

PRINCIPLES DETERMINING THE SYSTEM OF LOCAL GOVERNMENT IN POLAND

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Abstract. Local government has become a constant part of the state system. It must be therefore founded on principles that determine the system in an appropriate manner that conforms to legal regulations. Decentralisation and subsidiarity are the basic principles. They make direct references to an individual's situation, fundamental rights and freedoms. This is the individual who should have maximum control over their position in both private and public legal dimensions. The systemic issues seen in this light are connected to the participative model of public administration, which assumes active civic involvement in the process of making resolutions. This paper will analyse positions of the doctrine and judicature concerning fundamental principles determining local government, i.e. of decentralisation, subsidiarity, and participative democracy.

Keywords: state political system, local governments, decentralisation, subsidiarity, participation

INTRODUCTION

The concept of local government is not clearly defined by the science of administrative law. As B. Dolnicki notes, local government in its legal (corporate) sense is understood as decentralised discharge of public administrative tasks for which entities separate from the state are responsible, whose duties are not in any way subject to state interference [Dolnicki 2016, 21]. Local government is part of public power that covers populations and territories determined by the general territorial division of the state [Ura 2015, 191]. The notion and essence of local government are made more specific by designating principles based on which this local government operates. They determine discharge of public duties and rules of local government authorities and institute stable patterns of behaviour. J. Smarż points out local government in Poland has a long tradition. To begin with, the institution was a form of the society's participation in power – certain communities made decisions regarding their own affairs. In time, that cooperation required legal institutionalisation of communities, which gave rise to corporations and associations [Smarż 2021, 62].

The public administration system of the Republic of Poland is determined by constitutional principles as its 'foundations' and 'guidelines' for activities of the legislature and public administration, on the one hand, and by the remaining legal norms, of secondary function and complementing the system with detailed solutions, on the other hand [Szlachetko 2018, 45]. Public administration is operated by the state (or its distinct entities as authorised by the state) and realises the

common good, or public interest, to bring some benefits to the public (community, state). It also cares for individual needs, representing interests of the entire society or community with regard to universally shared values [Zimmermann 2016, 29–32]. This paper will analyse positions of the doctrine and judicature concerning fundamental principles determining local government, i.e. of decentralisation, subsidiarity, and participative democracy.

1. DECENTRALISATION OF LOCAL GOVERNMENT

Decentralisation of power was initiated in 1990 and resulted in a three-tier structure of local government.¹ The science of administrative law defines decentralisation in various ways and using diverse terms. This is a basic principle of organising public administration which commonly refers to legal construct of local government. J. Starościak states legally defined independence in discharge of public tasks is the essence of decentralisation [Starościak 1960]. S. Fundowicz refers to this theory in his research into decentralisation of public administration in Poland and follows N. Achterberg, who claimed decentralisation is “distribution of administrative duties (actions) among a variety of organisations which are public legal entities” [Fundowicz 2005, 28]. Despite the number of definitions, decentralisation is always seen to result in distribution of administrative tasks (actions) from the centre to lower-level bodies, including public legal entities [ibid.]. Decentralisation may be territorial or material. In the former, an entity is charged with public tasks relating to a part of a state territory. Material decentralisation, meanwhile, consists in an entity being tasked with discharge of public duties concerning an area of affairs [Przybysz 2020]. It is expressed, therefore, as distribution of tasks and competences among administering entities [Kurzyńska-Chmiel 2020, 7–15].

Decentralisation has also been the object of the Constitutional Tribunal decisions, which declared “the concept of decentralisation means the process of a continuing expansion of competences of lower-level public authorities by transferring to them tasks, competences, and necessary resources;” it has also pointed out “the existing notion of decentralisation, to which the Constitution refers, is a multi-dimensional concept comprising the prohibition against concentrating power, on the one hand, and the requirement to seek the most effective structural solutions, on the other hand.”²

¹ The basic legal framework for organisation and operation of local government in Poland are currently provided by: Act of 8 March 1990, the Local Government, Journal of Laws of 2020, item 713 as amended; Act of 5 June 1998, the County Government, Journal of Laws of 2020, item 920 as amended; Act of 5 June 1998, the Regional Government, Journal of Laws of 2020, item 1668 as amended.

² Judgment of the Constitutional Tribunal of 18 February 2013, ref. no. K 24/02, OTK–A 2003/2, item 11.

Decentralisation is systemic [Niżnik–Dobosz 2018, 148]. This principle is adumbrated in Article 15(1) of the Polish Constitution,³ according to which the territorial structure of the Republic of Poland provides for decentralisation of public power. The overall territorial division of the state that addresses social, economic and cultural links and provides territorial units with the capacity for discharge of public tasks is defined by legislation. Article 16(2) states, meanwhile, “local government participates in wielding of public power. The substantial portion of public duties accorded to local government under legislation is executed on its own behalf and at its own responsibility.” These provisions should be interpreted jointly, since independence is a principal expression of decentralisation [Zydel 2020, 110–17]. Granting a local community the right to wield public power in its own name and to institute prevailing norms of local law as stipulated in legislation represents the conviction local authorities best recognise needs and conditions of their regions, which helps them to apply the most adequate means to satisfaction of these needs.⁴ “Independence” of entities demonstrates the essence of decentralisation of public power [Szlachetko 2018, 45–55].

Decentralisation of public power is also a principle named in the preamble to the European Charter of Local Self-government),⁵ and the construct of this self-government is a consequence of the principle. The preamble notes “existence of local communities provided with real rights creates conditions for effective administration which is in close contact with citizens.” Article 3 ECLSG says local government means not only the right but also the ability of local communities to direct and manage “a principal share of public affairs in the interests of their populations.” It is therefore the object of decentralising efforts to streamline discharge of duties by the administrative apparatus in direct contact with citizens and to satisfy collective needs of local populations [Husak 2009, 256].

2. THE PRINCIPLE OF SUBSIDIARITY

As T. Bąkowski notes, the principle of subsidiarity, seen in the perspective of the national legal order, has enjoyed the status of constitutional principle for more than two decades. Its spirit can be traced in various section of the constitutional law and it is additionally directly cited in the key fragment of the preamble: “we enact the Constitution of the Republic of Poland as the fundamental law of the state based on respect for freedom and justice, cooperation of authorities, social dialogue, and the principle of subsidiarity, which reaffirms rights of citizens and their communities” [Bąkowski 2020, 9–19]. The Constitution names the principle

³ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, item 483 as amended.

⁴ Judgement of the Regional Administrative Court in Wrocław of 19 October 2014, ref. no. II SA/Wr 287/03, Lex no. 578764.

⁵ *European Charter of Local Self-government* drafted in Strasbourg on 15 October 1985, Journal of Laws of 1994, No. 124, item 607 as amended [hereinafter: ECLSG].

of subsidiarity in its preamble. It is therefore a fundamental principle of the system. Its placement in the introduction to the Polish Constitution instructs the legislature to enact the principle in ordinary laws [Bandarzewski 2002, 49–50]. In light of the principle of subsidiarity, the state should only fulfil some care or supplementary functions in relation to its citizens without substituting them in caring for themselves [Wojtyła 2020, 190].

The principle is also expressed in Article 4(2–3) ECLSG, which declare “local communities shall enjoy, within the law, full freedom to act in any matter which is not excluded from their competences or is not part of competences of other authorities. Public affairs are generally the responsibility of those authorities that are closest to citizens. When these functions are entrusted to other authorities, scope and nature of duties and requirements of effectiveness and economy shall be taken into consideration.”

E. Olejniczak–Szałowska points out “the principle of subsidiarity in its legal aspect assumes legal regulation of the situation of citizens and their groupings should assure maximum independence and participation in discharge of public tasks. The state and other communities should be auxiliary to individuals, families and smaller communities without taking over any principles that can be realised there” [Olejniczak–Szałowska 2016, 177–78]. The nature of the principle of subsidiarity, like B. Dolnicki emphasises, is to attempt the most rational distribution of power among its particular levels based on the criterion of effectiveness [Dolnicki 1993, 27]. Thus, the principle applies to the local government above all else [Adamczyk 2003, 5–15]. What is more, it plays an important part in the entire administrative law by defining the regulatory role of the state and acceptable extent of its interference with citizens [Lipowicz 1998, 43–45]. It is intended to respect rights of citizens and communities they are part of, not to petrify existing resources of these rights [Chmielnicki 2005, 57–58]. The principle of subsidiarity can be observed and function successfully where there are sufficient resources of social capital, closely associated with civic activity, since people, groups and larger or smaller communities are assumed to be willing to solve problems in their local environment independently (actively). To achieve this state of affairs, it is a good idea to promote notions of civil society, whose commitment builds local welfare and thereby the welfare of a region and country [Śwital 2019, 46].

The principle of subsidiarity is expanded by the Polish Constitution by instituting “the presumption of competences (presumption of tasks) for the entire local government” (Article 163) and subsequent presumptions for the benefit of local communities (Article 164(1–3)) The constitution framers charged the local government with public duties which are not reserved by the Constitution or legislation to the competences of other public authorities. The principle of presumed competence of local government comprises realisation of “tasks of public nature” that serve to satisfy needs of local communities and are undertaken in order to realise the common good [Przywora 2016, 82–91]. The preamble to the Polish Constitution regards the principle of subsidiarity as a fundamental princi-

ple of Poland's legal order, with the subsidiarity reaffirming rights of citizens and their communities. The principle is expected to determine both mutual relations between central administration and local government and between citizens and their organisations with their local communities and their bodies.⁶ The principle of subsidiarity implies a prohibition against taking over duties individuals are capable of discharging themselves and assistance only when individuals are no longer self-sufficient in situations of crisis.⁷

As noted by H. Izdebski, "the subsidiarity in its horizontal sense consists in competent public authorities assuring realisation of public tasks in such a way that this is effected, to a maximum degree possible, with the aid of civil society institutions. Without abandoning responsibility for a field of affairs, in particular, welfare (social work, education, healthcare, culture, etc.), competent public authorities ought to transfer as many matters as possible, even financing full cost of realisation, to non-government organisations if only the latter are capable of effective discharge of tasks entrusted to them as part of their statutory activities" [Izdebski 2020, 87–91].

The principle of subsidiarity in discharge of public duties consists in such a distribution of public tasks that the state as a whole carries out only those that cannot be realised by citizens themselves, their communities or organisations. It should be remembered 'the state' in the above formulation refers equally to central public authorities and local government and state administration, which in turn means public duties which are responses to existing needs of populations should first of all be realised by themselves. The state undertakes discharge of tasks only where no civil structure is capable of performing them [Gilowska, Kijowski, Kulesza, et al. 2002, 35]. A local community, the starting point for any discussion of local government, can be a 'beneficiary' of subsidiarity on the one hand and can be of assistance itself, on the other hand. Subsidiarity can in no way be identified with support for local government alone [Waldziński 1999, 97–98].

It must be stressed the principle of subsidiarity is closely associated with personalism, founded on Christian thought. That position acknowledges primacy of a person over things and priority of a person before any type of communities. Personalists believe every community serves man who is a person, a conscious and free subject capable of self-determination. Assisting a man with personal development is a basic task of a community [Kowalczyk 2005, 260]. In his encyclical *Centesimus annus* (1991), John Paul II taught "a higher-tier community should not interfere with internal affairs of a lower-tier community, depriving the latter of its competences; instead, it should support the latter if needed and assist with coordinating its actions and tasks with actions of other social groups for the

⁶ Judgment of the Supreme Administrative Court of 4 June 2001, ref. no. II SA/Kr 911/01, Lex no. 53651.

⁷ Judgment of the Supreme Administrative Court of 26 June 2009, ref. no. I OSK 1458/08, Lex no. 563281.

sake of the common good.”⁸ In John Paul II’s opinion, functioning of a number of variously interrelated, autonomous groups is necessary for vitality of a society. Pointing to the need for “intermediate communities,” the Pope claimed they, as communities of persons, reinforce the social tissue and prevent a range of social degenerations. It should be assumed, therefore, the idea of subsidiarity is founded on a philosophy of man and society, in particular, the role and status of the human person in society. As an independent being, man creates a social organisation to the extent and in a form required to assist human persons. All organisations and communities should serve and help to realise objectives and interests of individuals, respecting their autonomy and enabling self-fulfilment [Millon–Delsol 1994, 42–43].

3. THE PRINCIPLE OF PARTICIPATIVE DEMOCRACY

The nature of relations between the state and individual has for ages been the object of study for prominent thinkers and scholars. Continuing attempts at establishing an optimum model of mutual links and dependences have given rise to a variety of solutions, with the concept of the common good worthy of particular attention [Machocka and Śwital 2016, 135–38]. Forms of social participation have evolved considerably during the 30 years of local government in Poland. Aside from decision-making forms, there are those of consultation, opinion-giving, and a unique, previously unknown semi-decision-making nature. They are a specific form of civil decision-making, not independent, but forming part of decision-making competences of local government authorities, which are – depending on form of social participation – bound by these decisions to varying degrees [Jaworska–Dębska, 2020, 49–64].

Participative democracy is a broader category of political representation than direct democracy. It combines features of deliberative, direct, and indirect democracy [Marczewska–Rytko 2002, 31–44]. Article 4(2) of the Polish Constitution identifies indirect forms of civic participation in this aspect of socio-political life and adopts – following a majority of present-day constitutions – the principle of representative democracy, which grants nations the right to choose their representatives to legislative bodies in general elections relying on programmes to be realised in performance of mandates entrusted to these representatives [Skrzydło 2002, 17] without omitting direct forms of power wielded by sovereigns. The idea of involving residents of a local community in the process of direct decision-making is not a new construct. The science of administration attempts to evaluate this phenomenon with regard to improvements to public administration, especially in the context of individuals and formal and informal social groups taking part in making decisions and discharge of public tasks [Giełda 2015, 181]. Participation of civil society in making decisions and discharge of public duties is an

⁸ Ioannes Paulus PP. II, *Litterae encyclicae Centesimus annus* (01.05.1991), AAS 83 (1991), p. 793–867.

expression of administrative policy and a method of exercising power by democratically constituted bodies. It is also an expression of care for the common good from participants in public life [Niżnik–Dobosz 2014, 25–26].

Public participation is effected via forms of direct democracy in its broad sense, inclusive of institutions that specialist literature occasionally refers to as semi-direct democracy and which constitute an intermediate category between direct and indirect democracy. In light of this division, the sovereign's ability to make final decision is the principal characteristic of direct democracy [Uziębło 2004, 300]. Participation denotes taking part in decision-making processes of administration by potential addressees of its actions. "Public causes of the participation include the desire of social organisations and groups and of citizens to participate in the earliest possible phases of decision-making processes" [Lipowicz 1991, 122]. Public commitment may take the forms of: consultation, creation of opinion-giving and consultation councils, public hearings, realisation of public tasks by non-public actors, including non-government organisations, to improve quality of the tasks; electoral (political) participation, understood as active or passive participation in elections or referenda at various levels of power; and compulsory (obligatory) participation, defined as compulsory civic activities for functioning of the political community and discharge of basic duties by the state [Gliński and Palska 1997, 365–66].

Local democracy is regarded as a major part of the democratic system. It allows for articulation of the needs and preferences closest to private life of a citizen, values and environment of a local community. At this level, participation by means of personal interactions, combinations of interests and local groups, and direct solving of local problems. Participative democracy should be interpreted in a wider sense of democracy. It means various paths of citizens' 'choices', from a system of representation (chiefly via political parties) to formal and informal ways of direct civic participation [Śwital 2019, 28–30]. As community members exhibit meagre interest in direct participation in power, activities of a local community continue to be identified primarily with activities of its authorities, including, as laid down in Article 11a of the Local Government Act, community councils and town mayors/presidents [Lewicki 2013, 143, 150–52].

Members of a local government community should be legally guaranteed – by virtue of their community membership – participation in "management and administration" of activities performed by a community to satisfy needs of its members [Olejniczak–Szałowska 1996, 8–9]. E. Olejniczak–Szałowska points out each resident of a local area is entitled to certain rights, such as: 1) the right to participation in management of community affairs as their fundamental and general right that includes: the right to take part in making decisions about local matters and to work with community bodies to realise public tasks; 2) the right to information about community affairs and actions of local community bodies and to public control of these actions; 3) the right to direct and exclusive resolution of community affairs (appointment and dismissal of community council and deci-

ding about key affairs of a community by way of a referendum); 4) the right to articulate and support their interests, by means of both individual and group actions; 5) the right to protect their interests against violations by local community bodies, including the right to submit complaints against resolutions and other actions or inaction of these bodies to administrative courts (Articles 101 and 101a of the Local Government Act); 6) the right to specific performances from a community, in particular, to welfare [ibid.].

Citizens' right to participate in crucial decision-making processes that affect them personally is the essence of democracy. This is an expression of empowerment of local communities, which are not only subjects of law but are also capable of regulating and managing, at their own responsibility and in the interest of their populations, the bulk of public affairs. Dialogue at both central government, regional and local levels should result from a considered vision and strategy of its utilisation for the purpose of effective policies intended to improve quality of governance and more democratic life [Sura 2015, 9–15].

CONCLUSION

Independence derived from the practised principle of subsidiarity is the essence of local governance. Experience of the past 30 years reaffirms accuracy of the reforms and systemic assumptions for the sake of decentralisation and development of self-government. Local governments have become part of the system and continuing support for public participation is in the general interest. Introduction of certain solutions to state or local government activities most frequently relies on clear normative foundations. A correctly formed system of a state and thus of local government must be based on properly standardised principles grounded in laws set out both in the Polish Constitution and ordinary legislation. They set limits to operation of public administrative bodies and affect civil involvement in decision-making procedures. Development of democracy and local government provides local populations with opportunities for exercising power and independent decision-making in affairs of local communities. Constructing frameworks for citizens to take an active part in management of their local communities is an instrument of building the civil society.

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