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Participation of the Special Self-Government in the Performance of Public Administration

Keywords: special self-government, profession of public trust, decentralization, chamber of commerce

Słowa kluczowe: zawód zaufania publicznego, decentralizacja, samorząd specjalny, izba gospodarcza

Abstract

The aim of this article is to analyse the bases in the Polish legal system for the functioning of the special self-government and its role in the exercise of public administration through the analysis of professional and business self-governments. The professional self-government is the expression of building the civil society. Introduction to the Polish basic law of the self-government of public trust is the expression of creation of citizens' trust to the specific profession. On the other hand the essence of the economic self-government is seen in the corporation created by law, equipped with administrative authority to perform the decentralized public administration and created for the empowerment of entrepreneurs, thus expanding the scope of participatory management.

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Streszczenie

Udział samorządu specjalnego w wykonywaniu administracji publicznej

Celem niniejszego artykułu jest analiza istniejących w polskim systemie prawnym podstaw funkcjonowania samorządu specjalnego oraz jego rola w wykonywaniu administracji publicznej poprzez analizę samorządu zawodowego oraz gospodarczego. Warto podkreślić, że samorząd zawodowy jest wyrazem budowania społeczeństwa obywatelskiego. Reprezentuje osoby wykonujące zawody zaufania publicznego, których rola sprowadza się do realizacji zgodnie z zasadą pomocniczości zadań publicznych zleconych im przez państwo. Zauważyć należy także, że wprowadzenie do polskiej ustawy zasadniczej samorządów zaufania publicznego jest wyrazem kreowania zaufania obywateli do określonego zawodu. Natomiast istotę samorządu gospodarczego dostrzega się w korporacji tworzonej z mocy prawa, wyposażonej we władztwo administracyjne, celem wykonywania zdecentralizowanej administracji publicznej i tworzonej dla upodmiotowienia przedsiębiorców, powiększając w ten sposób zakres zarządzania partycypacyjnego.

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I. Introduction

A corporation under public law is an administrative entity, endowed with public authority, situated according to its membership, existing independently of the change of its members and pursuing permanent public objectives². The basic category of corporation is self-government, to which the state delegates a significant part of its administrative function, and at the same time equips it with legal personality, including legal personality in the field of public law. In the functional sense, self-government is a certain specific form of performing public administration. However, its essence is the subjective side, i.e. the fact that public administration is performed by interested citizens, groups of people, associations of people acting on the basis of equality of their members, equipped by the state with certain competences and guaranteed possibility to exercise administrative authority. These groups of people must be

² P. Razowski, *Publicznoprawny status izb adwokackich – zarys problematyki*, "Palestra" 2013, no. 11–12, p. 77.

clearly defined and distinguished by law. Participation in them is obligatory and determined by law. In the broader sense, self-government can also be understood as a voluntary association of persons engaged in a particular activity³. Thus, self-government a way of organizing a legally separated group of people assuming:

- the establishment of a given self-government by law;
- the obligation, arising from the Constitution or the law, for a given category of persons to belong to that community;
- entrusting, by virtue of the Constitution or the law, the organs of this community with the right to make authoritative decisions regarding matters concerning it;
- exercise of supervision by the state authorities over the activities of self-government bodies, mainly in the area of legality;
- moreover, some self-government communities may have a legal personality and make their living from the levies imposed on their members⁴.

Special self-government is sometimes referred to as non-territorial self-government⁵ understood as public-law compulsory unions, which may exist as personal unions forming professional self-government or as real unions forming economic self-government. They are competent in a strictly defined sphere of activity (economic, professional, religious, cultural, national) of a certain category of persons exercising power over a decentralized part of the state administration on an equal footing with local self-government bodies⁶.

II. Professional Self-Government

Professional self-government is a public law institution established by law in order to carry out part of the tasks of public administration, consisting of ex-

³ J. Zimmermann, *Prawo administracyjne*, Warsaw 2018, p. 199, 200.

⁴ Z. Szażyk, A. Szafranski, *Publiczne prawo gospodarcze*, Warsaw 2018, p. 166.

⁵ R. Kmieciak, *Wielowymiarowość pojęcia samorządu – od związków terytorialnych do specjalnych*, “Środkowoeuropejskie Studia Polityczne” 2015, vol. 4, p. 59.

⁶ M. Błachucki, *Przemiany ustrojowe samorządu specjalnego w polskim prawie administracyjnym*, [in:] *Prace Studialne Warszawskiego Seminarium Aksjologii Administracji. Szkice z zakresu procedury administracyjnej*, t. III, eds. K. Wąsowski, K. Zalasinska, Kraków 2014, pp. 18–19.

exercising, in the public interest, supervision over the practice of a profession which is a profession of public trust and therefore subject to administrative rationing when it comes to its implementation. In the doctrine it is indicated that the establishment of a particular professional self-government constitutes a public good and social interest. Nowadays in the literature it is argued that the reasons for the establishment of the professional self-government are, among others, the necessity to give the statutory framework for the activities of a particular professional group, where the practice of a particular profession should be subject to special rigour due to the state interest or the social interest, and the desire to create a professional corporation by the members of a particular profession⁷.

According to J. Smarż a professional self-government is a type of a self-government associating persons who practice a given profession, i.e. it is not of a universal nature, but concerns the practice of professions of public trust and is established to pursue objectives specified by law. It constitutes a form of the decentralisation of public administration, which means that public authority ascribed to its bodies, i.e. also all their tasks and competences, belong originally to the State. This authority is transferred by the State, within the scope defined by it, to a professional self-government, which thus participates in the exercise of public authority. It becomes an entity of public authority and is therefore referred to as a public-law association⁸. Professional self-government, like local government, is one of the forms of decentralization of public administration and one of the forms of citizen participation in performing public tasks. Therefore, it is an expression of building a civil society⁹.

Decentralization by means of professional self-government strengthens the legitimacy of public administration and the confidence of citizens in the

⁷ R. Michalska-Budziak, *Udział samorządu lekarskiego w wykonywaniu zadań administracji publicznej*, [in:] *Decentralizacja i centralizacja administracji publicznej. Współczesny wymiar w teorii i praktyce*, eds. B. Jaworska-Dębska, E. Olejniczak-Szałowska, R. Budzisz, Warsaw -Łódź 2019, pp. 441–442.

⁸ J. Smarż, *Samorząd zawodowy jako wyraz decentralizacji administracji publicznej*, "Samorząd Terytorialny" 2021, no. 1–2, p. 67.

⁹ S. Pawłowski, *Decentralizacja przez samorządy zawodowe – ewolucja regulacji prawnej po zmianach ustrojowych*, [in:] *Decentralizacja i centralizacja administracji publicznej. Współczesny wymiar w teorii i praktyce*, eds. B. Jaworska-Dębska, E. Olejniczak-Szałowska, R. Budzisz, Warsaw -Łódź 2019, p. 632.

state by enabling the concerned professional groups to participate in the decision-making of authority that affects them¹⁰. The legal basis for its operation is regulated by the Constitution of the Republic of Poland of 1997 and by internal corporate legislation¹¹. The normative definition of professional self-government is contained in Art. 17 sec. 1 of the Constitution of the Republic of Poland, stating that¹² by means of a law, professional self-governments may be created, representing persons exercising professions of public trust and taking care of proper performance of such professions within the limits of public interest and for its protection¹³.

What also deserves taking into account is the opinion of J. Smarż that a profession of public trust is a profession where it is particularly important to guarantee the trust of the recipient of a service to the service provider¹⁴. The author also emphasises that in the Polish legal system it is incorrect to use the terms “liberal profession” and “profession of public trust” interchangeably¹⁵, because professions of public trust are characterised by the possibility of creating professional self-government by statute, and such a right were not reserved by the legislator for liberal professions, which were known to the legislator at the time when the provisions of the Constitution of 1997 were drafted¹⁶.

The professional self-government has a statutorily delegated scope of matters, performed independently. They create the conditions for the practice of a given profession, represent the interests and protect the rights of a given professional group, establish and ensure compliance with the rules of professional ethics, supervise the proper practice of professions through dis-

¹⁰ Judgment of the Constitutional Tribunal of March 7, 2012, file ref. no. K 3/10, LEX no. 1124353.

¹¹ A. Lemiszowska, *Społeczna misja samorządu zawodowego*, „Rocznik Lubuski” 2003, t. XXIX, part I, p. 173.

¹² M. Stahl, *Prawo administracyjne: Pojęcia, instytucje, zasady w teorii i orzecznictwie*, Warsaw 2014, p. 268.

¹³ Constitution of the Republic of Poland of April 2, 1997 (Dz.U.No. 78, item 483 as amend.).

¹⁴ J. Smarż, *Relacja pojęć „wolny zawód” i „zawód zaufania publicznego”, o którym mowa w art. 17 ust. 1 Konstytucja RP. Part II*, “Przegląd Prawa Konstytucyjnego” 2021, no. 1, pp. 167–168.

¹⁵ J. Smarż, *Relacja pojęć „wolny zawód” i „zawód zaufania publicznego”, o którym mowa w art. 17 ust. 1 Konstytucja RP. Part I*, “Przegląd Prawa Konstytucyjnego” 2020, no. 4, p. 261.

¹⁶ J. Smarż, *Relacja pojęć... Part II*, p. 172.

ciplinary courts. The decentralized tasks for professional self-governments also include professional training of members of particular corporations and trainees or apprentices, in order to constantly improve qualifications and ensure a high level of services. The legislator, appointing a professional self-government and delegating to it certain public tasks, establishes a certain degree of freedom in the implementation of activities entrusted to it. The independence of self-governments, including professional associations, is limited only by the criterion of legality¹⁷. The establishment of a professional self-government means the creation of a compulsory organization for a given professional group, equipped with certain public authority, a closed organization and with formalized membership, whose members have a monopoly in the practice of that profession. Their position sometimes clearly approaches that of a public official (e.g. notaries, patent attorneys). Although the Constitution does not explicitly provide here, as in the case of territorial self-government, for participation in the exercise of public authority, this cannot mean a constitutional prohibition of the exercise of such authority by the professional self-government. They have always been, in essence, understood as entities equipped with this attribute. The lack of constitutional reference may be explained by the small scope, subjective and objective, of this authority, in contrast to the general local self-government. In the opinion of the Constitutional Tribunal: by establishing the professional self-government referred to in Art. 17 sec. 1 of the Constitution, the State entrusts a certain professional group with the implementation of specific public tasks and equips it with the appropriate authorizing powers for this purpose. The self-government empowers a certain professional group and enables it to independently decide on its own matters within certain limits. As a result, it exercises public authority over the affairs of the professional group. Professional self-government makes use of the social energy, expertise, and self-regulatory capacity of the individual community to ensure the optimal fulfillment of public tasks¹⁸.

In another ruling, the Tribunal indicated that the essence of the professional self-government is independence granted by the legislator in organiz-

¹⁷ M. Karcz-Kaczmarek, M. Maciejewski, *Samorządy zawodowe i zakres ich samodzielności w świetle doktryny oraz orzecznictwa*, „Studia Prawno-Ekonomiczne” 2015, t. XCV, pp. 61–62.

¹⁸ Judgment of the Constitutional Tribunal of March 24, 2015, file ref. no. K 19/14, OTK ZU 3A/2015, item 32.

ing the practice of a profession, determining the conditions for its practice and the control over its proper practice, including the withdrawal of the right to practice. The limits of the independence of the professional self-government are established by statute. If the aim of the action of the self-government is the protection of the profession, then the limit of this freedom must be its action in the public interest. The freedom to practice a profession, as a constitutional right of the citizen, is not absolute, and the rules of its limitation may be determined by law. The above premises cannot lead to the conclusion that membership in the organizational structures of the professional self-government should be based on voluntary principles. Since in the public interest and for the protection of the professional corporation, the self-government is to control the proper practice of the profession and it does so on behalf of public authority, it cannot be agreed with the postulate that some members of the profession were outside the structures of the self-government and were not subject to such control. Freedom of association guaranteed by the Constitution of the Republic of Poland and the European Social Charter, relates to political freedoms and rights and applies to associations, trade unions and political parties. No one can be compelled to belong to these organizations. This principle does not apply to professional self-governments, since their bodies exercise control over the proper practice of a profession, which has been recommended to them by public authority¹⁹.

III. Economic Self-Government

The legal sciences see the essence of self-government as a corporation created by law, endowed with administrative authority to carry out decentralized public administration and created to empower entrepreneurs, thus expanding the scope of participatory governance and legitimizing civil society²⁰. The term economic self-government can be understood as a compulsory association of persons conducting economic activity in a particular field of produc-

¹⁹ Judgment of the Constitutional Tribunal of May 22, 2001, file ref. no. K 37/00, OTK ZU 4/2001, item 86.

²⁰ K. Bandarzewski, *Samorząd gospodarczy w prawie polskim. Studium prawne*, Kraków 2014, p. 83.

tion or a permanent representation of economic interests, as well as a group of institutions established to support the economic life of the country and to perform certain tasks of state administration on the basis of limited independence and autonomy from the government²¹.

The economic self-government should fulfill the tasks of independently promoting and satisfying the interest of the given economic group, taking into account the freedom of action and the right of independent decision, as well as the right of self-determination of norms within the statutory limits. The second type of tasks are those expressly entrusted to them by the state, i.e., by statutes and regulations, within the scope of which they act on behalf of the state and cooperate with state and local authorities. These tasks consist in realizing the goals and satisfying the interests of a given social group and regulating the coexistence of the members of a given association, taking into account the interests of the whole. These are duties that are inherently incumbent on the state, and which the state entrusts to non-governmental organizations in order to better perform them and more fully take into account the interests of the community. To the extent that an economic self-governing body does not merely carry out explicit statutory instructions, it is granted the right of independent action, the right of free decision, as well as discretion. Materially, it carries out the tasks of the state administration and thus exercises superior authority. Formally, on the other hand, it is an exemplification of decentralization, as it is an independent hierarchically autonomous organization equipped with administrative authority²².

Economic self-government differs from local self-government in that local self-government unites all the inhabitants of a certain area regardless of their personal interests. Economic self-government, on the other hand, brings together specific categories of people, taking into account above all their qualifications, specific rights and corresponding economic and social interests. In this case, the criterion of residence is in the background. Accordingly, economic self-government has the character of non-territorial, public-law com-

²¹ K. Dąbrowski, *Izby przemysłowo – handlowe Drugiej Rzeczypospolitej jako instytucje samorządu przemysłowo – handlowego. Ujęcie doktrynalne i konstytucyjne*, "Studia z Dziejów Państwa i Prawa Polskiego" 2007, no. 10, p. 304.

²² R. Kmiecik, *System gospodarczy a system decentralizacji administracji publicznej w Polsce*, "Polityka i Społeczeństwo" 2016, no. 3 (14), p. 36.

pulsory associations, acting as associations representing primarily the economic interests of the members of these community organizations²³.

The organizational units of economic self-government are chambers of commerce organized on the basis of regional criterion²⁴. Being social organizations in the light of the Code of Administrative Procedure²⁵. The competences of which include: expressing opinions on draft solutions relating to the functioning of the economy, participating in the preparation of legal acts on the principles laid down in separate regulations, as well as contributing to the creation of conditions for the development of economic life and supporting economic initiatives of members²⁶.

If the activities of a chamber of commerce are found to be in contravention of the law or the statutes, the minister competent for the subject of the chamber's activities or the provincial governor competent for the chamber's seat may request the competent organs of the chamber to rectify those irregularities within a specified period of time or request the court to: to issue a warning to the relevant Chamber authorities or to repeal a resolution of the Chamber authorities that is contrary to the law or the statutes, or to dissolve the Chamber if its actions grossly violate the law or the provisions of the statutes²⁷.

IV. Conclusion

Special self-government can occur as a personal relationship (professional self-government) or as a real relationship (economic self-government). It is worth emphasizing that professional self-government is an expression of building civil society. It represents people who practice professions of public trust, whose role comes down to the implementation of public tasks com-

²³ K. Tor, *Samorząd gospodarczy – wybrane zagadnienia*, "Państwo i Społeczeństwo" 2008, no. 3, p. 61.

²⁴ J. Zimmermann, *op.cit.*, p. 203.

²⁵ B. Draniewicz, *Pojęcie organizacji ekologicznej. Glosa do wyroku WSA z dnia 11 sierpnia 2010 r., IV SA/Wa 857/10*, "Prawo i Środowisko" 2010, no. 4, pp. 95–102.

²⁶ Act of May 30, 1989 on Chambers of Commerce (cons. Text Dz.U. 2019, item 579 as amend.).

²⁷ Cons. text Dz.U. 2019, item 579 as amend.

missioned to them by the state in accordance with the principle of subsidiarity. It should also be noted that the introduction to the Polish Basic Law of self-government of public trust is an expression of creating confidence of citizens in a particular profession.

On the other hand, the essence of economic self-government is seen in the corporation created by law, equipped with administrative authority in order to carry out the decentralized public administration and created to empower entrepreneurs, thus expanding the scope of participatory management.

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