

The autonomy of local self-government units – legal and financial aspects

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Abstract:

Aim: Today the local self-government is an element of public administration while the scope of its autonomy is one of the determinants of a democratic state based on the rule of law. The aim of the paper is an analysis concerned with the broadly defined autonomy of local self-government, particularly considering the legal and financial aspect. The author seeks to demonstrate that an absolute sovereignty of local government is not possible, with the state, and more specifically the legislator, being still its primary regulator.

Design / Research methods: In conducting the analysis of the extent and rules governing the autonomy of local self-government units, the author drew on a variety of studies illustrating not infrequently extremely different views on the institution of self-government and the functioning of the units themselves. The research process was based on an analysis of the content of materials constituting the topic scrutinized here.

Conclusions / findings: The analysis suggests that the autonomy of local self-government units is a vital and necessary element of the entire administration system of the state. However, in the light of the fact that local self-government – which functions based on the principle of public authority devolution – is shaped by the legislator, and that it performs a portion of public responsibilities, the state may – in accordance with provisions laid down by law – shape its character.

Originality / value of the article: The principle of autonomy of local self-government units is entirely in line with the provisions of the European Charter of Local-Self Government and the doctrine of the rule of law. However, the fact should be emphasized that the legislator should carry out a careful analysis of the solutions adopted and – seeing them from the perspective of nearly 30 years since local self-government was reestablished in Poland – implement changes within the broadly defined area of finances.

Implications of the research (if applicable): The legislator ought to conduct an in-depth analysis of the functioning of the public administration system in Poland. The issue concerned with the autonomy of individual units of local self-government requires that a parliamentary debate and beyond be conducted. This pertains to the very subject, as well as the functional determinants (the number of units, their competences, vertical relationship).

Limitations of the research (if applicable): Not applicable.

Keywords: administrative reform, decentralization, local self-government, public administration.

JEL: K25; H76

1. Local self-government in the public administration system. Introduction to the topic

From the point of view of administrative law, local self-government in Poland should be defined as a form of the political system within decentralized public administration. While undertaking organizational actions, measures and projects in pursuit of public interest, local self-government units act within a broadly defined system of public administration (Kamiński 2012: 57). It is also here that the very spirit of self-government is manifested, which, on the one hand, consists in its being entrusted with governance (administration) of public affairs of the main stakeholders, i.e. a union of citizens organized under law as corporations based on public law, and on the other hand, being endowed with power to resolve at least some affairs with binding effect (obviously excluding those of a national nature). “Adopting a legal approach – J. Pokładecki asserts – the local self-government’s role is that of intermediate state administration, that is, an administration which is not conducted by state immediate authorities but by the entities which are separate from the state, competent to perform legal activities and to administer state responsibilities (Pokładecki 2012: 82). The state is a public and legal union of all citizens, with a commune, district and voivodship being a public and legal union of residents of a particular area. If the nature of such corporation (association, community) is territorial – then we deal with a local self-government (Wykrętowicz 1998: 22-34)¹.

According to J. Panejko, “self-government is (...) a decentralized state administration that is underpinned by law and exercised by local bodies which are not subordinate hierarchically to other authorities, being autonomous within the limits of statute and general legal system “ (Panejko 1934: 9-10; Buczkowski 1994: 9). In establishing self-government, the state narrows down the scope of its responsibilities and limits its authority in terms of exerting influence on how the duties delegated to the local self-government are performed. Local self-government is first and foremost a union of local community that is distinguished within the structure of the state and endowed with legal personality (Ochendowski 1997: 22). “Self-government, as a qualified way of exercising state administration, is, on the one hand, bound by the legal system in force and the relationships

¹ If the corporation is not territorial, then we deal with a professional, economic, agricultural association, depending on the statutory criterion underpinning the said distinction of a particular corporation.

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established within this system with regard to the state central authorities, while on the other hand, it is granted the most stable guarantees of autonomy in exercising its functions” (Kamiński 2011: 212).

In the contemporary administrative structures operating in democratic countries, decentralization has become a fundamental element of the system recognized as necessary for public administration to be able to function efficiently, effectively and economically, with this administration exercising public authority on behalf and to the benefit of citizens (Bigo 1928; Dembiński 1934). Adopting this solution is in accordance with the state theory of self-government which considers it to be a personification of the state. This is the very state that – by virtue of positive law – appoints a commune (and other units of local government) with a specific scope of public tasks and equips it with administrative power convinced that the commune will perform these tasks better and more effectively than the government administration ever could (Kamiński 2015: 105-107).

2. Theoretical thoughts on the autonomy of local self-government units

Nowadays, various segments can exert impact on the development of self-governance and on the activities of government administration, with these segments displaying such a degree of complexity that it is impossible to expose them through a simple relationship. The core of self-governance is public trust, here understood as satisfying citizens’ interests by local authorities (Zalesny 2015: 26). What in turn affects the said interests are specific segments involved in the functioning of local self-government such as financial autonomy of local self-government units encompassing, among other things, financial resources, financial management and pursuing a rational expenditure policy in order to safeguard social interest (Wankiewicz 2010: 551). The proposals which W. Madurowicz formulated 40 years ago and which addressed the division of competences within the state administration system have lost nothing in their relevance. He argued that in order to create an efficient public administration capable of satisfying social interest at large, the following was necessary:

- defining the scope of affairs which are important for the entire local structure together with the objective for which implementation it is responsible,
- defining the scope of autonomy (including the legal protection) needed to achieve the goals set,

- implementing the „verifying” supervision,
- creating a system of instruments prioritizing goals of lower levels in relation to higher ones, and a system of stimuli designed to steer work performed by lower levels towards the goals for which implementation they are responsible (Madurowicz 1977).

A particular emphasis should be put on the issues of autonomy relating to the verifying supervision which is reflected directly in the fact that it can only be applied in cases of a higher need as provided for by law. A direct consequence of such solution is that it is critical to implement measures ensuring legal protection of such autonomy. In his conception, Z. Niewiadomski defines the autonomy of local self-government not as an absolute independence from the state but rather as the state’s intervention in local affairs only in specific cases (Jagoda 2017: 40). Moreover, A. Agopszowicz defines the autonomy of local self-government as meeting inhabitants’ needs with the limits of this autonomy being laid down in the provisions of law and the rules on living in a community (Agopszowicz 1991: 12). In this respect, the autonomy is conceived of as an autonomy in matters of decision-making and fulfillment of needs. Still, that should not be seen as an absolute autonomy, which means that the autonomy of self-government units – such as communes – should be interpreted as the possibility granted under the Constitution to decide on their own affairs within the framework of applicable law (Adamiak, Borkowski 1991: 39).

In the light of the above, the thesis seems reasonable stating that the autonomy of self-government should be understood as the possibility to exercise local self-government units’ functions, which is ensured by the Constitution and is legally distinguished and structurally independent, and which in practice is reflected in decision-making and taking actions without the state authorities’ interference, and further to that, it is subject to state supervision provided that the state acts within the law and is governed by it (Wykrętowicz 1998: 114). Thus, we can assume that the autonomy of local self-government arises from the interpretation of the constitutional and statutory rules. As R. Krawczyk asserts, what certainly affects in practice the scope of interpretation is that exercising public authority by self-government is by the will of the sovereign; however, the essential feature of thus defined authority is the ability to decide independently on how tasks are to be performed, since self-government operates in the sphere of imperium (authority sphere) and in the sphere of dominion (non-authority sphere) (Krawczyk 2017: 59).

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The autonomy of local self-government units is a public and private right and it is applicable within the limits of the law. The autonomy is granted with a view to achieve public aims and tasks, and it denotes the ability to implement tasks in one's own name and under one's own responsibility. If in their performance of or abandoning activities the rights of self-governments are violated, then they may pursue claims or go to court seeking to protect the autonomy to which they are entitled.

An important systemic element is judicial protection of the autonomy of local self-government units, for it arises directly from the rules governing rights. It should be viewed as a permanent and structured function which is exercised to protect legal order and rights. As such, the judicial protection of the autonomy exercised by self-government units represents *de facto* a specific measure taken by legal protection authorities. Violation of this rule takes place when other public entities' actions interfere in the sphere allocated to local self-government. At this point, it should be noted that supervision that is conducted properly cannot be seen as a violation of the autonomy of local self-government. R. Szumlakowski is right to point out that "the essence of the principle of judicial protection of the autonomy exercised by local self-government units represents the implementation of the fundamental constitutional principle governing a democratic state based on the rule of law at a local level, which denotes the phenomenon of a local self-government democracy. The autonomy of local self-government units is reflected in building the idea of democracy at the level of a self-governing community through efficient public administration, which in performing its responsibilities should meet the needs of the given community of the local government" (Szumlakowski 2012: 101-111). This stance is also adopted in the European Charter of Local Self-Government, according to which local communities have full discretion to act with regard to any matter that is in their competence within the limits of the law, thereby providing an outline for the legislation of individual European countries in the process of developing laws on local self-government functioning (European Charter of Local Self-Government).

The autonomy of the individual units distinguished territorially is not absolute and limitless. The scope of the autonomy exercised by local self-government units is strictly circumscribed by the law, which is why – within the limits of the law – this autonomy is subject to judicial protection safeguarding independent performance of responsibilities.

3. Legal aspects of the autonomy of local self-government units in Poland

The Constitution of the Republic of Poland lays down the fundamental principles with regard to the functioning of local self-government, conferring on it a legal personality and functional, financial and organizational autonomy, which means that it has an administrative and legal as well as civil law autonomy. The principle of subsidiarity included in the Preamble indicates that what the local self-government units have been entrusted with is, on the one hand, the freedom to shape the community, while, on the other hand, the responsibility for meeting its needs. As J. Zaleśny notes, the principle of subsidiarity enshrined in the Constitution allows for the conclusion that “for the constitutional legislator, it is an enduring constitutional value whose meaning, the ways in which it is understood and applied should be preserved and strengthened along with the development of the country’s political system (Zaleśny 2015: 26). What is particularly highlighted by the Constitution is the importance of the principle of public power devolution², which – in compliance with the jurisprudence of the Constitutional Tribunal – denotes such an organization within the system of state authorities in which local units exercise the autonomy prescribed by law, while any kind of interference into the autonomy enshrined in the Constitution may only take place if it is in accordance with statute and measures laid down in it (Judgment of the Constitutional Tribunal dated 25 November 2002, K 34/01, file OTK ZU no 6/A/2002, item. 84). What can be inferred from Article 16 (2) of the Constitution, which states that the local self-government participates in the exercise of public power, while the substantial part of public duties is performed by it in its own name and under its own responsibility, is that local self-government is defined as a separate entity consisting of specific self-governing communities. The said communities are a part of public power, are of a sovereign nature while their functioning involves using the elements of official authority (Syryt 2015: 222).

The Basic Law does not provide a legal definition for the term “autonomy,” which is why the scope of interpretation regarding this concept in numerous legal aspects may be quite broad (Balicki et al. 2001: 59). It allows, however, for the conclusion that it represents an enduring constitutional value whose meaning and the ways in which it is understood and applied should be

² Article 15 (1) of the Constitution of the Republic of Poland. An important element of this provision is to strengthen the rights of citizens and their communities. Local self-government should perform public responsibilities in such a way as to satisfy its residents’ needs. A district and voivodship are defined as subsidiary and complementing institutions for communes.

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preserved and strengthened along with the development of the country's political system (Zaleśny 2015: 26). What is directly derived from this principle is the constitutional judicial protection and independence from government administration, with this independence being constrained only – within the scope of direct responsibilities – by the supervision in terms of legality. This autonomy is sort of “further complemented” by the lack of hierarchical subordination of local self-government units and the principle contained in Article 163 of the Constitution of a presumption of competences of local self-government with the underlying premise being that if the provisions of law do not reserve to government administration the competence to clarify a given case, the commune is a competent authority in all affairs. However, as noted by Z. Niewiadomski, the local self-government's autonomy does not consist in its absolute independence from the state but rather in that the provisions of law clearly set out the instances in which the state may interfere in the local government's exercise of its functions (Niewiadomski 1994: 23). This implies that it is not self-enforcing, with an essential element of this autonomy being the scope of the local self-government's competences that is legally regulated. A direct result of this is the fact that the constitutional legislature and legislator determine the scope of this autonomy.

The acts on local self-governments confer on individual units legal personality within the public law sphere, endowing them with rights and duties (they are attributed with official authority), while providing that local self-government performs a portion of public duties allocated to it under statute in its own name and under its own responsibility. They are complemented by the provision on the legal protection of the individual units' autonomy, which determines their system-based position and the manner in which they perform their duties (Article 2 of the Act on Commune Self-Government (hereafter “u.s.g.”); Article 2 of the Act on District Self-Government (hereafter “u.s.p.”); Article 6 of the Act on Voivodship Self-Government (hereafter “u.s.w.”)³.

Moreover, the fact should be noted that the acts on self-governments delineate the limits of the autonomy in terms of exercising duties and competences, as well as the manner and rules on state supervision over the performance of those duties which is called the “self-government correlative.” “The scope and intensity of this supervision – J. Jagoda argues – are what determines

³ In addition, the Act on Voivodship Self-Government states that the scope of functions of this self-government does not violate the autonomy of the district and commune (Article 4(1)).

the real, and not merely proposed scope of the autonomy in terms of the local self-government's exercising its functions" (Jagoda 2011: 140). This is insofar important and significant, as the key aspect of the self-government's autonomy, being also directly related to the above mentioned aspects, is the issue surrounding performance and scope of tasks of public nature. The legislator divided them into direct and delegated tasks. These tasks are mainly laid down in the acts on local self-governments, with special laws complementing them. This division was implemented under Articles 7 and 8 of the Act of 8 March 1990 on Local Self-Government, being affirmed by the Constitution of the Republic of Poland, stating that public tasks whose purpose is to meet the needs of a self-governing community are performed by the local self-government unit as its direct responsibilities (Article 166 (1)) and they refer to commune, supra-commune and voivodship communities (Leoński 2006: 30). These tasks are performed by local self-government units under their own responsibility, which makes these units (e.g. a commune) an autonomous entity within administration. This autonomy is naturally protected by law, which means that a particular unit has the right to take action against state authorities if they have violated its autonomy. What should also be highlighted is the fact that although the legal protection is ensured under the constitutional provisions, there are other international regulations of which the provisions of the European Charter of Local Self-Government are most notable, where a direct reference to the principle of legal protection of the local self-government is made. It includes the provision (Article 11) stating that local authorities have "the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for the principles of local self-government" (European Charter of Local Self-Government; Oniszczyk 2002: 90). Under the Polish law, among the bodies for legal protection (also referred to as resolution or judicial bodies) the legislator also included common courts, specialized courts (voivodship administrative courts, the Supreme Administrative Court), the Supreme Court and the Constitutional Tribunal (Jagoda 2011: 133). It should further be emphasized that any legislative interference in the autonomy of the local self-government requires that the statutory form be preserved (Judgment of the Constitutional Tribunal dated 12 March 2007, file K 54/05, OTK ZU no 3/A/2007, item 25), which means that public tasks may not be delegated to the local self-government in a self-enforcing manner with no legal basis to it, while the type and nature of the task must be set out in the statute (Judgment of the Constitutional Tribunal dated 23 October 2012, file U 1/10).

4. Financial aspects of the autonomy of local self-government units

Financial autonomy underpins self-governance. Local self-government units cannot enjoy their autonomy in full if they do not have appropriate discretion in managing resources which are adequate in relation to the size of their tasks (Regulski 2000: 263). The principle of autonomy – in relation to performing and financing public tasks by local self-government – safeguards local self-government's independence from the central administration. It refers directly to the political system concept as regards the position of the local self-government in the state and is mainly concerned with the relationship between the structures of central authority and the institution of the local self-government as a whole, whatever its internal organization.

Decentralization of the public finance sector coupled with the country's political system reforms carried out in 1998, which involved, inter alia, establishing higher tiers of local self-government, were to foster more effective management of public resources in territorial arrangements and to allow for performing public duties in a more productive and complete way. The administration reform, which came into force on 1 January 1998 under the Act on Establishing a Three-Tier Territorial Division of the state, brought about a fundamental change of the political system in that it reformed, to a significant (although by far not sufficient) extent, public finances as well as the participation and place of the local self-government units in this system. As J. Zaleśny is right to point out, the economic and financial independence is the fundament of the local government's autonomy and without it any other forms of autonomy are illusive, whereby the financial autonomy of the commune pertains to both its revenues and expenditures (Zaleśny 2015: 27).

The financial bases for the functioning of the local self-government in Poland (apart from the Constitution and acts on local self-governments) are mainly regulated by the following acts:

- Act on Municipal Services,
- Act on Public Finance,
- Act on Regional Chambers of Audit,
- Act on Income of Local Governments,
- Act on the Liability for Violation of Public Finance Discipline,
- Implementing acts to these acts.

At a local level, the authorities have many possibilities which they can use to actively stimulate development. To this end, what appears crucial for the local self-government units is to apply (and to make a practical use of the rights they have been conferred on) the statutory right to draw up and pass local law acts on, for example, the manner in which to manage the commune's property, the rules and procedures for using commune's facilities and public utility equipment (Rynio 2010: 389). One of the manifestations of the financial autonomy of the local government units is the right to set tax rates and local fees within the scope laid down in the statute. The provision thus formulated results, on the one hand, from the constitutional guarantee provided by the legislator and ensuring that local self-government units have control over their revenues, of which the power to tax is but one element, and on the other hand, it states the limitations set in this respect by law (Miemiec 2005: 92 ff.). This also applies to other financial aspects involved in the functioning of the local governments, such as, inter alia, multiannual financial planning as a process devised to specify financial possibilities of local government units in a longer perspective and a tool for rational management of public resources, with its integral part being debt management (Piszczek 2017: 365). The growing importance of multiannual financial planning has been brought about in the first place by the fact that the local self-government bodies, which enjoy an ever greater scope of financial autonomy, draw up and implement the commune's (district, region) development strategy and financial policy that is integrated with it, with the primary aim being to show the importance of multiannual financial forecast for the financial policy of local self-government units (Patrzałek 2010: 275).

A significant manifestation of distinctiveness of local self-government units, while forming the economic basis for carrying out their duties is ownership and property rights. The element that determines the local self-government's autonomy and which is directly related to the construction of their legal personality is to equip local self-government units with specific property (Jagoda 2017: 138). As J. Jagoda rightly points out:

“Providing local self-government units with property allows them to run an economic activity for their own account and risk and to bear thus related responsibility. For it is on account of this wealth that the commune (district, voivodship), by using it, is capable of autonomous liability for any obligations made, as well as damages caused by the local self-government officials while

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performing their duties. Thus, endowing the local self-government units with legal personality, providing them with their own property which enables them to be liable for their own actions should be recognized as the primary conditions (determinants) for local self-government units to enjoy their autonomy” (Jagoda 2017: 139-140).

At this point, however, one should stress a few other aspects associated with the financial policy. One of them – the crucial one – relates to budgetary policy. Given the fact that there is a risk of excessive levels of debt on the part of individual local self-government units – which may also affect directly the limits imposed on their autonomy – the legislator has the right to set the rules and limits with respect to the extent of their borrowing. These issues are governed by the Act on Public Finance (Article 243) specifying an individual debt ratio for local governments (IWZ), while stating it more precisely in saying that in a given budget year, the value of outstanding commitments together with the costs of their servicing in relation to the total budget revenues of a local self-government unit may not be over the arithmetic mean of the ratio, calculated for the last three years, of its current revenues plus the revenues from property sale and reduced by current expenditures to the total budget revenues. The premise of this provision is to prevent the units from pursuing an inappropriate financial policy.

In the light of the above, what should be stated and emphasized clearly is that financial autonomy is the fundament of local self-governance and of the functioning of local self-government units. Local self-governments should exercise a specific discretion to use financial resources proportionately to the size of their duties and should have a relatively permanent financial base, as it ensures that public resources are spent effectively (Wankiewicz 2010: 556). Financial autonomy – according to a judgment issued by the Constitutional Tribunal – is the right to pursue one’s own financial policy, to raise one’s own revenues and use them to perform the commune’s tasks (Kornberger-Sokołowska 2001: 40). With no adequate revenues allowing the public duties to be carried out as required by law and expected by citizens it is not possible for the local self-government unit to be autonomous financially. Still, the commune’s financial autonomy does not mean that there will be no interference on the part of the state into the financial management of individual communes. The commune’s autonomy is twofold in its nature; income-based and expenditure-based. The acts on local self-governments (notably the Act on Commune Self-

Government and the Act on Income of Local Governments) indicate a wide range of communes' revenue sources. Although these sources are closed in their nature, they are also comprised of those raised and launched by the commune. This means that it is not possible to generate commune's revenues from extra charges such as, for, example taxes. At the same time the commune's revenues are compulsory in their nature. However, in referring to the expenditure-based nature of the communes' autonomy, it is difficult to delineate clearly its limits. The limit of the autonomy is related directly to the tasks imposed on the commune, district and voivodship, as well as the requirement to perform compulsory tasks, while excluding tasks which are financed by other units. Despite enjoying the autonomy of financial management, local self-government units do not have discretion to use revenues, since it is constrained by their having to meet collective needs of all residents. Being required to bear particular expenditures while limiting others is what sets the limits on the communes' expenditure-based autonomy (Kornberger-Sokołowska 2001: 126). The commune can carry out public responsibilities properly when it is provided with adequate financial resources. There is no doubt as to this being what underpins its autonomy. The provisions on the financial autonomy of communes are included in the Polish Constitution. The share of local self-government units in public revenues which is proportionate to the number and scope of their tasks is safeguarded under the said provision.

Moreover, the protection of the autonomy of local self-government units is ensured by conferring on them the right to appeal to an administrative court against any decision pertaining to them issued by a supervisory authority. A supervisory decision may be appealed on the grounds of its non-compliance with law within 30 days from its receipt⁴. A complaint may be lodged only by a local self-government unit or association whose legal interest, powers or competences have been violated. For the said complaint to be lodged it is necessary to pass a resolution by the authority, which adopted it, or to which the supervisory decision is addressed (Byjoch et al. 2000: 165-196).

⁴ Commune, district or voivodship which are affected by the decision have the right to appeal against it within 30 days from its receipt. Failure to observe this period leads to losing the right to appeal with the decision becoming final. See Article 98 of the Act on Commune Self-Government; Article 85 of the Act on District Self-Government; Article 86 of the Act on Voivodship Self-Government.

4. Summary and conclusions

Local self-government – as one of the segments of the public administration system – is an element of public authority which is exercised by a self-governing commune itself or by the institutions which it established for broadly defined public benefit. In the concluding remarks, it should be affirmed that there is no local self-government's autonomy that could be complete and absolute. If such solution were to exist, it could threaten the state's unitariness, while, on the other hand, it would imply that there would be no dependence on anybody, at whatever time and in whatever manner. It should then come as no surprise – as M. Mączyński is right to note – that the issue of the limits of the local government's autonomy, and the permissible extent of the state's interference into the autonomy of local self-government units has been a subject of vigorous discussion among both theorists and practitioners of self-governance, particularly in the context of public tasks performed in the name and under responsibility of the local self-governments” (Mączyński 2011: 17).

Beyond any doubt, the authority exercised by the local self-government is not sovereign. Its constitutive attribute is a limited autonomy denoting – as J. Pokładecki is right to point out – that not all areas of social life fall within the scope of its functions (since it is the state that sets the limits of local affairs) and it has to respect legal regulations established by the state, which is manifested in the institution of the state supervision over local self-government” (Pokładecki 2012: 82-83). As the Constitutional Tribunal maintains, the protection of autonomy should not exclude or cancel completely or in a substantial part the legislator's right to shape the relationships in the country. The legislator's intervention into the communes' autonomy should be justified by the aims constitutionally defined and values constitutionally safeguarded and whether or not they are given priority over the principle of autonomy depends on the legislator's assessment (Judgment of the Constitutional Tribunal dated 4 May 1998, file K38/97, OTK 1998, no 3, item. 31).

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