

THE IMPACT OF LEGAL SELF-RELIANCE OF MUNICIPALITIES ON THE DECENTRALISATION OF PUBLIC AUTHORITY IN POLAND

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Abstract. The literature emphasizes that decentralization signifies self-reliance. Several conditions must be fulfilled to speak of decentralization. They include: equipping of bodies with their own competencies, absence of hierarchic subordination, financial self-reliance (a decentralized body has own sources of income and independently decides how to spend its financial resources). Self-reliance in disposal of property and organizational (statutory) self-reliance are also noteworthy.

Keywords: territorial self-government, self-reliance of municipalities, decentralisation of public authority in Poland

INTRODUCTION

Various factors affect the form and development of the apparatus of a government administration within a territory. These factors include model of the political system [Wiktorowska 2011, 357], as well as model of the economic system derived from it. The legal system is also not without importance, particularly the constitutional and administrative law. Technical factors such as professionalism, efficiency, coordination of activities, rationality and proper work organisation [Jaroszyński 1964, 33] have also been listed among the factors determining the model of territorial administration.

Two basic models of territorial administration have taken shape over the course of historical development – the model of uniform administration [Starościak 1969, 116] and the model of dualistic administration. The dualistic administration model is based on a combination of the principle of centralisation and decentralisation in the process of shaping the state's territorial system of governance. With a strict hierarchy and based on a bureaucratic factor, the principle of centralisation determines the formation of the apparatus of governmental administration, representing the state and totally dependent on

the state. Yet, the principle of decentralisation allows for the formation of an apparatus of decentralised administration in the form of a territorial self-government – based on a social (civic) factor. A self-government created in such way enjoys the attribute of self-reliance [Frankiewicz 2003, 95].

A self-reliance is inscribed in the essence of self-government. The definition of a self-government shows that it is organisationally and legally distinct within the structure of the state, an institution of the local community arising from the law, appointed for self-reliant performance of state administration, equipped with the material resources enabling the realisation of the tasks within its purview [Zawora 2008, 14].

In the legal science of administrative, and constitutional law, in administrative science and many other sciences, including politology, it is generally assumed that the fundamental and intrinsic characteristic of the municipality, deciding the essence of this unit of territorial self-government as an entity of public administration, is its self-reliance [Bąkowski, Brzeski, and Laskowska 2010, 17]. The self-reliance of territorial self-government units is identified with the constitutional normative principle of establishing and applying legal norms forming the expansion and specification of the wording of the Constitution of the Republic of Poland [Szewczyk 2002, 105].

Precisely these factors have led to the choice of the subject above. Under the laws, local governments have been given the authority to perform administrative tasks, both local and regional. The work of local governments units is associated with the subsidiarity rule of the local council. This principle assumes that the exercise of power shall be in the hands of the institutions in subject. In the first instance, the local councils should be assigned tasks and competences as well as appropriate monetary resources to implement these. Tasks which can be performed by local councils should not be assigned to other units (district, voivodeship). Delegating these tasks to the upper level should occur only in instances in which the execution of these exceeds the capability of the local council. The government administration should only deal with the tasks which cannot be completed by the local councils. The principle of subsidiarity gives citizens the opportunity to deal with individual matters in their local communes, in places of their residence and through authorities they have chosen.

1. EXPLANATION OF THE SELF-RELIANCE OF TERRITORIAL SELF-GOVERNMENT

Three perspectives on the essence of the self-reliance of territorial self-government emerge from the literature. The first postulates a very high degree of a self-government's self-reliance. However, strong decentralisation and financial independence are the conditions for its actual independence.

The second approach recognises the overriding role of the state in the public sector and the strong dependence of territorial self-government on central authorities. Whereas the third approach accounts for the realities upon which a determination of the scope of self-reliance is dependent, i.e. the level of income, types of sources of income and their yields, the real impacts and methods of action of territorial self-government units in the direction of increasing their income, and the scope and types of expenses that such units may incur [Jastrzębska 2003, 100].

The essence of a municipality's self-reliance is grounded in its decision-making capacity, within the framework of the binding legal order, with respect to all local (regional) affairs, allocation of communal property, rules of using public facilities, zoning, the scope of investments, the order, methods and resources by which they are implemented, as well as with respect to all associated financial and material expenditures [Jagoda 2011, 21]. The essence of self-reliance also manifests in the fact that public tasks are performed by entities that are independent (self-reliant) and dispose of their own subjective rights. No body of governmental administration has such attributes at its disposal. Neither body of state administration has its own subjective rights, nor benefits from self-reliance granted *a priori*, so to speak, nor has its own legal personality [Błaś 2002, 101].

The semantic scope of self-reliance can be interpreted in two ways: positive and negative. The former involves studying, based on binding laws, situations in which bodies of territorial self-government have a legally defined scope of decision-making freedom. Meanwhile, the negative aspect involves reconstructing of the scope of the legally permissible influence on territorial self-government of state authorities situated outside of the given self-government's system, particularly from bodies exercising so-called monitoring over the territorial self-government [Daniluk 2020, 36–70].

Self-reliance as a positive aspect is made visible in the sphere of creating self-government structures and shaping their human resources, in the realm of lawmaking and management of communal resources. The negative aspect is related to judicial protection of self-reliance. Hence, the case law of courts, reacting to the violations of the principle of self-reliance, determines the legally protected area of a territorial self-government's self-reliance negatively, as it does so through elimination of such violations. The self-reliance of territorial self-government receives protection within the framework of the case law of administrative courts, and with respect to affairs related to management of communal property, the case law of general civil courts. The case law of the Constitutional Tribunal plays a special role in protecting the self-reliance of territorial self-government, by eliminating laws that violate the constitutional principle of self-reliance from the legal system. The protection of self-reliance afforded by administrative courts involves, above all, protection against

unauthorised interference of monitoring bodies, appointed to control the legality of actions and activities of self-government bodies. A self-government unit has the right to file a complaint against these acts to the administrative court for the purpose of investigation by the court of whether monitoring intervention was legal and whether the sphere of self-reliance of the self-government unit was infringed upon illegally. Within the scope of disposal and management, self-reliance is protected by general civil and commercial courts resolving disputes arising over the course of such activity [Bojanowski 2009, 16–17].

2. INTERPRETATION OF THE PRINCIPLE OF DECENTRALIZATION IN POLISH CONSTITUTION

The principle of decentralisation corresponds directly to the concept of self-reliance. The concept of decentralisation itself is deemed one of the key concepts in the theory of administrative law. The oldest view concerning decentralisation in the Polish literature can be found in the first Polish textbook of administrative law by A. Okolski [Okolski 1880]. The author sought a decentralisation in self-government bodies, to which he ascribed the right to “handle the interests of a given place,” in contrast to the centralised government bodies to which he left general affairs [ibid., 98].

Administrative legal science of the 19th and early 20th century linked the subject matter of decentralisation with the institution of self-government, considered the elementary form of decentralisation.¹

Discussions on the subject of the idea of territorial self-government and its place in the system of the state’s administrative authorities led to the emergence of two theories: the naturalistic and state theories. These theories reached a full maturity at the end of the 18th century, at a time when anti-absolutist tendencies prevailed in Europe, as best expressed in the revolutionary doctrine of France (1789). It was then that the theory of the so-called natural rights of a municipality was formed on the foundation of the idea of “natural law.” According to this theory, the municipality, as the fundamental cell of self-government, has “natural” rights to self-governance, not originating from the state. The state may neither trespass into the domain of these rights nor violate them without fear of standing in contradiction to the natural development of social relations. The second theory, which decidedly differs, is the so-called state theory of self-governance, reflecting the view that a self-government should be totally subordinated to the state. Any freedom of the self-government, including its independence from the state, may only have such boundaries as drawn by the state’s legislation. Both theories, present in

¹ This subject matter was also discussed by: Bigo 1928; Panejko 1926; Dembiński 1934.

the legal doctrines of many countries in 19th-century Europe, clashed with each other and affected the form of concrete legal and systemic solutions. This also pertained to the Republic of Poland, where the second theory ultimately prevailed. In the opinion of a contemporary author concerned with the study of the concept of territorial self-government in the 2nd Republic of Poland, “[...] the first assumed – in the most general of terms – that territorial self-government is a natural political institution, belonging to the category of public, not only legal phenomena. *A contrario*, the second theory most commonly sought the essence of self-government in the established order of the state, or at the least, in the equipping of self-government with legal instruments by the power of the will and authority of the state. Neither of the theories were accepted without criticism by theoreticians of territorial self-government, which is why one may occasionally encounter the naturalistic state theory, sometimes described as the evolution of the naturalistic theory of self-government or a modification of the state theory” [Bosiacki 2006, 9].

One of the foundations of the naturalistic theory was the conviction of the superiority of individual personal rights above the rights of the state. It was assumed that a municipality, as a local authority, the earlier form of organisation than the state, is the primordial form preceding the creation of the composite organism of the state. Thus, the municipality should be treated as a category of natural law – an entity that possesses intrinsic and inviolable rights and is completely independent of the state. Personalities such as Aleksander Kroński were advocates of this concept.

The systemic transformation into the Polish People’s Republic and the abolition of territorial self-government brought about a new understanding of the decentralisation. It ceased to be linked to the institution of self-government and began to be associated with the state apparatus. J. Starośniak presented a detailed analysis of the decentralisation. For this author, the basic criterion of the decentralisation is legal self-reliance. He introduces the concept of a legal decentralisation, by which he understands decentralisation based on laws that are inviolable by direct monitoring bodies [ibid., 10].

In turn, T. Rabska observes that “decentralisation [...] defines the sphere of activity established by way of legal regulations by assigning competencies while simultaneously ruling out interference of units higher in the hierarchy in this activity. This means waiving forms of direct top-down management, however it does not rule out monitoring of how these competencies are exercised. Monitoring may be permitted solely within the scope and in the forms provided for by laws [Rabska 1977, 21–24].

The concept of decentralisation has evolved greatly; from being identified with self-government as a legal subject, separate from the state, through to the accretion of many new forms of its implementation in the Polish People’s Republic and its constant subordination to systemic political needs, up to its

establishment as an institution of positive law, acting within the framework of a uniform administrative apparatus in the Polish People's Republic as one of the forms of democratisation of this apparatus, and as a means of facilitating the realisation of administrative tasks and the process of administration itself. Here, the fact that administrative legal science never detached decentralisation from the institution of self-government and always sought the essence of decentralisation in self-reliance [Wiktorowska 2002, 49], is worthy of note.

Today, a decentralisation is defined as a method of organising the executive apparatus in a state in which territorial or other units have legally sanctioned self-reliance, and interference in the scope of this self-reliance may take place only on legal grounds and in the forms provided for by the law, with verificative monitoring being the basic form, based on the criterion of legal compliance [Boć 2000, 209]. An inherent feature of decentralisation is a free disposal of financial resources, albeit within the confines of the law [Gilowska 1996, 42].

3. RELATION BETWEEN DECENTRALIZATION AND SELF-RELIANCE OF TERRITORIAL SELF-GOVERNANCE

It is generally emphasised in the literature that a decentralisation signifies self-reliance [Ochendowski 1999, 197–201]. Several conditions must be fulfilled in order to speak of decentralisation. These include: equipping of the body with its own competencies and the absence of hierarchic subordination, financial self-reliance (a decentralised body has its own sources of income and independently decides the method of expending financial resources in its possession). A self-reliance in the disposal of property and organisational (statutory) self-reliance are also noteworthy [Wierzbowski and Wiktorowska 2001, 101–102].

In foreign literature, decentralisation and centralisation are among the most controversial subjects in the practice of and literature on administration. It is highlighted that decentralisation of public administration may not be achieved without a strong and operational self-governing municipal administration [Leidinger 1992, 58]. The Dutch administrative law attorneys say decentralisation is the transfer of rights to make binding decisions to a subordinate body. The dynamic version of decentralisation as a process rather than a static phenomenon relates to the continuous flow of tasks and authority between various rungs in the administrative structure [Raadschelders 1994, 4–5]. In turn, the German literature speaks of political decentralisation as a shift of legal decision-making authority to parts of the system or to lower echelons in the multi-level administrative structure, and decentralisation of administration refers not to the transfer of decision-making authority but to the performance of specific tasks [Mayntz 1978].

Taking inspiration from the past² [Niewiadomski 2002, 3] the Legislator did not define the form of the Republic of Poland's territorial system in the Constitution of 1997. They did, however, impose the obligation of shaping the territorial system in such a way that it ensures decentralisation of public authority.

The principle of decentralisation was formulated in Article 15(1) of the Constitution of the Republic of Poland: "The territorial system of the Republic of Poland ensures decentralisation of public authority." This principle signifies the transfer of power to entities distinct from the state as a legal person in public law (e.g. to the municipalities) and equipping of these entities with authoritative competencies, freeing them from the system of hierarchic subordination [Daniluk 2015, 3]. The promise of legal self-reliance for municipalities also stems from the decentralisation principle. Among the legal elements determining the self-reliance of a municipality in the context of the decentralisation principle, one should indicate, among other things, the scope of the competencies of municipal bodies, creating a zone of so-called self-reliance of competency, i.e. the subordination of municipal bodies to other units of the state solely in the form of verificative monitoring, exercised according to the criterion of legality, thus creating so-called organisational self-reliance. Endowment of the municipality with municipal property, securing its so-called self-reliance in the disposal of property, and the municipality's endowment with its own sources of income and the ability to independently expend owned financial resources are no less significant, since, along with the ability to impose local taxes, these elements form the sphere of so-called financial self-reliance and the sphere of tax authority. The legal self-reliance of a municipality shaped in this way is subject to judicial protection [Wiktorowska 2002, 56].

A self-government is one of the forms of decentralised administration. In the spirit of this principle, legal regulations should therefore guarantee specific social groups and the bodies appointed by them the right to manage their own affairs. These groups participate in the exercise of self-governance obligatorily under the law (one becomes a member of self-government by the power of the relevant act, not voluntarily by the power of one's own declaration of

² The Constitutions of 1921 and 1935 did not mandate distinct decentralisation of public authority, although such an intent of the Legislator could be inferred from their wording. Both of these documents, however, were decisive to the territorial structure of the 2nd Republic of Poland. The Constitution of 1921 divided the state into voivodeships, poviats, urban and rural municipalities, assigning them the status of territorial self-government units, with the reservation that the division was to be enacted by way of an act (Article 65). The Constitution of 1935 maintained the division into voivodeships, poviats and municipalities but did not guarantee their self-governing nature. Moreover, it did not require a division of the state at the poviat and municipality level (Article 73). Later constitutional provisions did not regulate the shape of the state's territorial system further.

will) and perform tasks within the purview of public administration³ (OTK ZU 1998, No. 3/18, item 31). Management itself occurs according to the principles of self-reliance (decentralisation), which means that interference, in the form of monitoring, in the activity of a self-government is possible solely in the forms provided for by the relevant laws, without violation of these areas of self-reliance [Leoński 2006, 6].

However, self-government in Poland is not an autonomous institution. Its self-reliance is based on determining when and in what forms state bodies may interfere in the sphere reserved for the independent activities of territorial self-governing bodies. As part of ensuring implementation of the decentralisation principle, it is necessary to transfer not only executive but also lawmaking competencies, to the territorial units [Dąbek and Zimmermann 2005, 10].

A decentralisation of the public authority through territorial self-government is defined in Article 16 as participation in exercising this authority, involving performance of a significant part of public tasks. Territorial self-government communities have the nature of authoritative entities, and their activity should be based on disposing of components of this authority. Their decisions may be binding in nature, may be subject to compulsory enforcement, and refusal to implement these may result in sanctions against one's own person. Territorial self-government units become an integral element of the structure of public authority in the state of which they are a part, within the scope defined by law. The scope of public authority remaining at their disposal is therefore not their own authority, but a manifestation of the decentralised state authority [Garlicki 2005, 3].

The Constitutional Tribunal has also referred to the decentralisation principle in its case law. In the ruling of 4 May 1998, it recognised the legal self-reliance of the territorial self-government as an element of the decentralisation principle. This self-reliance, being the essence of self-government, need not be enshrined in the constitution, and only requires legal measures and the guarantee of protection. The Legislator's interference in the sphere of self-reliance should not be excessive and should find justification in constitutionally defined goals and constitutionally protected values, which override the principle of protecting the self-reliance of municipalities depending on the Legislator's assessment (OTK ZU 1998, No. 3, item 31, p. 183–84). In another ruling (of 24 March 1998, K 40/97), the Constitutional Tribunal emphasises that the

³ The Constitutional Tribunal has devoted much attention to the principle of decentralisation of public authority. In ruling K 38/97 the CT discerned the decentralisation principle in the organisation of the entire state's system, not just of territorial self-government. This means that the constitutionally guaranteed decentralisation of public authority is broadly protected by the Constitutional Tribunal, which protection is, in turn, detailed in the case law of the Supreme Administrative Court and Supreme Court.

principle of self-reliance concerns all aspects of a municipality's activity, including the financial sphere (OTK ZU 1998, No. 2, item 12, p. 69–70).

CONCLUSION

A decentralisation of the public authority signifies the process of permanently broadening the rights of lower-level units of public authority by way of transferring tasks, competencies and the resources indispensable for realising them to these units. The Constitutional Tribunal stresses that decentralisation of the state is an idea with the goal of transferring the competencies of public authority to the bodies of territorial self-governing units, elected democratically by local communities. At the same time, it indicates the fact that, the broader the transfer of the state's competencies to territorial self-government, while the territorial self-government benefits from universal self-reliance limited only by binding law, the better the idea of decentralisation of the state will be implemented.

A decentralisation of the state authority cannot be construed with respect to just one subject, as it pertains not only to territorial self-government but also covers a substantially broader catalog of bodies that have been granted attributes of public authority [Jaworska–Dębska, Olejniczak–Szałowska, and Budzisz 2019].

One of the first and fundamental features of decentralised public authority is its exercising in a self-reliant manner, understood as endowment with the right to relatively autonomous action within legally permissible limits, as well as independence understood as freedom from interference in its affairs by bodies at a higher level. The self-reliance of the decentralised public authority, including of self-government, is not an attribute that is absolute in nature. The framer of the Constitution does not rule out the possibility of adopting such solutions that require the disqualification of certain affairs from among the competencies of self-government bodies and their transfer to other authorities. However, it should be specified as to the form and circumstances when state body is allowed to intervene with local governments. The state acts as an overseer, delegating responsibilities, rights and monetary resources to the local council. Nevertheless it is the local governments, on their own behalf, which undertake a series of activities and tasks to fulfil the needs of a local community.

Potential delimitations of the boundaries of decentralisation should be drawn within the scope defined by law, with respect for the requirement of rationality. A change in the boundaries of decentralisation may be determined by the evolution of national politics, the condition of the local economy, and by the possibilities of adapting the administration for performing public service in accordance with the principle of subsidiarity. Always, however,

in accordance with the stipulations of the European Charter of Local Self-Government, the location of the public authority realising its tasks should be situated as close as possible to the citizen, after in-depth assessment of all socioeconomic circumstances.

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