ECONOMIC AND ENVIRONMENTAL STUDIES No. 4 OPOLE 2003

Ernest KNOSALA*

THE PRACTICE OF ASSESSING UNITS OF LOCAL SELF-GOVERNMENT IN THE LIGHT OF RECENT LEGISLATIVE CHANGES

1. Constitutional grounds for assessing units of local self-government

The constitutional regulation of local self-government is contained in Chapter 7 of the Constitution of the Republic of Poland. In Article 171 Par. 1 it is explicitly stated that actions by a local self-government shall be subject to assessment in terms of their *legality*. Therefore, the constitution clearly excludes any forms of purpose-related assessment. Besides, the constitution introduces a qualified criterion of assessment, *i.e.* flagrant violation of the constitution or a statute, which is a ground for the dissolution of an organ of local self-government. In the literature it is pointed out that there is a controversy concerning the interpretation of the notion „flagrant violation of the law". However, in the light of jurisdiction it may be stated that a decision flagrantly violated the law, firstly if the legal regulations arouse no doubt with respect to its understanding, secondly the content of a decision is a negation of the whole or part of the binding regulations [Borkowski, 1997, 102]. This notion of a flagrant violation of the law was formed on the basis of the Code of Administrative Practice. Considering the problem from the perspective of constitutional law, this code can be supplemented with additional principles. This obviously concerns the subject of flagrant violation of the constitution and statutes. According to the constitution, the basic qualities essential to a democratic country are based on the rule of law, the violation of which, especially flagrant, may disturb the peaceful and stable

* Prof. Ernest Knosala, University of Silesia, Faculty of Law and Administration.

existence of society [Knosala, 1998, 86]. Undoubtedly these qualities include equality before the law, rights of national minorities, freedom of religion, conscience, tolerance etc.

2. Criteria for undertaking assessment in constitutional statutes

The subject matter of this section is solutions in the scope of assessments in self-government statutes [Dziennik Ustaw, 1996, 1998a, 1998b] and the Act on Government Administration of Voivodeships [Dziennik Ustaw, 1998]. Regarding the former – as compared to the constitution – the grounds for dissolving a constitutive organ which is a local self-government unit, it should be stressed that constitutional statutes on self-government adopted another criterion. In the light of the statutes the grounds for dissolving an organ is a repeated, yet not flagrant, violation of the constitution or statutes. In my opinion it is not merely another wording of the same premise and there is an essential content-related difference. Flagrant violation of the constitution or statutes is *qualitative*, while *repeated* violation is of a *quantitative* character. I believe the statutory solutions are at variance with the constitution.

The basic legal measure of assessment is the invalidation of a resolution by a municipal organ which is executed ex tune, *i.e.* the statute is deemed to be invalid ever since its implementation. This measure is used when a statute is against the law. A significant aspect of this measure is the principle introduced by way of a recent amendment, which states that according to the law the execution of the invalidated statute is to cease on the date of the receipt of the appropriate decision.

In my opinion the amendments to the self-government statutes concerning so-called prescription are significant. In the original version the statutes mentioned above state that resolutions by organs of units of local self-government cannot be invalidated more than a year after their adoption, even if there are premises for their invalidation. I have strongly criticised this solution, emphasising the disagreement with the idea of the rule of law which occurs when an illegal statute is in force [Knosala, 1998, 58–9]. I have argued for the invalidation of such a resolution with ex nunc effect, *i.e.* for its repeal. The solution adopted in recent amendments is in alignment with this point of view. If there are any premises for invalidating a resolution and a year has passed since its adoption, the administrative court may decide on the incompatibility of the resolution with the law. The resolution becomes invalid on the

date of the decision of its incompatibility with the law, in other words it is repealed.

Analysing the development of self-government legislation and in particular amendments of constitutional statutes and above all the Act on Municipal Self-government (previously called local self-government), one can infer that the biggest changes have affected the so-called anti-corruption regulations and in particular their number has considerably increased. In the original version of the Act of 1990 on Local Self-government there were no such regulations whatsoever. This was due to the fact that the authors of the first act on self-government was characterised by an idealistic approach to the institution of local self-government, as they believed that self-government is a universal remedy for any irregularities brought about by government administration. Besides, they also idealised future self-government officials, assuming that they would all be honest and law-abiding and driven by the public good. However, practice differs from this ideal. It is worth quoting a warning made by Professor Stanisław Kasznica, a pre-war academic of the University of Poznań, who says: "Self-government in general and local self-government, in particular at its lower levels, is an environment in which corruption, abuse of office, profitable private dealings will often flourish under cover of the public good [*Polish administrative law...*, 1947, 76]."

Coming back to the primary line of our considerations, it should be stressed that the anticorruption regulations did not define any effective sanctions, for instance when a councillor's mandate has expired or when premises to dismiss a member of the board arise. The expiry of a mandate or the dismissal of a member of the board requires a resolution of a constitutive organ of a unit of local self-government. Constitutive organs frequently did not adopt any appropriate resolutions. It was necessary to introduce a special measure of assessment, namely the substitutionary order.

The Act on Municipal Self-government is deprived of purpose-related assessments which cover the execution of tasks. The assessments are based on the criterion of economy, purposefulness and reliability and the legal powers of such assessments were to repeal a resolution adopted by an organ of a municipality and eventually issue a substitutionary order by the voivode (president of a region).

The Act on Government Administration in a Voivodeship introduces the concept of *entrustment*, which means that a voivode may entrust some matters within his competency, to units of local self-government. These matters are not executed by organs of units of local self-government on behalf of the voivode (Article 33, Par. 1). This concept significantly differs from the order, because units of local self-government

carry out substitutionary orders on their own behalf. Therefore, substitutionary orders are a form of decentralisation, while entrustment is a form of deconcentration. This undoubtedly affects the practice of assessment. Firstly, the scope and principles of control held by the voivode over the appropriate execution of assignments. Secondly, the voivode can prevent the execution of a resolution of an organ of a local self-government unit, pointing out its failures and setting the date of its next adoption. If the terms specified by the voivode are not met, he can repeal the resolution and issue a substitutionary order. What is characteristic, the act does not indicate any criteria of assessment leaving it at the voivode's discretion. However, on the other hand, a substitutionary order is subject to appeal to the administrative court.

3. The organs of control

The original concept of the structure of organs carrying out control (assessment) assumed that some organs of control should include self-government units. Thus, initially the composition of regional audit chambers was partly set up by self-government *sejmiks* (parliaments) and in part by the Prime Minister. Self-government appeal committees were originally appointed by self-government *sejmiks*. As a result of the development process of the legislation, these organs were given the status of organs of government administration. The members of these organs are appointed by the Prime Minister with only limited participation (submitting motions) from the structures of local self-government.

4. The problem of conflicts within public administration

In the course of constructing legal norms (legal institutions) the legislator should always bear in mind the fact that the normative solutions adopted should not themselves be the source of conflicts [Ohlinger, 1982, 239 ff.]. I would like to point out here two sources of possible conflicts.

1. The Polish system of public administration is structured on the basis of dualism. This can clearly be seen in the structure of voivodeship administration. Government administration (associated administration headed by the voivode) and self-government administration (sejmik of the voivodeship, board, marshal of the voivodeship) functions within a voivodship. Their competencies are not entirely separate. This is the first natural source of conflicts. Another source of conflicts is the natural

expansionism of organs, which aim to extend their scope of power and prestige.

2. One source of natural conflicts is the system of joint administration. What binds this system is the principle of double subordination. This is based on the assumption that the head of a structure being part of the joint administration is subordinate horizontally to the voivode, the staroste, the poviat board and vertically to his direct superior. It is assumed that the horizontal line denotes assignments while the vertical line specifies methods of their implementation. There is no doubt that separation of these two spheres is very difficult and I believe impossible. Such solutions inevitably lead to conflicts which will consequently cause erosion of such administrative structures [Knosala, 1983, 17–8]. The first symptom of such a situation is the removal of sanitary inspection authorities from the joint system of poviat administration.

Literature

Borkowski, J., *Invalidity of an administrative decision*, Łódź–Zielona Góra, 1997.

Dziennik Ustaw, No. 13, Item 74, *Act of March 8, 1990 on municipal self-government*, 1996.

Dziennik Ustaw, No. 91, Item 575, with later changes, 1998.

Dziennik Ustaw, No. 91, Item 576, *Act of June 5, 1998 on voivodeship self-government*, 1998a.

Dziennik Ustaw, No. 91, Item 578, with later changes, *Act of June 5, 1998 on poviat self-government*, 1998b.

Knosala, E., *Legal control systems in public administration*, Katowice, 1998.

Knosala, E., "Concepts of the organisation of regional administration in Poland", in: *Prace Naukowe Uniwersytetu Śląskiego*, 563, Katowice, 1983.

Ohlinger, T., *Methodik der Gesetzgebung. Legistische Richtlinien in Theorie und Praxis*, Wien–New York, 1982.

Polish administrative law. Notions and principal institutions, Poznan, 1947.