PROBLEMS OF THE FUNCTIONING OF LOCAL SELF-GOVERNMENT

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DIRECTIONS OF IMPROVEMENT IN THE REGULATION OF THE STRUCTURE OF SELF-GOVERNMENT

Improvement of the law regarding self-government structures is a constant process. This is not only due to the necessity of adapting the law to constantly arising challenges brought about by the practice of self-government, but also the necessity of setting coherent regulations, as well as filling the gaps in self-government legislation.

Reacting to these needs, the legislator is continuously introducing amendments [Dziennik Ustaw, 1996, 1996a, 1996b, 1998, 1998b]. A particularly wide range of amendments of the law on the structure of government have been introduced based upon the amendment of 2001 [Dziennik Ustaw, 2001], covering several problems previously pointed out by experts [Jaworska-Dębska, 2000].

The form of the amendment removes any doubt regarding the range of autonomy of a district in shaping its organizational structure by statutes. The competency to pass a statute is considered by experts as a kind of autonomy in "regulating the internal life" of self-government [Adamiak, 1993, 17–8; Leoński, 2000 62; Korczak, 2000, 62].

However, municipalities, districts and regions (provinces) do not enjoy freedom of organization to an equal degree. In particular, much doubt has been raised about the rights of districts in this field in the light of the regulation of the Minister of Home Affairs and Administration of 27th November 1998 on a model statute of a district [Dziennik Ustaw, 1998a]. The opinion that this statute is merely an aid in formulating the statutes of districts has often been expressed, whereas any non-conformity with the model statute does not imply non-conformity with the law,

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unless the statute of a district infringes the regulations of the law of district self-government or another law. It has been said that if the model statute has a greater significance, this should be explicitly expressed in the law on district self-government [Ochendowski, 1998, 111]. However, at the same time a different opinion was presented stating that by determining the model statute in the form of regulation, it becomes a universally binding rule as regards the statutes of districts. As a result the voivode (provincial governor) should examine the conformity of the statutes of districts under his supervision with the model statute [Podgórski, 1998, 15]. This problem disappeared when Art. 2 Item 5 of the act on district self-government was repealed, which stated that the minister in charge of matters of public administration should determine a model statute for districts in the form of regulation. After this amendment districts became completely free to determine their statute, as did municipalities with a population of below 300,000 inhabitants. However, municipalities with a population of over 300,000 and regions still determine their statutes in cooperation with the prime minister. A draft statute of a municipality with a population of over 300,000 requiresthe acceptance of the prime minister, at the request of the Minister of Home Affairs and Administration and the statute of a region is determined by the regional assembly (sejmik wojewódzki) after acceptance by the prime minister.

The right of inhabitants of self-government communities to participate in local referenda is guaranteed in all self-government bills. However, in these bills any strict regulation of details has been ignored and a separate much expected [Olejniczak-Szałowska, 1999, 2000] bill of 15 September 2000 [Dziennik Ustaw, 2000b] on local referenda has been enacted. It contains more detailed regulations regarding the rights of members of such communities to express their will as regards the way of determining essential matters concerning the community by voting in a local referendum. In considering the possibility of using this form of direct democracy by the communities of municipalities, districts and regions, it should be noted that the bill on local referenda determines certain standards in this area. It is indicated that the subject of a local referendum is restricted to matters referring to the given self-government community and within the range of tasks and competency of the organs of the given unit of local self-government. This is a very substantial regulation, whose lack was experienced in practice [ONSA, 1994]. Thus it was impossible to find a rational justification for the diversified, in various self-government bills, ways of determining the subject of a facultative referendum in municipalities, districts and regions. The bill on municipalities stated that a referendum could be taken in any matter important to the municipality, not only those requiring an obligatory re-

ferendum. In a district a facultative referendum may decide on matters within the range of competency of the district, whereas any matter important to the region, within the scope of its tasks, may be the subject of a facultative referendum in a region.[1] Moreover, the normalization in the bill on local referenda, and the subject of referenda has liquidated the former differences between norms in this matter as regards removing organs of local self-government from office, before the termination of its term. Thus, in the bill on regions, unlike the bills on municipalities and districts, there was no limitation on the time of a referendum on removing the regional assembly from office before termination of its term. The bills on municipal self-government and district self-government stated that a referendum on removing a municipal council or district council from office cannot be carried out earlier than 12 months after the day of their election or after the day of the last referendum on this matter, and not later than 6 months before the term of office elapses.

At present, the time limitations mentioned above apply to all units of local self-government from the terms of the bill on local referenda. Moreover, the bill on local referenda determines the details of the referendum procedure. It is necessary to avoid any situation in which emotions decide about taking a local referendum, in which the conclusion of inhabitants as to taking a referendum is a spontaneous act of will [Olejniczak-Szałowska, 2000a, 177]. Certainly, some differences remain in the legal regulation of local referendum. These consist, among others, in giving municipalities the right to take referenda on the self-taxation of inhabitants for public aims within the scope of tasks and competency of municipal organs, as well as defining the numbers of inhabitants authorized to vote necessary to initiate a referendum, as well as the form of an appropriate conclusion to hold a referendum. The initiators of a district or regional referendum must be a group of at least 15 citizens, who have the right to vote in that given unit of local self-government. The initiators of a municipal referendum must be a group of at least 5 citizens who have the right to vote in that municipality. However, the conclusion to hold a referendum in municipalities and districts must be supported by at least 10 per cent of inhabitants authorized to vote, and in the regions it is sufficient to have the support of 5 per cent of inhabitants. Thus, the bill on local referenda has reduced the number of persons authorized to vote required to initiate a referendum. In the bill on local referenda from 2000 the earlier limitations regarding municipalities were only pre-

[1] This problem regarding municipal referenda has been noticed by Janku [1997]. The problem was often dealt with in judicial decisions of NSA. Regarding districts the problem is raised by Ura [1999].

served as regards the possibility of taking a referendum on self-taxation for public aims. However, this bill precisely defined public aims of self-taxation of inhabitants by indicating that they must be within the range of tasks and competency of municipal organs.

Also public consultation, which before the amendment of 2001 could only be held at the level of a municipality, can now also be held at the level of districts and regions. Such public consultation can be arranged with the inhabitants of al types ofl units of local self-government in cases outlined by the bill on self-government and in other matters important to the given unit. Public consultation is to may be held according to the principles and procedures determined by a resolution of the relevant council (sejmik).

Under the amendment of self-government bills from 2001 the strange gap in the former regulations referring to the question of issuing regulations by the Council of Ministers concerning municipalities and districts as units of territorial division has been filled. Thus, the basis of the activities of local self-government and participation of constitutional organs and inhabitants in such matters has been established. The regulations issued by the Council of Ministers concerning the formation, merger, division and liquidation of municipalities and districts were determined in detail, as well as regulations on the determination of their boundaries, granting municipalities or communities the status of a town and determination of their boundaries and also determination and changing the names of municipalities and districts, as well as the seats of their authorities. This procedure demonstrates, among other things, the scope of the participation of local government units in consulting inhabitants and various forms and range of such consultation, depending on whether an act is to be issued on the conclusion of a municipal council, district council or town council with the status of a district.

As regards the constitutional-controlling organs of local self-government, the amendment of 2001 provides, first of all, the long postulated reduction of the number of their members. Municipal councils will have from 12 (until now from 15) councilors in municipalities up to 5,000 (until now 4,000) inhabitants, to a maximum of 60 councilors (formerly the number of councilors could not exceed 100). A district council will consist of 15 councilors (until now 20) in districts with a population of up to 40,000 inhabitants plus 3 (and not 5) councilors for each additional 20,000 inhabitants (rounded upwards), but not more than 39 councilors (formerly 60). The number of members of a regional council has been reduced from 45 to 30 councilors in regions up to 2,000,000 inhabitants, and the number of additional councilors reduced from 5 to 3 for each additional 500,000 inhabitants (rounded upwards).

The amendment of 2001 also enlarges the range of matters belonging to the exclusive competency of constitutional-controlling organs at all levels regarding the determination of salaries of heads of local administration, as well as the principles of granting scholarships to pupils and students. As regards the municipal councils, their autonomy has been widened in the field of cooperation with foreign local and regional communities, as well as joining international associations of local and regional communities. The autonomy of district councils has been widened in the field of crime prevention, public safety and keeping public order, as well as in counteracting unemployment and job creation, and also in *taking over tasks of government administration and delegating public tasks to units of local self-government.*

The amendment of 2001 introduced necessary provisions: according to them a member of central administration cannot be a chairman of a constitutional-controlling organ of local government at any levels. At the same time the range of rights of a chairman has been reduced to organizing the work of the council and presiding at sessions. The relation between the chairman and vice-chairmen has been determined by allowing the chairman to designate a vice-chairman to perform his duties. However, when the chairman is absent and no vice-chairman has been designated, the tasks of the chairman will be performed by the eldest vice-chairman. Similar rules apply in the case of the resignation of the chairman or vice-chairman of the council in the procedure of acceptation of a new chairman.

Under the amendment of 2001, solutions referring to the composition of committees of municipal, district or regional councils have been unified by permitting them to be composed of councillors only. However, it is not a solution which can be fully approved of. Until now the composition of district or regional councils could include only councillors, whereas a municipal council could also include, along with councillors, people from outside the council but numbering less than half of its composition. Considering the problems which may appear in small municipalities as regards establishing a committee, which should include persons with knowledge and qualifications useful to the work of committee, it has to be admitted that in the case of small municipalities (*e.g.* up to 20,000 inhabitants) it should be permissible to include people from outside the council in the committee, provided that the number of people from outside the council cannot exceed half of its composition. Under the amendment of 2001 the regulation stating that the governing committee should include representatives of all the clubs of councilors, which previously only covered district councils, was extended to municipalities and

self-government regions. The composition of this committee, considering its importance, should represent the political composition of the council.

The rather uniform legal status of a councilor in municipalities, districts and regions fixed so far by bills of legislation has undergone a further process of unification. First of all, in all self-government bills (not only regarding districts and regions) an explicit provision has been included that a councilor is not bound by instructions of the voters. Under the amendment of 2001 not only bills on municipal government, but also other self-government bills state that it is a duty of a councilor to keep in permanent contact with the inhabitants and organizations within that community. The rights of constitutional-controlling organs at all levels of local self-government, as regards determining the principles of paying expense and travel allowances to councilors, has been considerably unified. The former full freedom of municipal councils in this matter has been restricted to now resemble the rights of district and region units. At present, a solution has been accepted in all self-government bills according to which the expenses due to a councilor in a month cannot exceed one and a half times the basic salary determined by the state budget bill for persons filling executive posts, according to the regulations of the bill of December 23rd, 1999 on salaries in the state budgetary sphere and amendments of various bills [Dziennik Ustaw, 1999]. At the same time this is the maximum of expenses and allowances for municipalities with the largest number of inhabitants. For smaller municipalities and districts the maximum value of expenses and allowances due to a councilor in a month is determined by the regulations of the Council of Ministers, according to the number of inhabitants of the municipality or district. This process of unification of the legal status of a councilor at all levels of local government also covers legal regulations which are to guarantee the „transparency" of councilors' activities, to avert them from any suspicion of unfairness. Therefore, the prohibition of simultaneously holding the mandate of a governor or vice-governor of a region (voivode), as well as the mandate of a member of parliament or senator or membership of another unit of local government has been extended to all councilors at all levels of local government. The restriction of freedom to sign contracts with an organ of a given unit of local government, which until now only municipal councilors were subject to, has been extended to all councillors of local government units. As a result the administration of a given unit or its chairman cannot delegate to a councilor any work in the unit where he holds a mandate on the basis of a civil law contract. Also, the institution of excluding a councilor from participation in a vote when it is connected with his legal interests, which councilors

of district and region councils were subject to, has been extended to councilors of municipal councils.

Under the amendment of 2001 the difficulty of justifying the differentiation included in structural bills as regards the procedures of summoning the first session of a newly elected council has been removed, particularly the date the first session is due [Jaworska-Dębska, 2000, 57]. At present regulations state that the first session of a newly elected council is summoned by the chairman of the council from the previous term of office within 7 days of the collective results of a nationwide election being announced, or in the case of a by-election within 7 days of the results of the election of a given council being announced. If such an election was the result of a local referendum on removing a council from office, the first session is summoned by the person appointed by the prime minister to perform the function of the organ of that local government unit. After this term elapses, at all levels of local government the session is summoned by the regional commissioner for election within 21 days of the collective results of a nationwide election being announced, or in the case of a by-election within 21 days of the results of the election to a council being announced.

When considering the range of amendments referring to the constitutional-controlling organs of local government, it has to be added that municipalities have been charged with a duty to undertake actions directed towards supporting and popularizing the idea of self-government among their inhabitants, particularly among the youth. Under such activities a municipal council may permit, following the request of interested parties, the formation of a municipal youth council as an organ of a consultative nature.

Although the basic problems of legal norms, as regards executive organs at all levels of local government are identical, there are considerable discrepancies in particular cases. The amendments of self-government bills also covered such problems. First of all, the number of members of collective organs in municipalities and districts has been reduced, stating that the administrative board of municipalities and districts may consist of 3 to 5 people, where before they could consist of 3 to 7 people [Podgórski, 1998, 15], whereas the administrative board of a district may consist 4 to 6 people. Within these norms municipal and district councils have the liberty to determine in their statutes the number of members of the administrative board. There is no liberty in the matter for municipal councils in municipalities with up to 20,000 inhabitants, as in such cases the number of members of the administrative board has been determined by the statute to be 3. Moreover, under this amendment the regulations have been unified stating that the adminis-

trative board at all levels of local government may not only include councilors, but also people from outside the council. The regulations referring to administrative boards at all levels of local government demand that membership of an administrative board cannot simultaneously held together with membership in another unit of local government, employment in government administration or a mandate as a member of parliament or senator. In the local government system the time at which any constitutional organ elects the administrative board has been made uniform as within 3 months of the date of announcement of the election results by the proper electoral organ. Also, regulations regarding performing the functions of organs of a given unit of local government after the dissolution of a council due to not having elected the administrative board within the term determined by statute, till the administration is elected by the new council has been made uniform. It is stated that it is the prime minister who, at the request of the minister responsible for administration, appoints the person who performs the function of organs of the given unit of local government till the election of the administrative board by the new council. Under this amendment the regulations regarding the person taking over the tasks and competency of organs of local government units has been uniformly determined. When a council elected in a by-election does not elect the administrative board within the term determined by statute, it is dissolved on the basis of law. In this case no by-election is held and the functions mentioned above are taken over at all levels of local government by a government commissioner appointed by the prime minister at the request of the minister in charge of administration. The employment protection for a councilor provided by the self-government bills also covers members of the administrative board who are not councilors under this amendment.

The amendment of 2001 has brought also some modifications as regards removing the administrative board from office. First of all the possibility of removing the administrative board for any other reason than not being accepted in a vote, differently regulated according to the levels of local government, has been liquidated. This former possibility of removing particular members of an administrative board from office at the level of district and region for reasons different from not being accepted in a vote has also been liquidated [Olejniczak-Szałowska, 1999, 2000]. However, the possibility of removing the head of the administrative board of the given unit of local government from office for any other reason than not being accepted in a vote has been uniformly determined. Legislature indicates the procedure applied in this case and the legal consequences, which entails removing the whole administrative board from office. It has to be remembered that before this amendment the dis-

trict statute did not provide such regulations. Under the amendment the possibility of the resignation of the head of an administrative board has been introduced at all levels of local government. This is equivalent to the resignation of the whole administrative board. It should be noted that in the case of removal or resignation of the whole administrative board from office, it has been regulated that the resulting election is carried out under the general principles for the election of an administrative board after a local government election. In all self-government bills the legal possibility of removing a member of the administrative board from office who is not its head has been provided. However, there is no indication of a procedure to be applied in this case, although a statutory obligation has been introduced to elect a new member of the administrative board within 1 month after such a removal.

The process of improving self-government legislation has also covered provisions referring to the right units of local government to pass laws. The previous forms of issuing rules of order by local administrations (municipal administrations issued regulations and district administrations formulated resolutions[2]) have been liquidated. Now regulations are issued by municipal and district administrations in the form of resolutions. Essential amendments as regards these problems have been also introduced by the bill of July 20th, 2000 on the publication of normative acts and other legal acts [Dziennik ustaw, 2001a]. On the basis of this bill the names of local legal acts of self-government have been standardized as „local legal acts issued by a municipality", „local legal acts issued by a district" and „local legal acts issued by a region". Moreover, by means of the amendment introduced in the bill mentioned above, a duty to publish all the acts of local law issued by units of local administration in the regional official journal has been introduced [Maćkowiak, 1999]. In the light of the amendment of 2001 on regulations regarding public order an additional procedure for publication of such acts has been provided. Municipal public order regulations are sent by the head of the municipality or mayor as a form of information to the neighbouring municipalities and the head of the district within which the municipality is situated, on the day after their issue. Whereas the head of a district sends public order regulations as a form of information to the administrations of municipalities situated within the district and to the heads of neighbouring districts on the day after they are issued.

[2] It has to be noticed that the regulations of the bill on district self-government did not determine the regulations expressis verbis. Admitting that the regulations have the form of a conclusion was the result of an interpretation of the regulations of the bill.

The process of improving self-government law has also covered the adaptation of municipal law to constitutional standards as regards supervision. At present all self-government bills, according to Art. 172 Item 2 of the constitution, state that the organs of supervision over the activity of local government units are the prime minister and the governors of regions and regional audit chambers in financial matters. Also the criteria of supervision over local government have been made uniform in the structural bills according to Art. 171 Item 1 of the constitution stating that the supervision over local government is to be based upon the criterion of legality. This required a modification of municipal law, which stated that in the case of commissioned activities that supervision is also exercised on the basis of the criteria of purpose, fairness and thriftiness. This in turn resulted in the exclusion of the application of these criteria to commissioned tasks from the catalogue of means of supervision, such as the right of the governor of a region to stop the execution of a resolution of a municipal organ and to return the resolution for repeated consideration, indicating errors, as well as a term in which to settle the matter. If the resolution of a municipal organ is passed as a result of such repeated disregarding the recommendation of the governor of that region, he may reject the resolution and issue a substitute regulation, at the same time informing the proper minister. The rights of municipalities, districts and regions of lodging a complaint to the court of administration regarding the decisions of supervisory bodies, so far differently defined in particular structural bills, have also been made uniform. The principle of legal protection of the autonomy of local government is realized by the provision introduced in all self-government bills that in the case of an organ of local government lodging a complaint about a decision of a supervisory body the court of administration is obliged to fix the date of the hearing to be not later than 30 days after the complaint reaches the court. The directions of improving self-government legislation as regards supervision over local government and legal protection of its autonomy mentioned above are of an illustrative nature and do not give a full view of the phenomenon.

Amendments of self-government bills have not ignored the cooperation of units of local government, but have not introduced any radical modifications and have been restricted to only a few problems. First of all, the organ keeping the register of associations of municipalities and associations of districts has been changed: so instead of being kept by the prime minister, the registers are now kept by the minister for public administration. Moreover, it has been permitted that municipalities and districts may associate not only with other municipalities and districts, but also with regions. A regulation in municipal and district law has been

introduced stating that to establish an association a minimum of 3 initiators are necessary. This will remove any doubts in the matter appearing in practice [Jaworska-Dębska, 2000a, 264].

Not all the postulates for amendments of structural bills suggested by theory and practice have so far been taken into consideration.

The process of improving self-government law has not so far taken into consideration the postulate of liquidating a certain confusion in the terminology regarding ownership and other property rights possessed by units of local government [Ochendowski, 2000, 329; Jaworska-Dębska, 2000, 59].

Numerous amendments of the bill on regional self-government have not decided, as the municipal bill has, the question of the appropriate organ to settle a dispute between a regional self-government and the prime minister on the form of a draft statute. The postulate to abandon the solution laying a duty on local self-government to consult the prime minister when writing its drat statute is still topical, because it is difficult to present convincing arguments for maintaining such an influence of that organ on the organizational structure of municipalities with over 300,000 inhabitants and self-government regions.[3]

Although under amendments introduced by the amendment of 2001 district councils have been given the right to commission public tasks to units of local government and the right to take over tasks from the range of tasks of government administration, in the district bill there still are no provisions identical to those included in Art. 8 Item 3–5 of the municipal bill, requiring that municipalities are given the necessary financial means to execute their tasks [Podgórski, 1998, 25; Jaworska-Dębski, 2000, 56].

It has to be stressed that the statutory prohibition of obtaining expenses for membership in more than two committees still only refers to district councilors, although reasons why this prohibition has been introduced also apply to other units of local government.

A distinct hesitancy is demonstrated by the legislator as regards the question of the only change of statutory and commissioned tasks of local government [Niewiadomski, 1998; Stahl, 2000; Olejniczak-Szałowska, 2000b]. On one hand there is a constitutional difference between statutory tasks of local government units (public tasks meeting the needs of the self-government community) and commissioned tasks (other public

[3] In the literature it has also been noticed that the special procedure of determination of the statute of a municipality with over 300,000 inhabitants is to serve the proper functioning of large cities, also from the point of view of tasks performed within the state infrastructure [see for example Czechowski, 1993, 10].

tasks delegated to a self-government according to statutory procedures which it result from justified needs of the state). In the self-government legislation this distinction is only provided expressis verbis in the municipal bill. However, the district and region bills do not directly introduce such categories of tasks. At the same time it has been pointed out that such a distinction actually exists as the constitutional term „commissioned task" has been replaced by the term „tasks within the competency of government administration" [Stahl, 1999, 246; 2000, 515, 518; Ura, 1999, 286].This normative status quo has not been broken by amendments of self-government law.

The legislation referring to the structure of self-government planned for the near future includes the question of direct election of the head of a district, mayor or president of a city. It should be noted that there is a favourable climate for these legislative projects as there is a political will, as well as, according to surveys, general support [Kalinowska, 2000, 18], although there are also some critical opinions among self-government circles [Piasecki, 2002; The standpoint..., 2002; Pieczkowska, 2002]. Meanwhile, the deadline for implementing an appropriate bill is rapidly approaching, making the possibility of using it in the nearest self-government elections in autumn 2002 doubtful. This is the result of difficulty in reaching a consensus about the details of project.

The above mentioned directions of improving the structural regulations of self-government demonstrate vast needs in this area. Beside the objective scope of this process, attention should be paid to the way in which amendments were introduced. Most often they were introduced somewhat by the way, when other questions were being settled, *e.g.* salaries for executive employees [Dziennik Ustaw, 2000], or the amendment of the bill on the Spokesman for the Public Interest (ombudsman), the bill on civil code and amendments of other bills [Dziennik Ustaw, 2000a]. More rarely, such modifications are a result of an intentional amendment, as the amendment of 2001. Thus, the continuously topical question returns as to whether it is more favorable to improve each structural bill separately, without being certain that all unjustified discrepancies will be noticed and eliminated, or rather reach a formula for one self-government structural bill. The question of addressing the problem of local referenda in one bill is given attention to by Z.Janku, who indicates that separate regulations often bring many unnecessary repetitions, they include differentiations very difficult to interpret, giving an impression that they were introduced to accept „the need to regulate institutions, which are identical or different in an insignificant way, in separate bills" [2001, 253–4]. It should be repeated here that the formula for a single structural bill on self-government in no way means a me-

chanical unification of the structure of local government and enables preserving justified individuality. It is not a new postulate: it has already been expressed before [Leoński, 1993, 13]. In the conditions of a unitarian state, such as Poland, one single bill on self-government is the solution which should be given the most consideration when working on legislation.

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