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Committing a Crime as a Reason to Limit the Ability to Perform Functions in Local Government Administration

Abstract: 2018 local self-government elections in Poland were special ones. Brought to light mismatching of provisions of the Electoral Code and Act on Local Self-Government Employees and attempt to use it to obtain an advantage in fight for political power caused political emotions and legal controversies. The aim of this article is presents limits imposed by criminal law on right to be elected in this type of elections and more general, role of criminal law as a tool in politics. The article presents a problem of conflict of legal regulations regarding the right to be elected and perform a public function in a local self-government unit as a problem of conflict between will of voters and attitude of politicians to creation of law and aim they try to obtain.

Keywords: *criminal law, elections, electoral law, legal policy*

Introduction

The elections to local self-government unit showed a very important and interesting problem. There is a conflict between electoral law regulations and regulations regarding local self-government agencies, which is troublemaking but happens. However, a manner used by legislature to solve this problem presents also more important issue. A conflict between voter's will and paternalistic attitude of the lawmakers. It seems to be pivotal problem of the democracy. The case of elections 2018 also shows the use of criminal law as a tool for exercising and maintaining power

2018 Elections of Local Self-Government Bodies Controversies

The local elections held in 2018 gave rise to great political emotions and no less legal controversy, especially due to the ambiguous legal situations of some candidates for positions of commune head, mayor and city president. Candidates with legal problems were also present among those participating in elections in municipalities, cities, counties and regional assemblies, but the profiles of candidates for the post of commune head, mayor and city president were inevitably more popular, with emphasis on the candidates for presidents of big cities.

The most famous, but also the most interesting from a legal point of view is the case of Hanna Zdanowska, the president of Łódź, applying for re-election in 2018. By the judgment of the District Court on September 27, 2018, she was finally convicted of an act under art. 18 § 3 of the Criminal Code¹ in conj. with art. 297 § 1 of the Criminal Code in conj. with art. 12 of the Criminal Code. She was charged with the fact that in 2008, in order to obtain financial support for her partner in the amount of PLN 200 000 granted in the form of a bank loan, she helped him to submit untruthful documents. The court sentenced her to a fine of 20 000 PLN and it was the decision about the conviction that turned out to be the most problematic aspect in the perspective of local elections (TokFm, 2018).

The District Court's judgment was given at the end of the election campaign, i.e. when the deadline for presenting candidates in the election had already passed, so a question arose whether Zdanowska should withdraw from the candidacy if the possibility of taking office in case of winning became questionable. The problem that arose is due to the contradiction of two legal acts relating to candidates for presidents (commune heads, mayors) and presidents (commune heads, mayors) as self-government employees. On the one hand, the Electoral Code², which defines the negative factors for eligibility, i.e. conviction by final judgment to imprisonment for intentional offense prosecuted by public prosecution or intentional fiscal offense (art. 11 § 2 of Electoral Code), did not eliminate Zdanowska's candidacy, because she was not sentenced to imprisonment, but on the other hand, the Local Government Employees Act³ explicitly prohibits the employment of a person convicted by a final court sentence for an intentional offense prosecuted by public prosecution or an intentional fiscal offense, regardless of what penalty was sentenced (Art. 6 sec. 2 of the Local Government Employees Act), which *prima facie* prevented Zdanowska from being a president. Meanwhile, she achieved a record result, receiving as much as 70.22% of votes (Gazeta Wyborcza,

¹ Ustawa z dnia 6 czerwca 1997 r. Kodeks karny (last consolidated text of the Code is published in Dziennik Ustaw of 2018, pos. 1600, as amended).

² Ustawa z dnia 5 stycznia 2011 r. Kodeks wyborczy (last consolidated text of the Code is published in Dziennik Ustaw of 2018, pos. 754, as amended).

³ Ustawa z dnia 21 listopada 2008 r. o pracownikach samorządowych (last consolidated text of the Act is published in Dziennik Ustaw of 2018, pos. 1260, as amended).

2018), which means that the inhabitants of Łódź clearly showed her confidence despite the allegations of her, confirmed by a valid court judgment.

Also interesting was the case of the candidate for the presidency of Olsztyn, Czesław Małkowski, accused of sexual crimes. In 2008, media reported that Małkowski was molesting female clerks working in the city hall, and one of them, who was pregnant, was raped. In November 2008, by way of a referendum, he was dismissed from the post of president of Olsztyn. After these events, he three times applied for the post of the president and three times he got to the second round of the election, he lost, but he got the councilor's mandate each time. In 2015, the District Court in Ostróda, after a four-year trial, declared Małkowski guilty of rape and attempted rape, and sentenced him to five years imprisonment. In addition, the court ruled against him a prohibition to hold managerial positions in public administration units for six years. However, the appeal court quashed that decision and remitted the case. The second trial of Małkowski began on October 24, 2017 in front of the District Court in Olsztyn, which did not prevent him from running for the post of president of Olsztyn (Gazeta Olsztyńska, 2018).

According to the constitutional guarantee of the presumption of innocence, everyone is presumed innocent until his guilt is confirmed by a valid court sentence (art. 42 sec. 3 Constitution of the Republic of Poland⁴). This presumption applies only to criminal liability (*sensu largo*), has the character of a legal presumption and is rebuttable - i.e. it can be refuted, but only by a final conviction of a court judgment. The principle of the presumption of innocence is further specified in the Code of Criminal Procedure⁵, art. 5 § 1 stating that the accused is considered to be innocent until his guilt is proved and confirmed by a valid sentence and in § 2 in accordance with which doubts that cannot be removed are settled in favor of the accused (*in dubio pro reo*).

In the light of these considerations, it is obvious that despite the proceedings against him, Małkowski could run for the post of president of Olsztyn. In the first round of the election he obtained as much as 30.66% of the votes, and his rival 33.78%, which means that the fight was very even and despite many accusations on him he managed to convince many Olsztynians. However, in the second round Piotr Grzymowicz clearly won, defeating Małkowski with 54.47% of the votes against 45.53%. Interestingly, on December 28, 2018, the District Court in Olsztyn acquitted Małkowski from the acts he was accused (Gazeta Olsztyńska, 2018).

⁴ Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. uchwalona przez Zgromadzenie Narodowe w dniu 2 kwietnia 1997 r., przyjęta przez Naród w referendum konstytucyjnym w dniu 25 maja 1997 r., podpisana przez Prezydenta Rzeczypospolitej Polskiej w dniu 16 lipca 1997 r. (Dziennik Ustaw of 1997 No 78, pos. 483 as amended).

⁵ Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego (last consolidated text of the Code is published in Dziennik Ustaw of 2018, pos. 1987, as amended).

The candidacy of Zbigniew W., head of the Daszyna commune, was even more controversial. He was temporarily arrested from May 2018, but he applied again for the elections of the commune head. He was charged with managing an organized criminal group that was supposed to extort agricultural subsidies. The campaign led from prison proved to be so effective that, seeking the third term, Zbigniew W. won in the first round of the election with as much as 48.5% of the votes, almost twice as much as his best opponent. However, he lost in the second round (Rzeczpospolita, 2018). What is interesting, his first term was terminated due to a valid conviction for hunting for wild boars without permission, however, after the conviction was sealed, in 2014 he was re-elected as the head of Daszyna commune (Portal Samorządowy, 2018). This is obviously admissible because from the legal point of view, once the conviction is sealed, it is considered to be null and void, which does not mean, however, that the conviction will also be “erased” from human memory. On the contrary, it is admissible to quote information about a conviction, e.g. in a public debate, especially when the person concerned is seeking a position requiring social trust, as was the case here. Besides, there were more candidates for commune head elections being temporarily arrested. A similar legal situation was the one of Hubert C., running for the elections of the head of Przyrów, who was accused of participating in an organized criminal group dealing with VAT frauds (Radio Zet, 2018).

General Rules of Criminal Law

Regardless of the regulations of the Electoral Code and the act on local government employees, the Criminal Code contains an independent legal basis that makes it impossible to perform functions in local government administration. This is about two criminal measures, i.e. deprivation of public rights and a ban on taking a specific position, performing a specific profession or conducting a specific business activity (art. 39 pt. 1 and 2 of the Criminal Code).

Deprivation of public rights, regulated in art. 40 § 1 of the Criminal Code, is the most severe criminal measure depriving a convicted person of certain categories, i.e. political rights in the form of active and passive electoral law, civil rights (right to perform functions in state bodies and institutions and territorial or professional self-government) and honorary rights (loss of his military rank and return to private and loss of distinctions, decorations and titles of honor and loss of ability to obtain them).

The ruling of this penal measure is stigmatizing, it is an expression of the moral condemnation of the perpetrator who turned out to be unworthy of using public rights and honorable distinctions (Stefański, 2018).

The content of art. 40 § 1 of the Criminal Code does not include electoral rights to the European Parliament, but this prohibition results from the content of the provisions of art. 10 § 2 and art. 11 § 1 item 4 of the Electoral Code, according to which persons deprived of public rights are not entitled to active and passive electoral rights (Szeleszczuk, 2019).

The scope of deprivation of public rights includes the loss of the right to perform functions in organs and state institutions as well as in territorial or professional self-government. Loss of the right to perform functions in state bodies and institutions as well as local and professional self-government covers all kinds of positions with which social trust or authority is connected, and thus managerial, supervisory and control positions (Stefański, 2018). Loss of the right to perform functions in state bodies and institutions and territorial or professional self-government is final, which means that after expiration of the period for which it was pronounced, the convict does not regain lost functions and only regains the ability to take them back (Górowski, Szewczyk, 2016; Marszałek-Kawa, 2019).

Deprivation of public rights is optional. The court can judge it when two conditions are met simultaneously. First, when the perpetrator was sentenced to imprisonment for no less than 3 years, and secondly when the offense for which he was convicted was committed as a result of motivations deserving special condemnation. While the first condition does not raise any interpretation doubts, the latter is more problematic. The assessment of whether the motivation deserves special condemnation belongs to the court and is not dependent on the legal classification of the act. Motivation deserving special condemnation means acting with motives deserving special stigma, and therefore assessed extremely negatively (SA w Lublinie, II AKa 12/99). Most often it will be about action for revenge, enrichment at any price, humiliation of someone, violation of personal dignity, etc. Deprivation of public rights can be ordered for a period of 10 years.

The second penal measure constituting a legal basis preventing the performance of a function in local government administration is the specified in art. 41 § 1 of the Criminal Code prohibition of holding a specific position, performing a specific profession or conducting a specific business activity. In the context of the topic being discussed, the first form of this measure is interesting, i.e. the prohibition of taking a specific position, in this case it will be a position in public administration. The position in public administration should be understood as a function in the organs of state or local government, which is characterized by imperious activities in the field of executive power (SN, I KZP 18/01; SN, V KK 213/06). The prohibition of taking a position may be ruled when the perpetrator abused a position when committing a crime, or when he showed that continuing his position threatens important goods protected by law.

Abuse of a position should be understood as exercising it improperly, overrunning or failing to fulfil duties, or violating the ethics of a given position, while the perpetrator's behavior must be conscious (SN, V KRN 300/8).

On the other hand, the demonstration that the continuation of a position threatens important goods protected by the law consists in violating, in relation to the position held, the commonly accepted rules of holding it. It may be a lack of competences, skills or predispositions necessary to occupy a particular position, where the relationship between the lack of these traits and the committed crime is important. In addition, there must be

reasons for the conclusion that further holding of the position by the perpetrator of a crime is likely to endanger important rights protected by law (Szeleszczuk, 2019). What is important, the decision prohibiting holding a position based on this premise can also take place in the event of an unintentional crime (Górowski, Szewczyk, 2016). The prohibition of taking a position may be ruled for a period from one to 15 years.

Rules of Election Law in 2018

It seems, that the most important legal problem connected to right to be elected in self-government unit election and possibility to perform public function is inconsistency between Electoral Code and Act on local self-government employees.

The main statute regulating rights to participate in territorial self-government units is Electoral Code adopted on January 5, 2011. Regarding influence of hitherto criminal responsibility of candidate on his/her right to be elected, it was very clear. According to Article 11 § 2. excluded is person who is subject of a valid sentence to deprivation of liberty for an intentional offense prosecuted by public prosecution or intentional fiscal offense.

There are 3 types of penalty of deprivation of liberty in Polish criminal law. The first one is so called term deprivation of liberty, which shall be for no less than one month and not more than 15 years and it shall be imposed in years and months. The next one is deprivation of liberty for 25 years. The last one is deprivation of liberty for life. Fiscal offenses i.e. offenses against treasury interests of State Treasury, regional self-government units or European Communities, belong to separated area of criminal law (Konarska-Wrzošek, Oczkowski, p. 23) and called fiscal offenses are contained in Fiscal Criminal Code of 1999. Article 69. § 1. of the Criminal Code provides for a court a possibility of conditional suspension of the execution of a penalty of deprivation of liberty. However, even if a court uses this possibility and suspend execution of a penalty, sentenced person is deprived the right to be candidate in regional self-government elections.

In the Polish criminal law, a prosecution of the offense shall occur upon a private or public prosecution. This first category contains offenses against personal goods, like honor and inviolability. A victim of such offense prepares and submits to a court and supports it during a trial. Such cases are personal conflicts between perpetrator and victim and threat of punishment of such offenses is comparatively low, consequently Polish legislator decided, conviction in such case, even for deprivation of liberty, shouldn't exclude punished person of performance of public function.

What should be stressed, that only sentence to deprivation of liberty created situation of prohibition to participate in elections as a candidate. So, the content of the court sentence was important but court's recognition that politician committed an offense. It seems to be purposeful decision of the Polish legislators. Art. 7. 2. of Electoral Law for Municipal Councils,

District Councils and Regional Sejmiks of 1998⁶ deprived the passive electoral rights persons punished for an intentional crime prosecuted by public prosecution and to whom a final judgment was issued conditionally discontinuing criminal proceedings in the matter of committing an intentional crime prosecuted by public prosecution. When Electoral Code was adopted this deprivation became narrower. Unfortunately, there was no coordination between Electoral Law... and Act on Local Self-Government Employees was adopted by Sejm on November 21, 2008. Its Article 4. constitutes that one of the self-government employees are employed based on choice and in Article 6.3 is written that self-government employees can be a person who was not convicted by a valid court sentence for an intentional offense prosecuted by public prosecution or intentional fiscal offense. Because city and town mayors are self-government employees who are employed based on choice, the difference between position of candidate and elected candidate was clear. As writes Agnieszka Rzetecka-Gil (2018), this conflict of legal norms cannot be removed by any rule used in Polish law in similar cases. On the face of it, rules *lex posteriori derogat legi priori* (the later rule repeals the earlier one) or *lex specialis derogate legi generali* (the special rule repeals the general one) or *lex superior derogate legi inferiori* (the higher rule repeals the lower one). The author's conclusion is there was a situation where a given person, elected by the local community in the election to be the commune head, will not be able to establish an employment relationship. Such an interpretation of the mentioned rules of law leads to the absurd result and of course it is impossible to accept it. Also, political consequences of refusing to accept in practice results of the election could be a reason to political unrest of the society.

Law Amendments 2019 and Its Explanation

The result of the conflict between Electoral Code and Act on local government employees was amendment of the Code on January 31, 2019⁷. Now every conviction for an intentional offense prosecuted by public prosecution or intentional fiscal offense, is legal obstacle to be a candidate in in self-government unit election.

The Polish legislator had three possibilities. The first and chosen one was to upgrade demanded standard of to this demanded for all self-government employees. The second one was to downgrade demands to the standard of Electoral Code as it was in force in 2018. The last possibility was to differentiate legal position of three types of self-government employees: employed on the basis of: election, appointment and employment contract. The first group could be people who were subject of a valid sentence other than deprivation of liberty and

⁶ Ustawa z dnia 16 lipca 1998 r. - Ordynacja wyborcza do rad gmin, rad powiatów i sejmików województw (last consolidated text of the Law is published in Dziennik Ustaw of 2010, No 176, pos. 1190).

⁷ Ustawa z dnia 31 stycznia 2019 r. o zmianie ustawy – Kodeks wyborczy (Dziennik Ustaw of 2019, pos. 273)

the second and third groups couldn't be people who were subject of a valid sentence for an intentional offense prosecuted by public prosecution or intentional fiscal offense. This type of compromise seems to be the best solution of the problem. On the one hand, it keeps high standards of self-government employees, on the other hand, it accepts right of voters to choose almost every person they want to be a mayor of a place where they live.

Unfortunately, there is no explanation of the legislator's choice. In official explanation of legislator's motive to prepare a draft of the Electoral Code amendment, there is no any analysis of the problem. It is just mentioned, that unification of regulations of these two statutes is reaction for expectations of State's Election Committee (Państwowa Komisja Wyborcza). Some explanation of the legislator's attitude can be draft of the Act on an Amendment of Criminal Code and Some Other Statutes, sent to Sejm by a group of MPs on March 8, 2019⁸. They claim the proposed Act is aimed to counteract corruption, what is an important problem in contemporary Poland. Increase of severity of the criminal responsibility, in their opinion, is a very useful measure to control unacceptable behavior of, among others, people performing public functions. Supporters of the draft see corruption as something what occurs in every political party and corruption scandals present as frequentative ones, focusing attention of public opinion.

The suggested change in the Criminal Code is an addition of a new penal measures, regarding problem described in a title of this article, a prohibition of work and performing functions in local and self-government with the loss of a passive electoral right to perform the mentioned functions. This prohibition shall be for not less than one year and not more than 15 years. However, in a case of committing venality in public official sphere, such prohibition could be ordered for life.

It seems reasonable to ask two questions. Does draft of 8th March really changes possibilities of a judges to react on cases of corruption and take preventive action. And is level of corruption in Poland so high that new manners of counteraction are needed. The answers for these both questions are negative.

In a social perception corruption remains an important problem to solve (76% of respondents think so). However, it is expanding issue. Five percent of asked Poles, (from 2013, a decrease of 1 percentage point) at least once in his life he found himself in a situation in which someone tried to bribe him. What seems to be more important, since 2013, the number of people declaring paying bribes has also decreased (from 9% to 6%) and is currently the lowest since 1993, when this type of research was made (CBOS pp. 1, 4, 5). When we think about results of Poland in Transparency International Corruption Perception Index, we see small increase of corruption since 2016. Polish scores were: 63 in 2015, 62 in 2016, 60 in 2017 and 2018⁹ (Transparency International, 2019). Since 2005 the score of Poland was

⁸ Projekt ustawy: - o zmianie ustawy - Kodeks karny oraz niektórych innych ustaw. Druk Sejmu VIII kadencji nr 3288

⁹ The CPI draws on surveys and expert assessments to measure public sector corruption, giving each

better and better, year till 2015. Also, there is no increasing number of offenses committed in Poland. When in 2008–2013 this number was about 1 million 100 thousand, it is less than 800 thousand since 2015 (Policja, 2019). So, this picture of Polish reality doesn't present any real need to restrictive changes of Polish legislation to make situation better.

So why the legislative did not give the voters wider scope of possibilities of choice? Three answers are possible. And probably mixture of them would be the best explanation. These answers are: cultivation of Criminal populism policy, reaction to political troubles of ruling party and general legislative problems in contemporary Poland.

Moral panic and Criminal populism are two inseparable phenomena. The first one is about publicizing the given social problem and presenting it as extremely dangerous, which causes inadequate, too strong reactions (Zielińska, 2004, pp. 163–164). The second one can be defined as a set of social beliefs and political and legislative activities undertaken with a purposeful border of the role of experts, co-formed by the media, characterized by a strict attitude to crime and lack of sympathy for the perpetrators (Zalewski, 2009, pp. 30–31). This mechanism was quite often used in political struggle in Poland (Chlebowicz, 2009, pp. 499–504; Kamińska, 2014, pp. 56–57). Also, the phenomenon of corruption was used in this way by politicians, often supported by the media (Makowski 2008) and good example of which may be the increase in interest in this problem after the disclosure of the so-called Rywin affair (Zielińska, 2004, p. 164). It is difficult to abandon this kind of politics, especially that ruling party has problems of acts of corruption confirmed by court verdict and widespread in the media, e.g. Case of a former deputy mayor of Radom (Rusek).

According to point of view of Marcin Gubała (Gubała, 2019) at present there is the spread of the view that not only no one obligation or sanction can be imposed on a citizen other than in the act, the action of the executive must also be found in a statutory act, but also there must be a inclusion in the act detailed regulations and it is demanded to “clarify the provisions”, “specify the regulations more” or “complete the act”. This is often due to the lack of enough knowledge about the relationship between the designed and existing regulations. So similar area of regulations exists in Electoral Code and Act on local government employees. It leads to conflict of rules and makes interpretation problems.

Conclusions

These not analyzed but just mentioned conditions of legislators and result of their work shows the scheme of creation of problem making regulations. Voters seem to prefer effectiveness of mayor, who is expected to be a *bonus pater familias* (good family father) refers to a standard of care, analogous to that of the reasonable man in English law (Parker 1993) and are less concerned about honesty and lawfulness. They don't want paternalistic protection of the legislator and prefer possibility to make unlimited choice in this area. On

country or territory a score from zero (highly corrupt) to 100 (very clean).

the other side, legislator prefers to restrict voters' possibilities. What may be surprising that this the conflict between the feelings of voters and legislator can recall the XIX century conflict between German historical school of law and positivism (Petrażycki, p. 241). According Georg Puchta and Friedrich Carl von Savigny, the constituted law is expression of the collective spirit of society. At present conflict of regulations of Electoral Code and Act on local government employees is removed. However, it is easy to predict political unrest of the voters before the next local self-government election because present state of legislation represents collective spirit of politicians but society.

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