to "local municipal functions" serves to ensure that the legislation will

The need for administration and enforcement of civil rights at the local level[26] further strengthens the argument that regulation of civil rights is a local municipal function.

> Government initiative in the field of human relations is needed at all levels, especially at the local level. Human relations problems cannot be adequately solved until the government and citizenry of each community . . . honestly face these problems and . . . work together for their solution.[27]

The ultimate goal of civil rights ordinances is the complete abolition of discrimination. This can only be accomplished by bringing about a change in individual attitudes. Since the individual tends to be most strongly influenced by his immediate associations,[28] the more closely a legislative body approximates that group the more strongly the individual will be influenced to accept its goals.[29] Thus municipal legislation is more likely to effectuate the crucial change in attitude than legislation promulgated by the state.

There is evidence that the state legislature itself believes that civil rights legislation is a local municipal function. The 1967 amendments to the State Act Against Discrimination[30] in-

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only affect members of the enacting municipality. In the area of municipal taxation and spending the "public purpose" doctrine serves the same function. *See, e.g.*, City of Lexington v. Hager, 337 S.W.2d 27 (Ky. 1960) (public purpose doctrine requires that taxes be levied only for the purposes of the particular taxing unit.) A taxing or spending measure is considered to conform with a "public purpose" when it is "such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government." Visina v. Freeman, 252 Minn. 177, 184, 84 N.W.2d 635, 641 (1958). The regulation of civil rights clearly serves as a benefit to the community, *see* note 19 *passim* and accompanying text. It is equally clear that the promotion of the general welfare resulting from such regulation is a governmental function. Thus the analogy to the area of municipal taxation supports the conclusion that regulation of civil rights is a local municipal function.

26. This need was recognized by the draftsmen of the Model Anti-Discrimination Act. It was provided for by the creation of a system of referrals to and from local commissions and by the inclusion of sections specifically enabling municipalities to enact local civil rights ordinances. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM LAW COMMISSIONERS' MODEL ANTI-DISCRIMINATION ACT §§ 902-906 (1966) [hereinafter cited as MODEL ACT].

27. Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 YALE L.J. 1171, 1226 (1965).

28. D. WILCOX, THE AMERICAN CITY: A PROBLEM IN DEMOCRACY 21 (1904).

29. Note, *Municipal Fair Employment Practices Ordinances as a Valid Exercise of the Police Power*, 39 NOTRE DAME LAW. 607 (1964).

30. MINN. STAT. § 363.01-.13 (1967). It might also be argued that the legislature merely contemplates municipal action only after seeking express approval from the state. *See* note 4 *supra*.

dicate that the legislature expects municipal action in this area. The Act provides that the State Commissioner of Human Rights may refer any matter covered by Chapter 363 to a "local commission." "Local commissions" are defined as agencies

> of a city, village or borough created pursuant to law, city charter, or municipal ordinance, and conferring upon the agency powers, including, *but not limited to* those which are conferred upon the commissioner by chapter 363.[31]

This definition obviously implies that municipal corporations have the power to establish civil rights commissions. Furthermore, the last part of the definition indicates that the draftsmen contemplated the existence of municipal power to legislate beyond the mere establishment of commissions.

Although the factors discussed above lead inescapably to the conclusion that civil rights legislation is a "local municipal function," there are several additional considerations. One such consideration is the need for statewide uniformity. In *Village of Brooklyn Center v. Rippen*,[32] the court based its holding that municipal licensing of boats is not a proper exercise of the police power on the conclusion that boating is not "local" in nature. In reaching this conclusion the court considered the adverse effect which disparate municipal licensing measures would have on those who engaged in the sport in several different localities. Thus, the inconvenience resulting from the lack of uniform regulation was the basis for the denial of municipal power.

In the case of civil rights measures, the persons most affected by the lack of uniformity would be those having substantial interests in many municipalities.[33] Such persons, however, could avoid undue inconvenience by simply complying with the most stringent municipal ordinance. Any inconvenience resulting from such compliance is clearly outweighed by the advantage of permitting municipalities to experiment with local solutions[34] by going beyond the minimum limits set by the State Act Against Discrimination.[35]

Another consideration is suggested by *State ex rel. Peers v. Fitzgerald*.[36] In that case the portions of a municipal charter which granted the city council contempt powers were invalidated. Since the exercise of contempt powers represents a sub-

31. *Id.* § 363.115 (emphasis added).
32. 255 Minn. 334, 96 N.W.2d 585 (1959).
33. For example, a corporation employing large numbers of workers and having plants in different municipalities.
34. *See* notes 15-16 *supra* and 81 *infra*, and accompanying text.
35. MINN. STAT. § 363.01-.13 (1967).
36. 131 Minn. 116, 154 N.W. 750 (1915).

stantial interference with the freedom of those concerned, the court feared that without statutory limitations the power would be subject to serious abuse and might be "readily converted into an instrument of oppression."[37] Its exercise, especially by "persons of limited legal knowledge and experience,"[38] could jeopardize guarantees of fair procedure. The court, therefore, found that the power to adopt a municipal charter does not include the right to confer contempt powers on the city council, holding in part that citations for contempt are not "local municipal functions." This reasoning indicates that municipal legislation which threatens basic community values and which is not subject to strict limitations is beyond the scope of municipal power.[39]

The regulation of civil rights is subject to more direct constitutional and statutory limitations than is municipal contempt power.[40] An arbitrary exercise of power is to be feared less where a judicial as opposed to an administrative forum exists to counteract this threat. Although potential conflicts between guarantees of fair procedure and methods of administration exist, they are not conflicts which inhere in the subject as in the case of contempt powers. Therefore, municipal regulation of civil rights does not present the threat foreseen by the *Peers* court and should not be excluded from the scope of municipal concern on that basis.

It has also been suggested by at least one writer that the political processes at the local level may not be sufficiently developed to make decisions on certain subjects.[41] This author contends that the relative homogeneity of a constituency and its numerical size may result in the lack of a satisfactory exchange of ideas or adequate representation of minority or unpopular views. Proponents of this theory argue, therefore, that municipal action in this area should be beyond the scope of "municipal functions."[42]

37. *Id.* at 120, 154 N.W. at 753.
38. *Id.*
39. Sandalow, *Municipal Power* 708.
40. Municipal civil rights legislation is limited by constitutional guarantees such as privacy and free speech. *See* St. Paul v. Dalsin, 245 Minn. 325, 71 N.W.2d 855 (1955). Local ordinances must also serve as "an important adjunct in preserving the standard of regulation as moulded by the general law." Duluth v. Evans, 158 Minn. 450, 197 N.W. 737 (1924).
41. *Cf.* Ylvisaker, *Some Criteria for a "Proper" Areal Division of Governmental Powers*, in AREA AND POWER 27 (A. Maass, ed. 1959).
42. Mr. Ylvisaker contends that before being granted governmental powers a unit should contain sufficient diversity of interests to ensure effective debate. *Id.* at 37.

The above argument is unpersuasive when applied to the field of civil rights. The communities which have the greatest need for civil rights legislation are those in which large numbers of citizens are affected by discriminatory practices. In such communities, the very size of the minority population insures lively debate. Thus, as the need for civil rights measures increases, so does the likelihood that minority views will be vigorously asserted.

B. Charter Authority

On balance, the above arguments indicate that regulation of civil rights is a legitimate subject of municipal concern. Nevertheless the authority to legislate on such subjects must be contained in the municipal charter. No charter has been found with specific provisions authorizing the regulation of civil rights. Although this defect could be cured by charter amendments, such steps may not be necessary. The legislative power of municipalities is not limited to subjects specifically covered by the charter when the instrument contains a general grant of "police powers,"[43] or provisions such as those of the Minneapolis charter enabling the council to "ordain, publish, enforce, alter amend or repeal . . . ordinances for the government and good order of the city . . . ."[44] In the absence of express authority, therefore, the power to regulate civil rights may stem from a charter's general welfare provisions.

A decision on whether a particular act is for the general well-being of the community is made by balancing the good resulting from the act against the evil it causes society.[45] Where this balance has involved *state* civil rights acts, the statutes have been upheld.[46] The same test is applied on the municipal level.[47] Thus, several foreign jurisdictions have held that

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In the same study a second author argues that while Ylvisaker's points on diversity may be well taken, it is also true that the debate envisioned by Ylvisaker must take place in a social and psychological unit. This can only be achieved in a viable and vital unit of government which will necessarily be somewhat homogeneous. Thus the desire for diversity can never be fully realized. Willbern, *The States as Components in an Areal Division of Powers*, in Area and Power 70, 73 (A. Maass ed., 1959).

43. *See* State v. Morrow, 175 Minn. 386, 221 N.W. 423 (1928).

44. Minneapolis, Minn., Code ch. 4, § 5 (1965).

45. *Cf.* Nebbia v. New York, 291 U.S. 502 (1933); Miller v. Schoene, 276 U.S. 272 (1928).

46. *See* People v. Bob-Lo Excursion Co., 317 Mich. 686, 27 N.W.2d 139 (1947), *aff'd*, 333 U.S. 28 (1948).

47. District of Columbia v. J.R. Thompson, Inc., 346 U.S. 100 (1953).

the regulation of civil rights is within the scope of *municipal* police power. The United States Supreme Court, interpreting a statute granting the District of Columbia power to regulate all "rightful subjects of legislation," held that an anti-discrimination ordinance was within the municipal police power.[48] Similarly, the Missouri court has stated that

> [a] municipal ordinance, designed to prevent discrimination by reason of race or color in restaurants bears a substantial and reasonable relation to the . . . grant of power to regulate . . . [for] the health, comfort, safety, convenience and welfare of the inhabitants of the city and is fairly referrable to the police power of the municipal corporation.[49]

In Minnesota, a trend has developed in the direction of expanding municipal police powers "to enable [municipalities] to meet and provide for new conditions as they arise."[50] This trend is the result of a growing recognition that broad legislative powers are necessary to deal effectively with the wide range of problems encountered by municipalities. As has been noted, civil rights problems can be most effectively dealt with at the local level since they demand intimate knowledge of the particular community and the ability to adapt to changing conditions. Thus, the reasons behind the trend towards expansion of municipal police powers are peculiarly applicable to the area of civil rights. It is clear, therefore, that legislation in this area should be considered as within the general welfare or police power provisions of municipal charters.

C. Preemption

The presence of municipal power to legislate in the field of civil rights does not by itself mean that home rule municipalities may validly enact such ordinances. If the state, by its own actions, has preempted the area of civil rights, then municipalities are precluded from any independent action on this subject.[51]

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48. *Id.*

49. Marshall v. Kansas City, 355 S.W.2d 877, 883 (Mo., 1962); *accord*, Porter v. City of Oberlin, 3 Ohio App. 2d 158, 209 N.E.2d 629 (1964). Three jurisdictions have held that municipalities may not legislate in the field of civil rights. Two of these did so on grounds of preemption. Midwest Employers Council, Inc. v. Omaha, 177 Neb. 877, 131 N.W.2d 609 (1964); Mayor & City Council v. Smentkowski, ___ Del. ___, 198 A.2d 685 (1964). In Nance v. Mayflower Tavern, Inc., 106 Utah 517, 150 P.2d 773 (1946), the Utah court held that a municipal ordinance prohibiting discrimination in restaurants was invalid. It concluded that the constitutional grant of home rule power did not authorize such legislation and that the statutory authority to license and regulate restaurants did not extend to the prohibition of discrimination.

50. State v. Morrow, 175 Minn. 386, 387, 221 N.W. 423 (1928).

51. The Minnesota Constitution provides that "any city or village

The Minnesota Supreme Court recently established a number of tests to determine whether the state has preempted a given field:[52]

> (1) What is [the nature of] the "subject matter" which is to be regulated? (2) Has the subject matter been so fully covered by state law as to have become solely a matter of state concern? (3) Has the legislature in partially regulating the subject matter indicated that it is a matter solely of state concern? (4) Is the subject matter itself of such a nature that local regulation would have unreasonably adverse effects upon the general populace of the state?[53]

The subject in question is the regulation of civil rights. The legislature has dealt with this subject by adoption of the State Act Against Discrimination.[54] In general, municipal regulations of subjects covered by comprehensive state legislation have been overturned on grounds of preemption when the court has found that the adverse effects of the ordinances outweighed their benefits.[55] When adverse effects were absent, the court upheld municipal ordinances despite comprehensive state legislation on the same subject.[56] Thus, in asking whether a subject has been so thoroughly covered as to be solely a state concern, the narrower issue is whether, in the face of comprehensive state regulation, the need for local initiative is sufficiently great to justify its adverse effects. In the field of civil rights, this question has already been answered affirmatively.[57]

When state legislation is insufficiently comprehensive to preempt a field of its own accord, preemption may be achieved by an expression of intent. Thus, a municipal ordinance regu-

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in this state may frame a charter for its own government as a city consistent with and subject to the laws of this state. . . ." MINN. CONST. art. 4, § 36. This phrase has been construed to mean that "local" ordinances will be given effect *unless* they contravene legislatively expressed state policies. State *ex rel.* Town of Lowell v. City of Crookston, 252 Minn. 526, 91 N.W.2d 81 (1958); Duluth v. Cerveny, 218 Minn. 511, 16 N.W.2d 779 (1944); Markely v. City of St. Paul, 142 Minn. 356, 172 N.W. 215 (1919); Park v. City of Duluth, 134 Minn. 296, 159 N.W. 627 (1916); Grant v. Berrisford, 94 Minn. 45, 101 N.W. 940 (1904).

52. Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 143 N.W.2d 813 (1966).

53. *Id.* at 358, 143 N.W.2d at 822.

54. MINN. STAT. § 363.01-.13 (1967).

55. Minnetonka Elec. Co. v. Village of Golden Valley, 273 Minn. 301, 141 N.W.2d 138 (1966); Village of Brooklyn Center v. Rippen, 255 Minn. 334, 96 N.W.2d 585 (1959).

56. Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 143 N.W.2d 813 (1966); State *ex rel.* Sheahan v. Mulally, 257 Minn. 27, 99 N.W.2d 892 (1959); Duluth v. Cerveny, 218 Minn. 511, 16 N.W.2d 779 (1944).

57. *See* notes 14-29 *supra*, and accompanying text.

lating driving while intoxicated was held invalid[58] because the state act on that subject provided that it should be "applicable and uniform throughout this state and in all political subdivisions therein . . . ."[59] Not only is there no such language in the Act Against Discrimination but the state Attorney General has issued a formal opinion to the effect that the Act was not intended to be preemptive.[60] Moreover, the 1967 amendments provide for interaction between the state commissioner and local commissions, which are defined as any agency of any municipality with powers including "*but not limited to* those which are conferred upon the commissioner" by the state act.[61] This language clearly implies that the legislature contemplated the enactment of civil rights measures by municipalities. It is obvious, therefore, that the Act Against Discrimination does not express an intent to be preemptive.

The fourth test of preemption established by the Minnesota court asks whether the subject matter is "itself of such a nature that local regulation would have unreasonably adverse effects upon the general populace of the state."[62] This is essentially the same question which has already been dealt with in the discussion of uniformity. It was concluded there that the advantages of granting municipalities enough power to effectively handle the changing problems of civil rights outweigh the need for uniformity.[63] Thus it can be concluded that the regulation of civil rights at the local level will not have *unreasonably* adverse effects upon the general populace of the state.

III. THE SCOPE OF THE POWER

Since the ability to enact civil rights ordinances is among the home rule powers given to Minnesota municipalities by the constitution, and since the exercise of that power has not been preempted by the state, the only remaining question concerns the boundaries of and limitations on the power. Although there is no case law which bears directly on this inquiry, a response is made possible by reference to analogous areas. *Laird Norton Yards v. City of Rochester*[64] and *City of Staples v. Minnesota*

58. State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959).
59. MINN. STAT. § 169.03 (1959).
60. Op. Atty. Gen. 59 a-32 (#3a) June 1, 1966.
61. MINN. STAT. § 363.115 (1967) (emphasis added).
62. Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 358, 143 N.W.2d 813, 822 (1966).
63. *See* notes 29-35 *supra*, and accompanying text.
64. 117 Minn. 114, 134 N.W. 644 (1912).

Power and Light Company[65] both involved a city's attempt to avoid application of equitable estoppel theories. In both cases, the court, using broad language, held that municipalities do not possess the power to abrogate any "rules of common law or equity."[66] If this dictum were applied to enactments in the field of civil rights, municipal legislative power would be more apparent than real since nearly every action would infringe upon some common law right.[67]

The indications are, however, that such an application will not be forthcoming. Both *Laird* and *Staples* involved reliance upon municipal action of a *proprietary nature*. Thus, the municipalities were estopped from denying the validity of contracts which would otherwise have been rendered invalid by municipal ordinance. On the other hand, where reliance has been upon municipal action of a *governmental nature* the same doctrine has not been applied.[68] Nor has it been applied to actions constituting exercises of the police power.[69] Since municipal civil rights regulation is not only within the police power,[70] but also a governmental function, the dictum of *Laird* and *Staples* should be considered irrelevant.

The second, and most easily avoided, judicial restriction on the scope of municipal action is the stricture that no municipality may legislate extraterritorially.[71] Since civil rights legislation is no more likely to violate this restriction than any other form of municipal action, no discussion is necessary.

Another restriction on municipal initiative was established by *State ex rel. Peers v. Fitzgerald.*[72] According to that case, municipalities may not confer contempt powers on administrative agencies such as city councils. Thus, orders emanating from such groups as human rights commissions cannot be enforced by means of contempt proceedings. On the basis of the *Peers* holding, it can be argued that municipal agencies should

65. 196 Minn. 303, 265 N.W. 58 (1936).

66. *Id.* at 307, 265 N.W. at 60.

67. For example, at common law an innkeeper could refuse to serve anyone for any reason whatsoever. Thus, an ordinance preventing discrimination in restaurants would infringe upon that right.

68. W.H. Barber Co. v. Minneapolis, 227 Minn. 77, 34 N.W.2d 710 (1948); Alexander Co. v. Owatonna, 222 Minn. 312, 24 N.W.2d 244 (1946).

69. City of St. Paul v. Haugbro, 93 Minn. 59, 100 N.W. 470 (1904).

70. *See* notes 43-50 *supra*, and accompanying text.

71. *See* Burnsville v. Bloomington, 268 Minn. 84, 128 N.W.2d 97 (1964). *See also* R. MADDOX, EXTRATERRITORIAL POWERS OF MUNICIPALITIES (1955); Anderson, *The Extraterritorial Powers of Cities*, 10 MINN. L. REV. 475 (1926).

72. 131 Minn. 116, 154 N.W. 750 (1915).

also be denied the right to exercise injunctive powers, since these powers (usually enforced by contempt proceedings) present the same threat of arbitrariness as contempt powers. Notwithstanding the *Peers* analogy, the inability of municipal courts to issue injunctions,[73] standing alone, denies municipalities the most effective sanction available for the enforcement of their ordinances. Any solution to this problem would require enabling legislation, possibly in the form of an amendment to the Act Against Discrimination, of the sort contained in sections 902 and 903 of the Model Anti-Discrimination Act.[74]

The last limitation on the exercise of municipal civil rights powers is found in the following general rule:

> . . . a municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves.[75]

The reason given for this rule is that its absence would allow innumerable jurisdictions to formulate divergent rules for countless legal issues.[76] This consideration indicates that the enactment of municipal laws should be permissible only when truly necessary for the proper performance of a municipal duty.[77] Thus, municipal civil rights legislation providing for civil relief should be held invalid unless vital to the effective protection of human rights.

The need for affording civil rights litigants the possibility of civil relief is obvious. The most effective form of civil relief —the injunction—is not available to municipalities or issuable by municipal courts.[78] A fine imposed by municipal ordinances could be no more than $1,000.[79] Thus, without the ability to recover substantial civil damages, there is little chance that a discriminatory practice will receive effective consideration. On

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73. MINN. STAT. § 488.05(d) (1967). Municipal ordinances are not enforceable in district courts.

74. MODEL ACT §§ 902 and 903 provide:

> A political subdivision may adopt and enforce an ordinance prohibiting discrimination because of race, color, religion, sex, or national origin not in conflict with a provision of this Act.
>
> A political subdivision . . . may create a local commission to promote the purposes of this Act and to secure for all individuals within the jurisdiction of the political subdivision or subdivisions freedom from discrimination. . . .

75. E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 22.01 (3d ed. 1949).

76. Sandalow, *Municipal Power* 679.

77. *Id.* at 678. The American Municipal Ass'n Model Const. Provision for Municipal Home Rule 19 also supports this position.

78. *See* note 73 *supra*, and accompanying text.

79. MINN. STAT. § 488.04 (1967).

balance, therefore, the danger of divergent municipal regulations is outweighed by the benefits which would be gained by permitting municipal damage provisions.

As we have seen, the power of municipalities to act in the area of civil rights is circumscribed by judicial proscriptions, the constitution and the State Act Against Discrimination. Nevertheless, a number of valuable steps could be taken at the municipal level. For example, a municipality could properly expand the areas in which discrimination is prohibited by broadening the definition of "real property"[80] to include all buildings and structures as well as all interests in real estate cooperatives. Municipalities could prohibit any printing or advertising with discriminatory overtones. They could also rectify some of the errors made by the draftsmen of the State Act Against Discrimination. For example, the present racial imbalance plan of the Minneapolis School Board, which is of questionable validity under sections 363.03 (5) (2), and (3) of the State Act,[81] could be validated by municipal legislation. In these and other ways, municipal initiative in this area could facilitate an end to discrimination in this state.

IV. CONCLUSION

The power to legislate in the field of civil rights granted to Minnesota municipalities by the state's home rule provision provides these municipalities with the opportunity to experiment with local solutions to a problem which affects each community differently. It further provides them with the opportunity of testing whether more extensive measures than those provided by the state anti-discrimination act would significantly

80. MINN. STAT. § 363.01(12) (1966).

81. Under the Minneapolis plan non-white elementary student must come from a school in which the white students comprise 80 per cent of the total attendance. The figure is 90 per cent for secondary schools. MINN. STAT. § 363.03(5)(2) forbids any educational institution to "exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student. . . ." MINN. STAT. § 363.03 (5)(3) forbids schools to "make or use a . . . form of application for admission that elicits . . . information . . . concerning the race . . . of an applicant for admission, except as permitted by regulations of the [human rights] department." The state Human Rights Department has not yet authorized the Minneapolis transfer plan.

The major difficulty might have been avoided by adopting a provision similar to § 504 of the MODEL ACT. *See* Auerbach, *The 1967 Amendments to the Minnesota State Act Against Discrimination and the Uniform Law Commissioners' Model Anti-Discrimination Act: A Comparative Analysis and Evaluation*, 52 MINN. L. REV. 231 (1967).

reduce the racial tension plaguing our cities. The exercise of this authority will also breathe new life into home rule municipalities thereby enabling them to take the kind of active social role which they must assume if they are to be valuable governmental units. Finally, the power to legislate in the area of civil rights provides municipalities with the opportunity to contribute significantly to the elimination of discrimination; by intelligently administered and enforced local regulations, eliciting a higher degree of support than state ordinances, municipalities can more strongly encourage an end to the attitudes producing discrimination.