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Local Law of Territorial Self-Government in the System of Sources of Law of the Third Polish Republic

Keywords: principle of subsidiarity, statutory authorization, commune law-making

Słowa kluczowe: zasada pomocniczości, ustawowe upoważnienie, stanowienie prawa gminnego

Abstract

The paper addresses the interpretation of the concept of local law issued by local government, included in the Constitution of the Republic of Poland of 2 April 1997. Local law of territorial self-government, against authorizations of other law-making organs, features a broad spectrum of possibilities, from implementing acts to legislation different than statute, which depends on a specific statutory authorization that must carry out the constitutional principle of decentralization of public power under Article 15 and the principle of transferring to the local government of a substantial part of public duties under Article 16.

Streszczenie

Lokalne prawo samorządu terytorialnego w systemie źródeł prawa III Rzeczypospolitej Polskiej

Tekst dotyczy interpretacji pojęcia prawa lokalnego wydanego przez samorząd terytorialny, zawartej w Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. Lokalne

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prawo samorządu terytorialnego, wbrew upoważnieniom innych organów ustawodawczych, zawiera szeroki spektrum możliwości, od aktów wykonawczych po ustawodawstwo inne niż ustawowe, które zależy od konkretnego ustawowego upoważnienia, które musi realizować konstytucyjną zasadę decentralizacji władzy publicznej zgodnie z art. 15 oraz zasadę przekazywania władzom lokalnym znacznej części społeczeństwa obowiązków na podstawie art. 16.

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A territorial self-government is a standard element of contemporary constitutional regulations². In Poland, in the current time of removing basic guarantees of the rule of law it is becoming the most important of them all, effective also in the political strata.

The constitutional basis of the concept of territorial rule of law lies in the principle of subsidiarity included in the introduction to the Constitution, which has a primary and binding character with regard to it (“[we, the Polish nation] [...] hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on [...] the principle of subsidiarity in the strengthening the powers of citizens and their communities”) by the power of the Constitution. Placing the principle of subsidiarity in the introduction to the Constitution does not take away its binding and legal power with respect to the precision and developed form of this approach and further developments in the proper text. The principle of subsidiarity is confirmed in the text of the Constitution many times in various forms. In particular as to the form of the community of territorial self-government regulated in Articles 15 and 16 (“Local government shall participate in the exercise of public power. The substantial part of public duties which local government is empowered to discharge by statute shall be done in its own name and under its own responsibility” – Article 16(2)), and as regards other communities e.g. in Articles 11, 12, 13, 17, 20, 25, 35 and 59.

² A. Balaban, *Samorząd terytorialny w konstytucjach państw europejskich*, [in:] *Europejska Karta Samorządu Lokalnego a prawo samorządu terytorialnego*, ed. M. Ofiarska, Szczecin 2015, pp. 17ff.

The principle of subsidiarity has a strong position in the Constitution indeed due to a) its “legal and natural” character, b) being placed in the introduction belonging with the general part of the Constitution, c) the number of its “expressions” that allow it to be given the status of a principle, d) its undoubted, normative and binding character resulting in the fact that e) it is a basis for further normative constructions, e.g. chapter 7 or for Article 94 concerning local law. In the perspective of such a normative state, it can be included without a doubt to the catalogues of primary principles of constitutional law.

Searching for the axiological basis of introducing a broad formula of local legislation and principles of its interpretation, it needs to be noted that it refers to two quite different constitutional entities. Equalling the law of local government and territorial government administration in the Article 94 of the Constitution with local legislation does not, however, have justification in reference to this administration and bears signs of a legal construction error (which should be removed with future constitutional amendments). Decentralization of public power in the light of Articles 15, 16 and 17 must be implemented by a way of its socialization by local governments and professional associations and possibly, though not in legislative forms, by “non-governmental” organizations listed in Article 12 as an example (as it is impossible to list legal forms of communities exhaustively), and not by territorial organs of government administration. Until the discussed constitutional inconsequence is removed (as its confirmation by abolishing the principle of subsidiarity is not likely to happen) Article 94 should be interpreted in an expanding way with regard to a local government, promoting its wide formula in relation to a statute, and in a narrowing way with regard to government administration (which shall be discussed in further parts). It seems inadmissible to grant a territorial government administration broad regulatory rights while the Constitution limits in such a fundamental way the legislative rights of central government administration by the restrictive construction of regulations (Article 92) and limited efficiency of internal law (Article 93)³.

An expression of losing the sense of legislative rights of territorial government administration in practice involves province governors and organs of administration not subordinated to a governor issuing “regulations”, i.e. acts

³ A. Bałaban, *Polskie problemy ustrojowe*, Kraków 2003, pp. 68–109.

which in the constitutional meaning have a strictly implementing character and thus should take away the law-making freedom from the issuing organ, whereas such freedom is introduced by “attaching” territorial administration to local-government legislation, included in the Article 94 of the Constitution. Moreover, it is happening despite the fact that the act on government administration in a province provides for issuing regulations only as a form of peace-and-order provisions and coming only from a governor. However, let us notice that issuing regulations as implementing acts for statutes suggests in turn that the form of universally binding territorial provisions has an internal character. One of those is the constitutional association related to the use of this term in reference to government administration. The legislator’s taking a clear stand on this matter thus it seems a pressing necessity. The lack of sufficient diversity in naming normative acts may be overcome by labeling them with an additional adjectival term differentiating individual constructions and applications.

The system of creating law in the Republic of Poland carries out the principle of the Sejm’s dominance using the legislative form of a statute within the Polish mutation of the parliamentary-cabinet system and the principle of openness to external law applicable in Poland as a consequence of ratification of international agreements which are binding as a “part of the domestic legal order [...] applied directly (Article 91(1))” and by the principle of “precedence in case of a conflict of laws” (Articles 91(2) and (3)). The adopted principle of monism provides for both applications of statutory consent for ratification of international agreements listed in Article 89 (in practice it is difficult to imagine agreements which do not concern these categories of affairs) and potential conditioning of the application of an agreement on an enactment of a statute (Article 91(1)).

A statute (if not a referendum) also is a form of expressing consent for transferring legislative powers provided in Article 90(2). The construction of an implementing statute, adopted as a solution ordered by an accession treaty, regulates the process of introducing EU legislation into life, applicable on the territory of Member States as autonomous law with its own features (of primacy, direct effect and effectiveness) which cannot be violated by an implementing act. The primacy of a statute is therefore implemented in the Constitution in the aspect of its legislative monopoly involving the creation of pri-

mary (though secondary in relation to the Constitution) domestic legal norms, referring to implementing provisions as well as in the framework of “licensing” in the mode of statutory authorization, law-making powers of territorial bodies of state administration and local government. A statute (within the boundaries specified by the Constitution) plays a role of an act legalizing applicability on the territory of Poland of various forms of international law.

Under the domestic system of sources of law, a statute plays various roles. Most of all, it regulates social relations to a dominant degree. Performing this task is supported by the constitutional construction of an implementing regulation as an act strongly determined by the content of the statute. The relationship between a statute and a regulation adopted in the Constitution is traditionally named as strictly implementing. The construction of local law, weakly outlined in the Constitution, is expressed more profoundly if one analyzes its background of a legally complex construction of a regulation, especially its relation to a statute. Local law is issued on the basis of and within limits specified by statute (Article 94) but not “on the basis of specific authorization contained in” a statute (Article 92(1)) as is the case with a regulation. In turn, the lack of an order of a specific authorization is not the same as the prohibition of it. Local law does not serve to “implement a statute” but implements what has been ordered (or permitted) in the statutory authorization. Therefore, a statute may even allow a local government regulation different than the statutory one, which in the absence of justification by an organizational position cannot be applied to territorial administration bodies. Statutory authorization may also determine the content of a local act in the direction of implementing all essential provisions of the statute in which it is included. Statutory authorization to issue an act of local law does not have to include guidelines concerning the content of a local government act, which is necessary in the case of regulations. Whereas the question of whether these elements of construction of a regulation can be applied to local government law-making can be answered affirmatively yet with limits, resulting from the application of the principle of subsidiarity in reference to local government.

However, it would be logical to apply elements determining the content of local legislation, modelled after a regulation, in relation to territorial government administration, in a much broader scope. Adopting a restrictive version of reasoning a contrario, excluding the application of elements of determi-

nation of the content of the law of local government provided for a resolution, leads to conclusions making it impossible to accommodate the principle of primacy of a statute and the scale of tasks of territorial bodies, in relation to which there must be an element of coordination of action on the part of a central legislator (resulting even from the principle of unitarity of the state included in the Article 3 of the Constitution)⁴. However, one should stress that the statutory forms of determination of the content of acts of local law fit within the category of authorization and not the legislator's absolute constitutional obligation, as is the case with a regulation.

The fact that the body authorized to issue an act of local law cannot transfer its legislative competences onto a different body, as adopted with regard to regulations, seems to result from the principle of legality (Article 7) that is the division of roles of local government organs and the statutory division of tasks of specific kinds of local governments. In the light of the Constitution, tasks of constitutive and executive organs are separated (Article 169 (1)). The legislative powers by principle then must belong with constitutive organs, and possibly by a way of an exception with executive organs in the scope permitted by statute. Because the Constitution does not take a stand in the question of "levels" of local government, it does not include guidelines as to the relation of their legislative powers either. Therefore, a general rule of acting within their competence applies, in this case statutorily established, the constitutional principle of presumption of the competence of the commune.

The problem of principles of using local law in the sphere of "statutory matter" or "exclusivity of statutes" is part of a broader problem of the relationship of implementing acts toward their statute. Creating a general rule searching for some separated statutory matter, and in particular drawing contrary conclusions from it, today does not seem to be necessary in the face of absence of limitations of the content of a statute and expanding in the Constitution of measures protecting its primacy. There are no reasons for excluding the application of strictly implementing regulations in the sphere of "statutory matter". They do not threaten it due to their strictly determined construction. With the will of the legislator local law is supposed to support a statute when the legislator deems it necessary and there are no reasons for it to be

⁴ Cf. H. Izdebski, *Fundamenty współczesnych państw*, Warsaw 2007, pp. 179ff.

generally excluded in a certain scope of matters in which the Constitution refers to a statute. If in a broad scope of “statutory matter” (e.g. matters where the Constitution expressly refers to statutes in the form of the so-called constitutional referrals) these rules are rejected, it will make it impossible to use regulations and local law almost entirely. It is because some mythical sphere “outside statutory matter” will remain which comprises exceptions from the constitutional principle of a broad application of a statute.

The constitutional requirement of a relationship with a statute in the case of local law boils down to only statutory authorization which can shape local law as implementing (although not only as strictly implementing as modelled on regulations) due to the said constitutional position of local government (it is supposed to implement “decentralization of public power” and carry out “an essential part of public tasks”). It can also shape them based on an extremely different principle, including admitting regulation other than a statute. Let us remember that the constitutive organ of local government comes from a general election, which deepens its democratic legitimacy and strengthens the position in relation to “representative” central legislator that the Sejm it (with a participatory role of the Senate).

The requirement of acting “on the basis of and within limits specified by statute” (Article 94) does not allow admission of interpretation permitting local government to independently search for “statutory basis” of its law-making, which can be accepted in the case of “order-based” law-making (Article 93(2)), carried out “only on the basis of statute”. This austere “only” used with regard to orders is weakened in the same provision by the use of the phrase “basis for decisions” and not “statutory authorization” which was applied in Article 92(1) with respect to local law. This makes it possible to allow a possibility for an order-applying legislator to look for and point to the statutory basis on his own. On the side it can be noted that with regard to resolutions of the Council of Ministers the absence of a constitutional requirement to issue them “only on the basis of statutes” allows an assumption that acts “equal to statute or of a higher rank” such as the constitution, a ratified international agreement or acts which are substitutive with regard to a statute such as rules of procedure of the Sejm and the Senate can be such a basis (within their internal application allowed by the Constitution) or acts under the Article 59(2) of the Constitution.

With reference to the law-making of local government, the Constitution includes one more legal construction. Article 169(4) provides that “The internal organizational structure of units of local government shall be specified, within statutory limits, by their constitutive organs”. The personal scope of this provision is wide and open. Certainly, it means communes, but under Article 164(2) also “other units of regional and/or local government”. Based on Article 172 associations of local governments may also be included among these entities. Specifying the internal organizational structure does not concern local government organs but local government units; therefore, it does not involve rules of procedure but something more, thus certainly the statute (as in charter) of a local government unit. The application of the statute in the constitutional meaning may have certain analogies to the way of understanding the rules of procedure regarded by the Constitution in Article 112 with the admissibility of their norms in universal application. An “extended” construction of rules of procedure provided for the representative organ that is the Sejm (and at the same time the Senate and the National Assembly) is present in the Constitution. The concept of rules of procedure as an act also regulating “the manner of performance of obligations, both constitutional and statutory” was adopted for it (Article 112 and similarly in Article 61(4)).

A self-governing community in relation to the Sejm is an entity with much broader scope of independence. This is why it was possible to use a phrase “within the limits of statutes” in the Constitution with reference to the statute (charter), and thus a phrase devoid even of the requirement of statutory authorization. Constitutional provisions expressly leave room for a broad formula of the statute, anyway compliant with the essence of this act and its “existing” understanding, permitting vast understanding of the subject matter of “internal organizational structure” and related matters. In terms of the autonomy of local government one can adopt a concept of the statute (charter) as an act regulating “within the limits of statutes” relationships with external entities, justified by separateness of tasks of a specific local government unit. Some of the features of “statutory powers” may be referred to local government rules of procedure when they develop statute-related concepts.

The limits of local government law-making are outlined by the limits of subject-matter competence of the local government. This question is open in the Constitution. It is because the preliminary principle of division of state

powers, that is the principle of separation and balance of powers referring only to the central power, does not apply to local government. As a result, Article 163 opening the chapter of the Constitution addressing local government and vesting in it the performance public tasks not reserved by the Constitution or statutes to the organs of other public authorities, bears signs of a general competence clause and presumption of competence, with, as it seems, an unrestricted substantive scope, of course referred to local matters. This provision is strengthened by the one of Article 16(2) concerning local government participation in the exercise of public power and entrusting a substantial part of public duties. We also learn from the Constitution that this scope of operation is vested primarily in a local-government commune according to the principle of further presumption of competence. Other forms of local and regional government operate pursuant to Article 164(2) within the limits of competences specified by statutes. Statutes also provide for the possibility of transferring competences to commune's auxiliary units. Agreements and communal associations themselves, contractually or by way of provisions of their statutes (charters), specify the scope of competence of these organizational forms of local government. Moreover, the scope of local government law-making may be determined by tasks resulting from the implementation of EU policies, especially the so-called regional operational programmes.

In terms of competences transferred to the Union and included within the laws passed by it, the EU law is binding on the territory of the Republic of Poland according to the principle of primacy, direct effect and effectiveness. Effective application of the EU law on the territory of Member States requires them to issue implementing acts taking into account national specificity of sources of law and their sufficient detail. A local government, as any other addressee of the EU law, is obliged to observe and apply the primary and secondary EU law before non-compliant national law. Implementing acts though not distinguished by a special name protect implementing acts from non-compliance. Achieving the implementing effect is also possible in every statute in the form of previous "harmonization" of its content with the EU law, which is why a presumption of compliance with this law does not only concern implementing acts.

Irrespective of a general obligation to observe the EU law, a local government may gain competence to implement EU tasks by an implementing stat-

ute. Problems that the statutory authorization may bring in such a scope are worth analyzing on the example of the Act of December 6, 2006 on the principles of conducting development policy (Dz. U. (Journal of Laws) 84/2009), transferring to the province's local government the right to grant EU sources necessary for the implementation of a Regional Operational Programme. Authorizing provision of this act and the practice of its implementation were thoroughly assessed by the Constitutional Tribunal in the judgement of December 12, 2011 (file ref. No. P 1/11)⁵.

General defining in the Constitution of the basis of local-government law-making on the one hand subjects it to "statutory authorization", on the other does not exact any requirements of this authorization, which does not mean that the legislator will not choose to apply them in a specific authorization since the Constitution does not prohibit it. The constitutional construction on the one hand eliminates local government's legislative autonomy and the possibility of its unrestricted operation "within the limits of the law", on the other creates encouragement for the legislator to restrict local governments legislative freedom minimally. Theoretically, the constitutional solution may operate without statutory concretization in an act on the principles of local government law-making as it can safely narrow it. If anything, it should be addressed to the legislator and outline the ways of understanding statutory authorization, not local government. Different to when it comes to regulations, about which everything (or even too much) was said in the constitution, generality of the constitutional norm creates an impression of its incompleteness.

Three organizational local government statutes include attempts to specify the constitutional construction within special chapters with ambitious titles but modest and unclear content. The commune, district and province acts grant the right to issue acts of local law to the commune, district and province, respectively, "on the basis of statutory authorizations" (Article 40(1) of the commune self-government act), "on the basis of authorizations included in statutes" (Article 40(1) of the district's self-government act), and "authori-

⁵ A. Bałaban, *Wyrok TK z dnia 12 grudnia 2011 r. (P 1/11) w sprawie delegacji prawotwórstwa zarządów województw dotyczących unijnych programów operacyjnych*, "Studia Iuridica Lublinensia", vol. XXII, *Księga Jubileuszowa dedykowana Profesorowi Ewie Gdulewicz w siedemdziesięciolecie urodzin*, ed. R. Mojak, Lublin 2014, pp. 513ff.

zations granted on the basis of this act” and “in other statutes” (Article 89 of the province’s self-government act). The adopted forms differ from the constitutional one and are a source of interpretational disputes in the doctrine. It is difficult not to have doubts if e.g. the commune act grants “the commune” the capacity to issue acts of local law while commune organs (all?) are only granted the right to issue acts of local law “on the basis of this statute” in only four categories of matters (Article 40(2)). However, after a short while one reads with relief in Article 41 that “acts of local law are given by the commune council by resolution”, but this later and detailed provision does not remove doubts as to the general legislative competence of a “commune” and questions whether it is the commune council or perhaps previously authorized “organs” (acting jointly?) that are competent in terms of previously listed four categories of matters.

The phrase “on the basis of this statute” was not used in the Article 40(3) of the commune act and it would actually be useful here since peace-and-order provisions are issued “in the scope not regulated in other statutes or other universally binding provisions”, which creates an impression of an autonomous legislative competence, excluded by the constitutional phrase “on the basis and within limit of statutory authorization”. Even though the actual statutory basis is present here, “statutory limits” in essence involve the absence of statutory regulation, or even other universally applicable regulation. What is this “absence of regulation”? Complete absence (difficult to imagine) or a not sufficiently specific norm that is necessary to protect the health and life of citizens in a commune, as well as public order, peace and security? While protecting “peace”, the commune does not protect property and the natural environment, which was unexpectedly vested in the district (with modest competences and resources). In turn, the province self-government was not equipped with the right to issue peace-and-order provisions. Such a right at this level of territorial division was granted to a governor, which seems a surprising solution.

This and abundant other evidence of substantive and legislative underdevelopment of provisions of internal organization structure-related statutes as regards legislative competences encourages the offering of a postulate of a separate statutory regulation in this scope. Since the Polish People’s Republic’s legislator made such an attempt (3rd Act of February 25, 1964 on issuing legal regula-

tions by national councils (Dz.U. (Journal of Laws) No. 8 item 47) in a state far from today's "rule of law", it seems more necessary, perhaps as an introduction to issuing an act on the principles of creating law, collating the dispersed parts of existing related legislation (even in the form of a regulation issued without a statutory basis on the principles of the legislative technique) and regulating what is necessary (e.g. the problem of implementation of the EU law).

In contrast to supreme state organs local governments are legislator's generic form within which there are approximately 2.5 thousand constitutive organs and the same number of implementing ones on the commune level, about 300 on the district level (some of them include combined commune and district councils) and 16 at the province level. This basic legislative structure itself is an arena for thousands of practical everyday interpretations of the broadly outlined right to issue normative acts. Let us remember that these organs are not supported by specialist legislative services, whereas they are under pressure from an enormous number of their own and commissioned tasks. Councils (and local government assemblies) in particular implement various forms of law-making covered under one, not revealing anything, name of resolutions. These include implementing resolutions and numerous, in practice, kinds of statutory referrals, "internal organizational structure" resolutions and financial resolutions based on their own competence statute (with the statute, plans and budgets at the forefront), acts of internal legislation related to the council's activity (mostly rules of procedure) and relations with an implementing organ, and finally peace-and-order provisions. The dominant quasi-legislative task in implementing organs involves preparation of most draft resolutions of the constitutive organ and the majority of acts of internal law necessary for the operation of the commune and district office. Peace-and-order provisions subject to approval by the constitutive organ also occur sporadically.

The multiplicity of local government units and their organs with legislative competences results in the fact that, different to what is the case with the state apparatus, various forms of "pre-legislative" cooperation exist here, but also forms of "joint" law-making within the public tasks vested in them. These are most of all acts of communal associations, often with a national dimension (the Association of Polish Cities, the Union of Polish Metropolises, the Union of Polish Towns, the Union of Rural Communes of the Repub-

lic of Poland) or of a local character (the Association of Maritime Towns and Communes, the Association of Jura Communes, etc.).

An extremely interesting phenomenon inspiring local government legislation involves acts of international associations, such as for example Euroregions created in the before-EU period still operating in the number of 27 on Polish borders. Their specific cross-border location causes that the problem of their legislative rights based on the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities is much more complicated than in the case of national and local associations, which organs are as a rule denied law-making competences⁶.

Marshals' Conventions and Conventions of Chairmen of Local Government Assemblies also have an essential influence on the process of creating law, which positions bind provinces in further law-making activity. Informal horizontal structures are also often created at the commune and district level. The Joint Commission of Government and Local Government operating since 1993 is also an auxiliary structure in the process of creating law.

Against the background of flexible forms of cooperation of local governments historical forms occur (the National Local Government Assembly, the obligatory association of communes of the capital city of Warsaw), often forgotten but remaining "in store" as well as new or old, not implemented ideas (macro regions, metropolitan districts or even the Senate of the Republic of Poland as a local government chamber). All these forms could influence legislative powers of local government in case of complete or partial adoption or create their own law-making forms in mutual relations and with regard to external organs.

The category of entities of the local government type that have legislative powers must include government commissioners appointed to substitute local government organs or entities appointed to carry out substitutive obligations of the local government organs, as it is the local government that bears, at least in part, the responsibility for consequences of their legislative activity implemented within its competences.

The constitutional jurisdiction of administrative courts to adjudicate on compliance with statutes or resolutions of local government organs (Article

⁶ Cf. D. Dąbek, *Prawo miejscowe*, Warsaw 2007, pp. 189ff.

184) is developed in the Article 51(1) of the law on proceedings before administrative courts, providing for the authorization of the prosecutor, the Commissioner for Human Rights and social organizations to challenge acts of local law. As part of such a complex system of review, the most important role is played, as can be seen, by administrative courts. It is them then who are competent to specify principles and boundaries of local government legislation. These principles serve somehow secondarily as models of behavior observed in the course of local government legislative activity. Auxiliary importance is also attributed to the regulation of the President of the Council of Ministers of June 20, 2002 on the principles of the legislative technique (Dz.U. (Journal of Laws) 100 item 908) addressing expressly “draft acts of local law” (§ 142 and 143). At the end of these reflections let us add that the CT’s competence to review acts of local law was recognized (judgement Ts 139/00), even though only in the mode of a complaint concerning constitutional infringements and questions of law. However, it seems that abstract review is excluded by means of the formulation of the Article 188 of the Constitution. As a result, the CT may also introduce judicature to formulating and verifying principles and limits of local government legislation.

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