Anna Gołębiowska

LOCAL GOVERNMENT IN THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 1997

1. Introduction

Local government[1] constitutes the basis of a democratic system. The essence of the local government is, in turn, managing local affairs; it follows from the objectives of the civic society, which stipulates common realisation and defending the needs. This issue is important since local government constitutes a community of the inhabitants of a given region of a state, which is distinguished by its common awareness or common objectives and destiny. The development of local government is to enable local communities to wield power both directly and indirectly. Furthermore, it is to ensure that such power and authority satisfies the current needs of the inhabitants and creates favourable conditions for social, cultural, economic and civilisation growth.

Therefore, the following questions arise, namely: what is the essence of local government? And what role does local government play in a democratic state?

Making an attempt to answer the above-mentioned questions, it is vital to indicate the legal basis for the functioning of local government, which can be found in the provisions of the Constitution of the Republic of Poland of 2 April 1997[2]. These issues have been regulated in a number of articles, namely:

[1] A. Gołębiowska, *Prawo miejscowe samorządu terytorialnego w okresie II Rzeczypospolitej* [Territorial self-government by-laws in the period of the Second Polish Republic], Cogitatus No. 7, Wydawnictwo Collegium Varsoviense, Warszawa 2009, pp. 59–61. At the same time, it is worth mentioning that local government is formed by virtue of law and autonomously performs tasks following from the needs of its inhabitants. One can say that local government is a corporation of local community living in a particular territory, having a legal personality as well as the right to manage public affairs of local significance on its own account and for its own benefit. This is how the idea of the contemporary local government expresses the essence of a democratic state, thus contributing to shaping a civic society and the inhabitants' responsibility for "their homeland". For this reason, the existence of local government has positive impact on local communities, who receive an actual opportunity to manage their own affairs. The issues related to the recognition of the needs of local communities or defining their hierarchy and the possibility of satisfying them are transferred to the citizens, which in turn lead to the emergence of social leaders, who assume responsibility for the self-governing community.

[2] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws from 1997, No. 78, item 483 as amended).

in Chapter I entitled "Republic" (Articles 15 and 16) and in Chapter VII entitled: "Local government" (Articles 163–172). Besides, what is important for the issues related to local government is also Article 94 of the Constitution of the Republic of Poland, which indicates that local government bodies, pursuant to and within the boundaries of the rights included in the law, may issue local legal acts mandatory within the jurisdiction of such bodies.

Among other constitutional provisions, one should note Article 184 of the Constitution of the Republic of Poland, which defines the competence of the Supreme Administrative Court and other administrative courts. This mainly concerns issues related to the control of public administration operations, which includes, among others, making decisions on whether the resolutions passed by local government bodies comply with the legal acts. Moreover, Article 203 par 2 of the Constitution of the Republic of Poland is also significant, because it authorises the Supreme Audit Office to inspect the operations of local government bodies, community legal persons and other local organizational entities from the point of view of their legality, reliability and efficiency. However, apart from the provisions included in the Constitution of the Republic of Poland, basic regulations concerning local government are laid down in local government acts[3], each of which is related to local government entities of a different level. Besides, legal provisions related to local government are laid down in many other acts[4], as well as in the European Charter of Local Self-Government of 1985[5].

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[3] At the same time, one should explain that since 1 January 1999, the basic three-level territorial division of the state has been in place, including communes, districts and provinces (Act of 24 July 1998 on the introduction of a basic three-level territorial division of the state – Journal of Laws of 1998, No. 96, item 603 as amended). Basic provisions on local government can be found in the following acts: Act of 8 March 1990 on commune self-government (consolidated text of 12 October 2001, Journal of Laws of 2001, No. 142. item 1591 as amended); Act of 5 June 1998 on district self-government (consolidated text of 27 October 2001, Journal of Laws of 2001, No. 142, item 1592 as amended); Act of 5 June 1998 on province self-government (consolidated text of 18 September 2001, Journal of Laws of 2001, No. 142, item 1590 as amended). The above-mentioned Acts are referred to as the system-regulating statutes and they contain solutions and decisions related to the functioning and governing principles of particular local government units and their operational mode.

[4] One should note that the provisions included in the system-regulating statutes have been complemented by other legal acts, namely: Act of 5 January 2011 – Electoral Code (Journal of Laws of 2011, No. 21, item 112 as amended), standardizing the elections to the decision making bodies of local government units as well as commune and town mayors; Act of 2000 on local referendum (Journal of Laws of 2000, No. 88, item 985 as amended); Act of 15 March 2002 on the system of the capital city of Warsaw (Journal of Laws of 2002, No. 41, item 361 as amended); Act of 7 October 1992 on regional accounting chambers (consolidated text of 26 April 2001, Journal of Laws of 2001, No. 55, item 577 as amended); Act of 12 October 2004 on self-government councils of appeal (consolidated text of 8 June 2001, Journal of Laws of 2001, No. 79, item 956 as amended); Act of 15 September 2000 on the principles of joining international associations of local and regional communities by local government units (Journal of Laws of 2000, No. 91, item 1009 as amended); Act of 21 November 2008 on self-government employees (Journal of Laws of 2008, No. 223, item 1459 as amended).

[5] European Charter of Local Self-Government of 15 October 1985 (Journal of Laws of 1994, No. 124, item 607, with the amendment that followed: Journal of Laws of 2006, No. 154, item 1107). The documents were adopted by the Council of Europe and ratified by Poland on 26 April 1993. Furthermore, it should be noted that due to the provision of Article 91 in connection with Article 241 par 1 of

2. The notion of local government

The explanation of the term 'local government' should begin with the indication that the notion is made up of objective and subjective elements. When considering the issue related to the subject of the local government, one should point out that it is the local community living in a given territory and referred to as the self-governing community. Therefore, an individual becomes a member of a community by virtue of law, because pursuant to Article 16 par 1 of the Constitution of the Republic of Poland: "The inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law". It follows that the existence of a local government depends on the will of the legislator and that a local government is not formed pursuant to a voluntary act of the founding members, just as it cannot be dissolved pursuant to a statement of will of its members[6].

One can therefore say that in this meaning, local government is definitely an imposed organization. Anyway, one cannot live in a given territory and at the same time remain outside the community organized as a territorial self-governing union. Therefore, the decisive criterion in this case is the fact of residing in a given territory rather than being formally registered as having domicile there. Besides, being part of a self-governing community lasts as long as the person is constantly residing there. This means that one cannot resign from the participation in a self-governing community, just as one cannot be excluded from it. Therefore, a local government unit established by the legislator exists regardless of the will of its inhabitants and has no possibility to dissolve itself. One will inevitably reach a conclusion that individuals are assigned to local governments, rather than being members thereof. One can therefore say that local government has universal character, because it refers to the whole territory of a state and includes all its inhabitants. Due to this fact, local connections between self-governing communities are formed, including people residing in

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the Constitution of the Republic of Poland, the European Charter of Local Self-Government, being an international agreement, constitutes a source of law generally binding in Poland, with supra-system force. It follows from the provisions of the European Charter of Local Self-Government that it recognizes the role of local government as an instrument of the citizens' participation in managing public affairs pursuant to the principles of democracy and power decentralization, as well as the need to recognize the principle of local self-governance in the legislation and, of course, in the Constitution of the Republic of Poland. It is worth explaining that it refers to local government, which, pursuant to the Polish law, needs to be understood as commune and district government. At the same time, one should note that for a provincial government, one should apply the provisions of the European Charter of Regional Self-Government of 5 June 1997, which was adopted by the Council of Europe, but has not been ratified by Poland yet.

[6] See H. Szczechowicz, *Samorząd terytorialny w społeczeństwie obywatelskim* [Territorial self-government in a civil society], [in:] *Samorząd terytorialny na przełomie XX/XXI wieku* [Territorial self-government at the turn of the 20th and the 21st century], (ed.) A. Lutrzykowski, R. Gawłowski, M. Popławski, Toruń 2010, p. 91; A. Jackiewicz, A. Olechno, K. Prokop, *Samorząd terytorialny. Podręcznik dla studentów studiów administracyjnych pierwszego stopnia* [Territorial self-government – course book for the first cycle students in the field of administration], Siedlce 2010, p. 6.

a given territory within a state, which in turn contributes to the creation of social, cultural, economic and civilisation-related bonds and to the initiation of various enterprises related to the development of local communities. Thus, although the basis for defining a local government is the territorial bond, i.e. residing in a given territory within a state, both the provisions of the Constitution of the Republic of Poland and of the local government acts clearly point to its corporate nature.

On the other hand, considering the issue related to the object of the local government, one should explain that it is related to the performance of public tasks assigned to it by law, because pursuant to Article 16 par 2 of the Constitution of the Republic of Poland, local government participates in wielding public power, therefore its objective is to perform public tasks. It follows from Article 163 of the Constitution of the Republic of Poland, where it is emphasized that: "Local government shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities". Therefore, one can say that the object of the local government is performing public administration, whereas public authorities are the institutions that possess statutory competences to make authoritative decisions binding both the citizens and legal entities[7].

At the same time, it would be appropriate to explain that the very essence of local government consists mainly in the fact that it is a decentralized form of public administration, and therefore it is a state, not a government, body. It is worth pointing out that local self-government and the government are two forms, mutually independent entities of the same public administration. Therefore, as far as the material aspect is concerned, they perform public tasks, but the scope of these tasks differs. Besides, it should be noted that local government is limited to local affairs, i.e. education, social care and welfare, environment protection or health protection, whereas the central government administration deals with general public and supra-regional affairs, related to the issues such as border security and monetary policy[8].

Continuing to explain the issue related to the notion of local government, one should point out that the purpose behind its existence is definitely the performance of public tasks of local or regional nature, because such tasks would be too cumbersome to be fulfilled by public bodies coordinated by the central government. Doubtless it refers to the tasks fulfilled by local or regional authorities, because they have direct contact with the communities and they have the best knowledge of the needs and opportunities to act if any events occur that would justify these needs.

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[7] See P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* [Commentary on the Constitution of the Republic of Poland of 2 April 1997], Warszawa 2008, p. 28.

[8] S. Wykrętowicz, *Samorząd jako wyraz demokracji obywatelskiej* [Self-government as the expression of civil democracy], [in:] *Samorząd w Polsce. Istota, formy, zadania* [Self-government in Poland – essence, forms and tasks], (ed.) S. Wykrętowicz, Poznań 2008, pp. 28–30.

When deliberating upon the explanation of the notion of local government, it seems appropriate to point out to Article 3 of the Constitution of the Republic of Poland, which stipulates that: "The Republic of Poland shall be a unitary State", which means that local government does not and cannot have its own sovereign tasks. There follows a statement that local government performs public tasks resulting both from constitutional provisions and from the legal acts, in its own name and in sole responsibility. Therefore, it is now worth presenting the opinion expressed by the Constitutional Tribunal, which sees the essence of local government in the fact that some classifications of affairs, separated from within the scope of the state authority, are entrusted to self-governing communities for autonomous handling[9].

At the same time, it should be noted that constitutional provisions included in Article 163 of the Constitution of the Republic of Poland, while granting local government the competence to participate in wielding public power, define that this participation consists mainly in performing those public tasks that are not reserved for the central government administration pursuant to the Constitution of the Republic of Poland and the statutes. Besides, participating in wielding public power consists, pursuant to par 1 of Article 166 of the Constitution of the Republic of Poland, in performing the tasks that include satisfying the collective needs of local communities, while pursuant to par 2 of the same Article, in performing public tasks assigned with a legal act, provided it follows from justifies public needs of the state.

3. Supervision over local government

When deliberating over the issues related to the supervision of local government, it is worth pointing out that pursuant to the decentralization principle, local government acts independently when performing public administration. However, this autonomy does not exclude the central government administration's possibility of supervising local government units. Due to the uniform character of the state, the autonomy of local government units should not be seen as tantamount to their sovereignty. Besides, local government must not be considered detachment from the state, because different standpoints would inevitably lead to the destruction of the state in the area of performing public tasks. Due to this fact, what is important is the standpoint presented by the Constitutional Tribunal, where it is explained that: "Guaranteeing local government the participation in wielding power and entrusting the public bodies implicitly with defining the scope and forms of such participation, the Polish

[9] Decision of the Constitutional Tribunal of 30 November 1999 (case reference no. Ts104/99, OTK ZU 2000, No. 1, item 21).

constitutional legislator has established positive legal basis for the functioning of the local government and thus included it in the power-wielding structure (…) at the same time denying it the feature of sovereign authority with a source of public power different than the law established by the state"[10].

When analysing the issue related to the supervision of local government, one should point out that institutional supervision is the competence of the President of the Council of Ministers and province governors, whereas budgetary supervision is the competence of the particular Regional Accounting Chamber. Moreover, the supervisory competence also rests with the Sejm, because as requested by the President of the Council of Ministers, it may dissolve the body that constitutes local government, but only in the event of a gross infringement of the Constitution of the Republic of Poland or of a statute. Due to this fact, it is important to quote Article 171 par 1 of the Constitution of the Republic of Poland, which stipulates that only criterion limiting the supervision is the legality of action. Therefore, it is worth noting that the autonomy of a local government means making decisions related to the affairs that are within its competence, excluding the cases defined in the provisions about supervision. Therefore, only the bodies defined in the legal provisions can interfere in the actions performed by a local government.

Another issue is introducing a system of electing joint bodies of self-governing community by its members, which effectively strengthens the feeling of self-governing and incites the conviction that the power is not imposed from above. It definitely means that they may autonomously decide who will represent them and act on their behalf. Thus, local and regional authorities are the representation of the self-governing community, so it can be concluded that their organization and place in the state structure constitute the means to achieve the objective defined as satisfying the broadly understood needs of the local or regional community.

4. Structure of local government

When considering the issues related to the structure of local government, it seems appropriate to note the territorial division of the state made up of three levels. It is vital to indicate the provision of Article 164 par 1 of the Constitution of the Republic of Poland, which stipulates that the basic unit of local

[10] Resolution of the Constitutional Tribunal of 27th September 1994 (case reference no. W 10/93, OTK 1994, No. 2, item 46). In the resolution it has been noted that: "Guaranteeing the local government the participation in wielding power and entrusting the public bodies implicitly with defining the scope and forms of such participation, the Polish constitutional legislator has established positive legal basis for the functioning of the local government and thus included it in the power-wielding structure in a democratic legal state (from Article 1 of the constitutional provisions that remained in force), at the same time denying it the feature of sovereign authority with a source of public power different than the law established by the state".

government is a commune, which is the minimal unit of the territorial division of the state. Moreover, it seems legitimate to consider par 1 of Article 4 of Act on commune self-government, pursuant to which forming, merging, demerging and abolishing as well as defining the boundaries of communes is the competence of the Council of Ministers. It is done with a decree issued by the Council of Ministers – ex officio or as requested by the commune council, pursuant to par 2 Article 4 of Act on commune self-government. Nevertheless, this is done after obtaining the opinion of the commune councils concerned, which in turn is preceded by the consulting sessions with the inhabitants, organized by commune councils, which follows both from the provision of Article 5 of the European Charter of Local Self-Government and from the opinions, mentioned by the provisions of Articles 4a and 4b of Act on commune self-government. At the same time, it should be added that the issue of defining and changing the commune boundaries is done in a way that safeguards the commune territory, considering the settlement and spatial structure, as well as social, cultural and economic bonds ensuring the ability to perform public tasks. On the other hand, pursuant to Article 6 of Act on commune self-government, the scope of commune activities includes any public affairs not reserved by the statutes to other bodies.

It is also worth noting that the allegation of the competence in favour of the commune allows for explaining doubts as to who is responsible for a particular task or competence at the local level. It is understandable that basic needs of individual such as those related to unemployment, public order, social care or education should be addressed at this very level. As a result, commune self-government should have most competence in the decentralized structure of local government. This is why local life is focused on this very level, because this is where individuals live, work and fulfil their needs as members of self-governing community.

On the other hand, starting the deliberations concerning the next unit of local government, which is in a district, one should consider the provision of par 1 of Article 3 of Act on district self-government. Pursuant to this provision, the Council of Ministers, with a relevant decree, forms, merges, demerges and abolishes districts and defines their boundaries, but subject to the fulfilment of certain conditions, which are, incidentally, the same as those included in Act on commune self-government. This is why, considering par 3 of Article 3 of Act on district elf-government, one should note that defining the district boundaries is done by indicating the communes that will be included in this district. Change of the border is made in a way that possibly ensures homogeneous territory of the district, considering the settlement and spatial structure, as well as social, cultural and economic bonds ensuring the ability to perform public tasks[11]. It seems

[11] It seems appropriate to explain that existing districts are not homogeneous, because there are townships and country districts (towns with district rights), which include: towns which had more than

rather important to note Article 7 par 1 of Act on district self-government. It results from its provisions that a district may only perform trans-communal public tasks defined in the statutes, listed by the legislator, as well as those indicated by the provisions of other statutes and acts of material law, considering the fact that they cannot infringe upon the communes' scope of action.

Therefore, considering the province government, one should note that it is defined as a regional self-governing community having a relevant territory. Due to the fact that the legislator has not defined the tasks of a province, one can claim that it performs province-related tasks defined in the statutes. However, one should observe that in Article 14 of Act on province self-government a classification of affairs listed in the statutes is provided. Besides, it is significant to note the indication included in Article 2 par 2 of Act on province self-government, because it contains a clause stipulating that the scope of province actions includes performing province-related public tasks, not reserved by the statutes to central government bodies. Continuing the considerations of the tasks delegated to the province government, one should note Article 4 par 1 of Act on province self-government, which emphasizes the character of province tasks and competences, because pursuant to it, the scope of actions assigned to province government does not infringe upon the autonomy of a district and a commune.

5. Decentralization of public power

In the Polish legal order, the notion of decentralization has been elevated to the rank of a constitutional provision included in Article 15 par 1 of the Constitution of the Republic of Poland, from which it results that: "The territorial system of the Republic of Poland shall ensure the decentralization of public power". Therefore, one can say that on the basis of this legal provision, decentralization constitutes a legal activity within the scope of public law, to which public power is subordinated as a subject, which effectively leads to the organization of a fragment of the state's territorial system. Thus, the notion of 'state decentralization' should be perceived as the willingness of the constitutional legislator to include also other types of public power within this term.

It is also worth recalling the standpoint of the Constitutional Tribunal, pursuant to which the notion of 'decentralization' is one of the terms whose meaning has

100 thousand inhabitants as of 31 December 1998; towns which ceased to be the seat of province governors as of 31 December 1998, unless at the request of a relevant town council it was decided that the town would not receive district rights; towns which obtained the status of a town with district rights when performing the first administrative division of the state into districts (Article 91 of Act on district self-government). At the same time, it should be explained that a town with district rights differs from a township, because a township includes a number of communes, while a town with district rights constitutes a commune that performs district tasks at the same time.

been exhaustively regulated in the Constitution of the Republic of Poland[12]. According to the Constitutional Tribunal, the notion of 'decentralization' expresses the prohibition to concentrate the power and the order requiring the legislator to search for the most effective structural solutions, which in turn would allow the local government entities to retain their ability to perform public tasks[13]. At the same time, it should be pointed out that the term "decentralization" expressed in Article 15 par 1 of the Constitution of the Republic of Poland constitutes an interpretational principle as regards other norms included in this statute and related to the system of public administration[14]. Therefore, it should be explained that the limits of decentralization are defined by the state legislator, whereas the very principle of decentralization should be interpreted in accordance with other system principles, inter alia the common good principle and the state uniformity principle, as expressed in Article 15 par 1 of the Constitution of the Republic of Poland. Local government constitutes the basic link of decentralized public administration and for this reason it ensures the decentralization of public power. It is appropriate to explain that correct functioning of a democratic state is not possible without introducing a horizontal division of power between the central and local government. It means that without the statutory transfer of at least some public tasks to local government, it would definitely be difficult to speak of decentralized public power[15].

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[12] Judgment of the Constitutional Tribunal of 18 February 2003 (case reference no. K24/02). In the judgment, it was noted that: "decentralization mentioned in the Constitution is not a one-off organizational enterprise, but a permanent feature of the political culture of the state, constructed on proper statutory solutions, pursuant to the constitutional principles of the Polish system".

[13] Judgment of the Constitutional Tribunal of 25 November 2002 (case reference no. K34/01). In the analysed judgment, the Constitutional Tribunal explained that: "The rule of public power decentralization has been expressed in Article 15 par 1 of the Constitution of the Republic of Poland, which states that the territorial system of the Republic of Poland ensures decentralization of the public power. (…) According to the Constitutional Tribunal, the principle of decentralization may not be understood in the way that the legislator has a duty to dismember the central organizational units and place them at the level of communes, districts and provinces. (…) The decentralization principle, expressed in Article 15 par 1 of the Constitution of the Republic of Poland does not involve a constitutional requirement of decentralizing all public organizational units. It is the legislator's responsibility to decide whether and to what extent such units should be subject to decentralization and at which level – province, district or commune – they should be constituted. The existing notion of decentralization also allows for the interference with the scope of autonomy held by local units, but only to the extent defined in the statutes. (…) The thesis about the unilateral process of decentralization (…) does not find any justification on the grounds of the sources of law, which do not stipulate – except for the Constitution – any laws of particular "strictness". Such "strictness" may be justified by political aspects, but does not have any basis in the mandatory political order".

[14] Judgment of the Constitutional Tribunal of 4 May 1998 (case reference no. K38/97). In the judgment, it was emphasized that: "the principle of public power decentralization and of the local government participating in performing a significant part of public tasks constitutes the rules for the organization and system of the whole state, not only local government".

[15] A. Gołębiowska, *Decentralizacja administracji publicznej na przykładzie samorządu gminnego. Zarys problematyki* [Public administration decentralisation exemplified by commune self-government – outline], Opere et Studio pro Oeconomia, No. 6, Warszawa 2009, pp. 63–74; At the same time, it is worth adding that the phenomenon of decentralization is considered from the viewpoint of many fields of science, inter alia sociology, management and organizational theory, as well as administrative science. There is

As provinces are made up of districts and districts, in turn, are made up of communes, this does not mean that this relationship makes one level dependent on another. And although a province is the largest unit, considering the territory and number of inhabitants, it does not hold executive competences with reference to districts and communes, which has been referred to in Article 4 par 2 of Act on province self-government. Pursuant to this provision, provincial government bodies are not supervisory or controlling bodies for districts or communes, neither are they higher-level bodies for them in administrative proceedings. On the other hand, in par 6 of Article 4 of Act on district self-government it has been laid down that district has no executive authority over communes, because the tasks of a district must not infringe upon the communes' scope of action. Therefore, one should explain that the units of all levels of local government are separately subject to the supervision exercised by central government administration, and what is more, for each of them separately, the relevant body for appeals shall be the self-government councils of appeal[16].

Considering the issues related to the principle of decentralization[17] of public power, one reaches the conclusion that the notion of "decentralization" means

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no doubt that this is related to the most momentous contents of the democratic legal state, i.e. equality or becoming close to the citizens and participation. Nevertheless, one should emphasize that the notion of decentralization stems from the legal science. Besides, the essence of decentralization is transferring both the tasks and competences of the public authorities to lower-level units, i.e. to local administration, considering the fact that these units have to be granted autonomy in performing assigned tasks. For this reason, local government units act as autonomous entities of the public law performing public tasks and they are responsible for such performance. Moreover, one should explain that there is no hierarchical subordination of local government bodies, either to the central administration bodies or to higher-level local government units. One can, therefore, say that the basic unit of local government is constituted by its particular, individual units, mutually independent, regardless of whether they would have been placed at the levels of the territorial division of the state, which does not in itself mean that there is any hierarchy between them, because local government units are independent of one another.

[16] In the light of the above considerations, one can reach the conclusion that such shaping of relationships with regard to local government units excludes the possibility to recognize a higher-level local government unit as a higher-level body in the meaning of the Code of Administrative Procedure.

[17] See A. Gołębiowska, *Decentralizacja administracji publicznej…* [Public administration decentralisation…], pp. 65–66. At this point, it seems appropriate to present a few concepts of understanding decentralization; R.W. Griffin, *Podstawy zarządzania organizacjami* [Organisations management basics], (ed.) M. Rusiński, Warszawa 1998, p. 350 shows that: "decentralization is a process of systematic delegation of power and authority within an organization to the middle and lower level managers"; J.A.F. Stoner, Ch. Wankel, (ed.) A. Ehrlich, *Kierowanie*, Warszawa 1994, p. 271 note that the notion of decentralization refers to the scope of transferring power to lower levels: "this terminology stems from perceiving an organization (…) as a series of concentric circles. The head of the organization is in the middle and from there a "network" of power grows. The more power is declared in the organization, the more decentralized it will be". According to the authors, decentralization is useful only to the extent to which it contributes to the efficient achievement of the organizational objectives. Within the scope of legal science, decentralization is not only a certain political assumption presented as an idea. The essence of decentralization is that it is sworn to the legal system; therefore it has its sources in legal norms. For this reason, the basis for decentralization in the legal and structure-related system of a given state will always be the legal norms present in such a system. Therefore, decentralization will have defined effects in the area of law when a given system includes in its scope of regulations certain legal institutions, inter alia those related to decentralized entities; M. Kotulski, *Pojęcie i istota samorządu terytorialnego* [Concept and

treating local government as a form of individual participation of the citizens in the process of governing, as well as an institution that serves to create democracy at lower levels[18]. Therefore, the decentralization of tasks must not be limited to imposing obligations on local government units, because those should be accompanies by certain rights and material resources needed to perform the assigned tasks. What is of great importance is the fact that without proper financial backup, the achievement of the objectives shall remain in the sphere of intentions, because without constant influx of support, local government could not exist.

This is why it now seems appropriate to refer to the judgment issued by the Constitutional Tribunal, which explains the legal definition of decentralization. This judgment also highlights the opinion related to the aspects of assigning public tasks to local level and the way local bodies use the property and rights that guarantee their autonomy. At the same time, the judgment of the Constitutional Tribunal includes statements on the possibility to make decisions on public affairs and having adequate financial resources to pursue its own policy[19].

6. Autonomy of local government units

The autonomy of local government units and their legal protection is declared both in the Constitution of the Republic of Poland[20] and in the system-related acts[21]. For this reason it is worth noting par 2 and 4 of the provisions of Article 4 of the European Charter of Local Self-Government. The presented

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essence of territorial self-government], Samorząd Terytorialny, 2000, No. 1–2, p. 87 explains that "local government is one of the forms of executive power, functioning in the form of decentralized authority. Decentralized means not hierarchically subordinated to the central government administration".

[18] At the same time, it should be added that political activity of the citizens is not limited only to periodically organized elections, because the citizens are in a way connected to the state due to the fact that they manage familiar, local affairs. In order to solve problems and affairs, they develop their own initiative, which involves a greater effort. For this reason, we may observe that the activity of local government definitely relieves the burden of the central authorities, as they do not have to perform local tasks, but are able to delegate them to the people inhabiting a certain area.

[19] Judgment of the Constitutional Tribunal of 18th July 2006 (case reference no. U 5/04, OTK 2006, No 7, item 80).

[20] Article 165 par 2 of the Constitution of the Republic of Poland states: "The self-governing nature of units of local government shall be protected by courts".

[21] The autonomy principle has been expressed respectively in Article 2 par 3 of Act on commune self-government, Article 2 par 3 of Act on district self-government and in Article 6 par 3 of Act on provinces self-government. Besides, one should explain that this principle has been confirmed by the fact that local government units have been granted legal personality in the provisions of Article 2 par 2 of Act on commune self-government, Article 2 par 2 of Act on district self-government and in Article 6 par 2 of Act on province self-government. At the same time, it should be added that having legal personality is the main element of the autonomy of local government units due to the fact that they have ownership rights and other property rights. Furthermore, having legal personality enables them to manage the municipal property belonging to the self-governing community.

legal provisions indicate that performing tasks under the decentralization principle assumes autonomy during the implementation of such tasks. This means that local communities have, within the scope defined by law, full freedom to act in every affair, provided it is not excluded from their competence or is not included in the competences of other authorities. As a result, the competences assigned to local communities should be total and exclusive. Nevertheless, these competences may be challenged or restricted by another authority, but only in the matters stipulated by the law. Undoubtedly, autonomous performance of the tasks may not be tantamount to unlimited autonomy. If self-governing communities perform public tasks, then their activity should definitely remain under state supervision.

Therefore, the autonomy of local government should not be seen as its complete independence of the state, but rather as a precise definition of situations when the state can effectively step in the area of local government's activity[22]. It is worth noting that except for such cases, the state must not interfere with the area of local government's activity, which is indicated in Article 171 of the Constitution of the Republic of Poland. Pursuant to these provisions, supervisory bodies may interfere with such activity, but only in the situations defined by the provisions of legal acts and from the point of view of legality. One may say that such treatment of supervision does not limit the autonomy of local government, but becomes its guarantee.

Thus, it must be emphasized that the autonomy of local government units constitutes an implication of decentralization, which is confirmed by the judgment issued by the Constitutional Tribunal, where it is emphasized that: "decentralized bodies are characterized by autonomy, understood as having the right to act with relative independence within statutory, permitted limits, and by independence meaning being free from the interference of higher level authorities in the local affairs"[23]. If financial autonomy of local government units ensures participation in public revenue, respective to the assigned tasks, then one should note Article 167 par 1 and 2 of the Constitution of the Republic of Poland. The disposition of this provision indicates that the income of a local government unit is made up of its own income and general subventions as well as designated subsidies from the state budget. On the other hand, from the provision of Article 168 of the Constitution of the Republic of Poland, it results that the autonomy and independence of the state budget is guaranteed to the local government units by their fiscal autonomy, which means the right to define

[22] Z. Niewiadomski, *Istota samorządu terytorialnego w Konstytucji RP* [Essence of the territorial self-government in the Constitution of the Republic of Poland], [in:] *Samorząd terytorialny a jakość administracji publicznej* [Territorial self-government vs. the quality of public administration], (ed.) A. Piekara, Warszawa 2002, p. 189.

[23] Judgment of the Constitutional Tribunal of 18 July 2006 (case reference no. U 5/04, OTK 2006, No 7, item 80).

the amount of taxes and local charges within the scope defined in the act[24]. Undoubtedly, guaranteeing financial autonomy is a serious problem related to the correct functioning of local government units. Therefore, a very important issue proving the autonomy of local government units is the fact that they have been granted the right to create local legal acts binding in the territory within their competence, within the scope defined in Article 94 of the Constitution of the Republic of Poland and other statutes[25]. At the same time, it is worth adding that pursuant to Article 169 par 4 of the Constitution of the Republic of Poland local government units may autonomously create the content of the statute determining their organizational structure and operational mode[26]. Nevertheless, a symbolic expression of the autonomy of local government units results from the fact that the legislator has granted them the right to define their own coat of arms, to erect monuments or grant honorary citizenship and to decide on the names of streets and squares.

Besides, it should be noted that pursuant to Article 165 par 2 of the Constitution of the Republic of Poland, the autonomy of local government units is subject to court protection. This issue is confirmed in Article 11 of the European Charter of Local Self-Government. Pursuant to the disposition of this document, local communities have the right to appeal, in the mode of court proceedings, in order to ensure the free execution of rights and respect of local governance principle, stipulated both in the Constitution of the Republic of Poland and in internal law. The contents of these provisions are repeated in local government acts, so due to this fact, a local government unit may assert its rights in an independent and impartial court, in the situation when they have been infringed upon due to the breach of the autonomy principle. This means that a local

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[24] Besides, it is worth explaining that without one's own property and constant inflow of funds from taxes, it would be immensely difficult to speak of the autonomy of local government, since local government funds may not be limited only to subsidies from the state budget. There is no doubt that such a situation would lead to effective dependency of local government units on central administration. Nevertheless, one should note that the funding of tasks from own income is not guaranteed at each level of local government in a proper way. Some authors explain that: "Whereas the communes, including also towns with district rights, are usually capable of performing the assigned tasks regardless of the subventions and subsidies due to considerable property obtained through municipalization, the actual income of districts and provinces is obviously too scarce to balance the subventions and subsidies from the state budget, which are often too low. The very fact that local government budgets rely on subventions and subsidies as well as on share in the taxes collected by the state means that local government units are in this respect devoid of actual autonomy"; See H. Izdebski, *Samorząd terytorialny. Podstawy ustroju i działalności* [Territorial self-government – Bases of the political system and activities], Warszawa 2011, pp. 134–135.

[25] This is shown in the following provisions: Article 40 par 1 of Act on commune self-government, Article 40 of Act on district self-government and Article 89 par 1 of Act on province self-government. Furthermore, one should observe that granting local government units rights to create the law brings the legislator closer to the situations regulated by law, which in turn grants better knowledge on any needs and increases the effectiveness of the measures taken.

[26] "The internal organizational structure of units of local government shall be specified, within statutory limits, by their constitutive organs".

government unit has the right to a court proceeding in the broadest meaning. Thus, legal provisions should be interpreted in such a way, so that they would effectively respect the right to court. Therefore, what is of crucial importance is the contents of Article 166 par 3 of the Constitution of the Republic of Poland, which guarantees court protection of the autonomy of local government units through solving competence related disputes between local government bodies and central government administration by administrative courts, while pursuant to Article 191 par 1 point 3 of the Constitution of the Republic of Poland, it is possible to file a request to the Constitutional Tribunal[27].

7. Principle of subsidiarity and local government units

When considering the issues related to the essence of local government, one must not omit the fact that the principle of autonomy related to local government units corresponds to the principle of subsidiarity. For this reason, it seems appropriate to observe the provision included in the Preamble to the Constitution of the Republic of Poland. The constitutional provision indicates that: "We, the Polish Nation – all citizens of the Republic (…) hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities". In the Constitution of the Republic of Poland it has also been marked that the principle of subsidiarity constitutes "the unshakeable foundation of the Republic of Poland". Therefore, if the principle of subsidiarity assumes respecting the initiative or autonomy and freedom of action belonging to the individuals as related to the community, or such assigned to smaller communities with relation to greater communities, then one may say that it reinforces the principle of decentralization of public power by guaranteeing the performance of public tasks assigned to local government units[28].

[27] At the same time, it is worth noting that Article 3 § 2 point 7 of Act of 30 August 2002 – Law on the proceeding in administrative courts (Journal of Laws of 2002, No. 153, item 1270 as amended) explains that: "Controlling the activities of public administration by administrative courts includes passing judgments related to complaints about the acts of supervising the activity of local government bodies". Furthermore, it should be added that the guarantee of the court protection of the autonomy of local government units is the possibility of filing a common complaint pursuant to Article 101 of Act on commune self-government.

[28] Besides, it should be added that the essence of the principle of subsidiarity is to indicate both the secondary and the ancillary role of the state with regard to lower level communities. Therefore, state intervention in the affairs of citizens or their self-governing communities is allowed, but only in the situation when difficulties occur in performing assigned tasks. Therefore, if there is a multi-level structure of local government, then if it is impossible for lower level local government units to perform their tasks, then their competences with regard to such performance are taken over first of all by higher level local government units and if such performance exceeds their capabilities as well, then central administrative bodies can and should intervene. Thus, considering the principle of subsidiarity, one should point out that

Analysing the issue related to the principle of subsidiarity, one should note that it has been formulated by Catholic social science, contained in the encyclical of Pius XI entitled *Quadragesimo Anno*[29] and in the encyclical of John XXIII entitled *Mater et magistra*[30]. This principle has also been mentioned in the Catechism of the Catholic Church[31]. One can therefore say that the principle of subsidiarity stipulated intervention of a community or communities, starting from the bottom levels, as well as of other institutions of the civic society in the situation when a unit is not able to cope on its own. On the other hand, in the legal aspect, the principle of subsidiarity assumes that legal regulation of the citizens and their groups or unions should ensure maximum autonomy and participation in performing public tasks. This means that state as well as other communities should be helpful and supportive towards individuals, families and smaller communities. Furthermore, they should not take over the tasks that can be performed there. It means that the principle of subsidiarity stipulates that the maximum possible range of tasks should be performed at the level that is closest to the citizen, whereas higher level authority should support and complement the activity of lower level entities if they are autonomous, for the common good.

It is also important to indicate the contents of Article 4 par 3 of the European Charter of Local Self-Government, which offers an opinion on the principle of subsidiarity. It results from its disposition that: "Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy". The principle of subsidiarity has been elaborated on in Article 163 of the Constitution of the Republic of Poland, where there is an indication that there is an "allegation of competence" in favour of the local government, because:

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a greater community should only take up those tasks that the smaller community cannot perform on their own. This means that greater communities can and should take over the tasks from smaller communities, but only in the situation when the capabilities of the smaller communities prove inadequate. Therefore, public administration bodies should intervene only when a problem cannot be solved within the civic society.

[29] Pius XI, *Quadragesimo Anno*, [in:] *Dokumenty nauki społecznej Kościoła* [Documents of Catholic social teaching] (ed.) M. Radwan, L. Dyczewski, A. Stanowski, vol. 1, Rzym–Lublin 1987, pp. 69–101.

[30] John XXIII, *Mater et magistra*, [in:] *Dokumenty nauki społecznej Kościoła* [Documents of Catholic social teaching], (ed.) M. Radwan, I. Dyczewski, A. Stanowski, vol. 1, Rzym–Lublin 1987, pp. 221–268. In the encyclical it has been written that: "state authorities may only order what – as may be presumed – leads to the common benefit of the citizens. Therefore, taking care of the wellbeing of the whole state, public authorities should take the utmost care of balance and even development of agriculture, industry and services, as far as possible. While doing so, one should stick to the rule that the inhabitants of the regions where development is slower should feel as if they were the main originators of economic, social and cultural progress. Those deserve to be called citizens who contribute significantly to the work on improving their own fate. (…) This is why – pursuant to the principle of subsidiarity – public authorities should support and incite the initiative of individual people so as to allow them to perform their planned tasks, if possible".

[31] *The Catechism of the Catholic Church*, canon 1894, Poznań 1994, p. 440. In the document it is indicated that: "pursuant to the subsidiarity principle, neither the state, nor any other greater community should replace the initiative and responsibility of the people and intermediary institutions".

"Local government shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities". Therefore, one should note the provision of Article 164 par 1 and 3 of the Constitution of the Republic of Poland, which explains that this "allegation of competence" may be transferred to a lower level by establishing it in favour of a commune and referring to it as the basic unit of local government, but at the same time guaranteeing court protection of the autonomy of such a unit.

At the same time, it is worth adding that the "allegation of competence" in favour of the commune has been mentioned in the dispositions of Article 6 par 1 and 2 of the Act on commune self-government. The provision of par 1 indicates that: "The scope of communal activity shall include all public affairs of local significance, not reserved by the statutes to other bodies". On the other hand, par 2 of this provision explains that if the statutes do not stipulate otherwise, decisions on such affairs shall be the competence of the commune[32]. Thus, the view concerning the transfer of tasks to the higher levels of local government, or eventually, to the central administration, is correct. There is no doubt that the adopted solution indicated that the legislator assigns basic tasks and competences as close to the citizen as possible, because he sees it as the need to involve the citizen in the affairs directly related to his or her immediate environment. Therefore, it seems legitimate that public power may incite, support or complement the initiative of local and regional units and even communities in the situation when they cannot individually cope with the fulfilment of particular tasks. Nevertheless, public authority must not hinder those communities in their initiatives or tasks they undertake.

8. Conclusion

Summing up the deliberations concerning the essence of local government units in the Constitution of the Republic of Poland of 1997, one should emphasize that local government is an important element of a democratic state system. Definitely, its functioning depends on the extent of the citizen's involvement and on the level of their knowledge and social awareness. Even though, the issue related to the local community's participation in public decision-making processes is connected with voluntary, personal and active participation in the affairs related to the citizens' own immediate environment. There is no doubt

[32] Furthermore, it is worth pointing out that a commune, as a basic unit of local government and being closest to the citizen, should definitely be equipped with the broadest possible scope of tasks, provided that it will be able to perform these tasks effectively. Besides, one should consider the situation when a commune is not able to cope with particular tasks. Then, it is legitimate to claim that in such a situation the matter should be transferred to higher levels of local government, but only as a last resort can it be forwarded to the central administration.

that the participation of the local community in public life contributes to the shaping of a civic society.

In a democratic state, local government has a positive role, if only due to the fact that it is a social function, which involves transferring public administration in the hands of the properly organized social groups, aware of their own capability and ready to assume responsibility for performing public tasks. Such a solution ensures the best way of exercising the principles of decentralization and subsidiarity. Therefore, the people concerned enforce or impact the administration within the operation of public administration, which in turn must take into account the local levels. In the light of the above, there is no doubt that such a solution reinforces democratic institutions of the state and gives the citizens a chance to exert effective influence on public affairs. Moreover, it causes more efficient management of resources that these social groups have at their disposal and it allows for the evaluation of capabilities by adjusting actions to the actual needs of the local community.

LOCAL GOVERNMENT IN THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 1997

Summary

Decentralization understood as the absence of hierarchical subordination makes a basic condition of district government in Poland, contributing to creating the model of democratic law–governed state. On account of that structure of local authority, including district government connected with the concept of decentralization is an expression of political principles adopted in Poland after 1989. Related conceptions have been also pointed out. The nature of local authorities, their divisions created for the need of both governmental and self-government administration have been explained. Analysing issues connected with the local administration, the principle of subsidiarity has been mentioned – being widely used in the Polish legal system as well as in catholic social learning. Local government is form of man's involvement in public matters of a local character. Owing to this, it contributes to the formation of civil society that assumes common and conscious articulating, advancing and defending common interest, needs and aspirations. The problems of self-government, of looking into the needs of local communities, belong to the citizens themselves. Owing to this, those who are involved immediately have a real influence on the course of public matters.

SAMORZĄD TERYTORIALNY W KONSTYTUCJI RZECZYPOSPOLITEJ POLSKIEJ Z 1997 ROKU

Streszczenie

Decentralizacja, rozumiana jako brak hierarchicznego podporządkowania, jest podstawowym warunkiem podziału administracyjnego w Polsce, przyczyniając się do tworzenia modelu demokratycznego państwa prawa. Baza tej struktury władz lokalnych, w tym okręgów samorządowych związanych z koncepcją decentralizacji, jest wyrazem zasad politycznych przyjętych w Polsce po 1989 roku. Powiązane koncepcje zostały także wskazane. Charakter władz lokalnych, ich oddziały utworzone na potrzeby zarówno rządowej, jak i samorządowej administracji, zostały tu również objaśnione. Analizując zagadnienia związane z lokalną administracją, omówiono tu także zasadę pomocniczości – znajduje ona zastosowanie w polskim systemie prawnym, jak i katolickiej nauce społecznej. Samorząd jest formą zaangażowania człowieka w sprawy publiczne o charakterze lokalnym. Dzięki temu przyczynia się do tworzenia społeczeństwa obywatelskiego, które zakłada wspólną i świadomą artykulację, pogłębianie i obronę wspólnych interesów, potrzeb i aspiracji.

L'AUTONOMIE LOCALE DANS LA CONSTITUTION DE LA RÉPUBLIQUE POLONAISE DE 1997

Résumé

La décentralisation comprise comme manque de subordination hiérarchique est une condition basique du schéma administratif en Pologne ce qui contribue à la création du modèle de l'état démocratique de droit. La base de cette structure des autonomies locales, y compris les régions autonomes liées à la conception de décentralisation, exprime des principes politiques acceptés en Pologne après 1989. Ces conceptions attachées y ont été aussi démontrées. Le caractère des autonomies locales, leurs filiales créées aussi bien aux besoins de l'administration gouvernementale que locale y ont été expliqués. En analysant les questions de l'administration locale, on y parle aussi du principe d'assistance qui trouve l'application aussi dans le système légal polonais que dans la science sociale catholique. L'autonomie est une forme de l'engagement de l'homme aux affaires publiques du caractère local ce qui contribue à la création de la société des citoyens qui implique l'articulation commune et consciente, l'approfondissement et la défense des intérêts communs, des besoins et des aspirations.

МЕСТНОЕ САМОУПРАВЛЕНИЕ В КОНСТИТУЦИИ РЕСПУБЛИКИ ПОЛЬША С 1997 ГОДА

Резюме

Децентрализация, понимаемая как отсутствие иерархической соподчиненности, является основным условием административного деления в Польше, обуславливающим создание демократической модели правового государства. Базовое основание данной структуры органов местного самоуправления, в частности, муниципальных органов, действующих на основе концепции децентрализации, является выражением политических принципов, принятых в Польше после 1989 года. Указаны также сопряжённые концепции. Характер органов местного самоуправления, их подразделения, созданные для нужд как правительственной, так и муниципальной власти, также нашли здесь своё толкование. Анализируя вопросы, касающиеся местных органов власти, автор раскрыл суть принципа субсидиарности – он находит своё отражение как в польской правовой системе, так и в католическом социальном учении. Самоуправление является формой участия человека в решении общественных вопросов местного характера, благодаря чему способствует формированию гражданского общества, которое предполагает наличие совместного и сознательного акцента, расширение и защиту совместных интересов, нужд и запросов.