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THE LEGAL POSITION OF MONOCRATIC TERRITORIAL LOCAL GOVERNMENT ORGANS

All the laws defining the territorial system of local government [Dziennik Ustaw, 2001, 2001a, 2001b, 2001c] distinguish two basic local government organs: legislative organs, which include municipal councils (*rada gminy*), district councils (*rada powiatu*) and voivodship (provincional) parliaments (*sejmik wojewódzki*), and executive organs, the role of which are fulfilled by appropriate boards. Besides these organs, the laws mentioned above do not define any other organs of self-government apart from auxiliary organs such as, for instance, suburb (town) councils, suburb (town) boards, estate councils, etc. The common and characteristic feature of these organs is their collegial character. Therefore, the decisions they make must take into account the necessity of a quorum and must be accepted by a majority of votes as prescribed by the appropriate regulations.

Besides these collegial organs, in particular self-government units there are also some monocratic organs, such as village officers (*wójtowie*), mayors (*burmistrzowie*), city presidents (*prezydenci miast*), district aldermen (*starostowie powiatowi*) and marshals (*marszałkowie*). As I have mentioned above, the legal system does not consider them to be organs of particular self-governments in a direct way. On the other hand, there are no regulations which would explicitly negate the role of these subjects as self-government organs. It should be stressed, however, that legislature is not clear in this respect since both the Municipal Self-Government Law (MSGL) and the District Self-Government Law (DSGL) call them "a municipal organ" and "a district organ" respectively. In regard to village officers, this is a consequence of Art. 102 of

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the CSGL, which says that the rules regarding the division of supervision of municipal activity cannot be applied to individual decisions made by municipal organs, their unions or self-government colleges of appeals (*samorządowe kolegia odwoławcze*). The plural used in this rule ("municipal organs") means that the legislature indicates here at least two municipal organs having the right to administrative decision-making. Since such decisions – as a rule – are made by the village officer and – as an exception – by the municipal board, then the content of this rule in connection with Art. 39, § 1 of the CSGL may be understood in the following way: even though the village officer has not been openly called a municipal organ in the chapter "Municipal Authorities", they remain so due to the fact they make administrative decisions. If so, they are, doubtless, also organs of public administration, since they possess all the traits of an organ stipulated in the legislation. The same formulation in regards to the district alderman is contained in Art. 89 in connection with Art. 39 of the DSGL. However, the Voivodship Self-Government Law (VSGL) lacks such a formulation.

The legal position of monocratic territorial local government organs is regulated by the legal system in chapters stipulating the powers of a given self-government. It can be said, therefore, that they are also – alongside legislative and executive organs – included in these authorities. Primarily, they fulfil the functions of board chairpersons and exert a fundamental influence on the selection of other board members. This approach, introduced in 1995 in Art. 28, § 3 of CSGL [Dziennik Ustaw, 2001],[1] has been accepted by other self-governments. According to this approach, the appropriate council (or voivodship parliament) elects the deputies of the board chairperson and other members of the board. This rule is also applicable in the case of a board chairperson of a union of municipalities.[2] It is not applicable, however, in the case of a board chairperson of a union of districts due to a lack of a clear system regulation. In the latter case, the procedure of selecting the board members should be regulated by the rules and regulations of a particular union. Finally, it should be emphasised that it is the board chairpersons who organise the work of their boards, manage the current business of a given self-government unit and represent it outside, and, in emergencies connected with a direct threat to the public interest, act on behalf of the board, however, without the possibility of making any rules pertain-

[1] In the meaning of the law of 29 September, 1995, on the amendment of the Territorial Self-government Law and some other laws [Dziennik Ustaw, 2001].

[2] "For the union of communes board chairperson, the rules regarding the village officer or mayor are applicable" [Dziennik Ustaw, 2001].

ing to the observance of regulations. They have also an obligation to present acts of legislative organs to supervisory organs within seven days of the date they are passed. The alderman, moreover, is the supervisor of the district community services, inspectorates and policing (Art. 35, § 2 and 3 of the DSGL). Executing this authority, the alderman – after consulting the voivod (*wojewoda*) – appoints and dismisses officers of these units, approves their operational programmes, co-ordinates joint operations of these units within their district, orders – in justified cases – inspections of the units, or even manages their operation. It should also be added that until 30 May, 2001, the alderman had, in specifically prescribed circumstances, the authority to call a session of the district council (Art. 15, § 3 of the DSGL).

As can be seen, these examples of the competencies of board chairpersons stemming from the legal system makes one recognise them as self-government organs even though the laws discussed above (with some indicated exceptions) do not indicate this unequivocally.[3] We also have to stress here that the legal position of these organs in districts (*powiat*) and voivodships (*województwo*) has been patterned on the legal position of the village officer or mayor of a municipality. In the last few years, with the CSGL being in force, this position has been strengthened by, among other things, granting the village officer the right to create a so called "author's" board or by making their removal from office by the board more difficult. One of the projects of the amendments to the CSGL even stipulated direct election of the village officer or mayor, which has only recently been implemented.[4] It seems justifiable, therefore, to discuss the position of this organ in view of constitutional law and the bills mentioned and also by taking into consideration the views on this topic formulated by court jurisdiction and administrative law. These remarks will also be significant in defining the legal position of the alderman and the voivodship marshal.

The 8 March 1990 Law on the Change of the Constitution of the Republic of Poland [Dziennik Ustaw, 1990], amending the text of Art. 45 of the 1952 Constitution asserted, among other things, that the municipal council (*rada gminy*) elects the municipal executive organs. As can be seen, the law uses the plural here in reference to the municipal execu-

[3] The problem of recognising the village officer or mayor as "a municipal organ" or even "a municipal executive organ" has caused doubts from the very beginning, particularly at the stage of setting up the rules and regulations regarding municipalities [Z.Z., 1991, 14].

[4] The idea of a direct election was proposed by the Union of Polish Towns and Cities (Związek Miast Polskich) as early as 1991. Presently, this issue is regulated by the bill of 20 June, 2002 [www.sejm.gov.pl].

tive organs; so consequently, by applying a grammatical interpretation of this regulation and referring back to the content of the CSGL, we may conclude that the municipal board and village officer or mayor are such organs regardless of the formulation contained in Art. 26 of the CSGL which defines just one municipal executive organ, that is the board. Neither the council commissions – as its internal organs – nor the municipal council chairperson can be considered to be such organs. Also, Art. 40 of the law of 22 March on the General Organs of Local Government Administration [Dziennik Ustaw, 1990a] makes provision for the possibility of delegating responsibility to take decisions in the range of the competencies of the regional office officer (*kierownik urzędu rejonowego*), left no doubts that such responsibility may be conferred to "municipal organs situated within the area of the office's operation." This law, therefore, also clearly treats a village officer or mayor as a municipal organ authorised to make administrative decisions in accordance with Art. 39, § 1 of the territorial self-government law operative at that time.

We cannot find any definitions in particular laws of the village officer or mayor as a self-government organ. Only in reference to administrative decisions did these laws either clearly confer to them competencies to make administrative decisions or use general terminology ascribing these competencies to municipal organs or municipalities themselves without indicating a particular competency of a specific municipal organ. One can also find even more laconic expressions like "the appropriate organ of territorial self-government", which did not in any way define the legal position of particular municipal organs: one hardly knows which municipal organ (including the village officer) is eligible to perform a given legal operation. It ought to be stressed here that the term "territorial self-government organ" was defined in 1990 in Art. 5, § 2, Point 5 of the Administrative Procedure Code (APC) [Dziennik Ustaw, 2000] as a very wide term encompassing municipal organs, union of municipalities' organs or self-government colleges of appeal (*samorządowe kolegia odwoławcze*). Due to such a vague legal definition, establishing an organ's competencies in a given field proves extremely difficult. It was not until the December 1998 amendments to the APC that the village officer (mayor, the city president), the alderman and the voivodship marshal were recognised as territorial self-government organs and thus they were called – alongside councils and boards – organs of the municipality, district and voivodship, respectively. It is regrettable, however, that the laws on the system of self-government still do not state this clearly.

The contentious problem of regarding (or not) the village officer to be a municipal organ has been reflected in the literature and court jurisdiction. It should be admitted, however, that differences in viewing the posi-

tion of a village officer or mayor are not that great. Boć and Miemiec seem to fully recognise village officers and mayor as municipal organs also arguing that "the problems of terminology, carelessly ignored in laws on territorial self-government, has actually become a significant problem. By placing the municipal council, board and mayor in the same context, we cannot find a title binding all three organs together" [Boć, 1998, 186]. The authors criticised, at the same time, the lack of explicitly recognising a municipal officer or mayor as a municipal organ by the law. This view has been shared by Janku, who argued, that in the light of the regulation enabling municipal officers to make administrative decisions, they may be regarded as a municipal organ since "it is hardly defendable to treat a municipal officer's competencies as the competencies of a board chairperson." In this way, the author has very clearly separated a municipal officer's competencies from the same person's competencies as the board chairperson [Janku, 1998, 112]. This view is completely justified.

Observing the inadequacies of legal regulations in this respect, Agopszowicz concurs in the opinion that the situation of a municipal officer or mayor in making administrative decisions is so particular that it permits recognising them in a doctrinal sense as being a municipal organ, with the reservation that the CSGL does not use such a notion [Agopszowicz et al., 1997, 34]. Elsewhere, the author does not go that far, seeing in a municipal officer some traits of a municipal organ simply in the range of administrative decision-making from his/her sphere of assigned tasks. A municipal officer is therefore in this respect a municipal organ due to "some features of independence" [Agopszowicz, 1997, 34] which he/she can demonstrate. Ochendowski, in turn, asserts that, apart from fulfilling the function of board chairperson, a municipal officer possesses his/her own competencies [Ochendowski, 1996, 218]. The author does not explain in detail whether he means the municipal officer's competencies stemming simply from law on self-government or from particular acts as well. It seems, however, that a wider sense is at stake parallel to the notion of "administrative organ" in administrative law. Elsewhere [OSP, 1992], the author, following Pater [1990, 56], calls the municipal officer or mayor "a self-government administrative organ." However, he does not speak decisively for recognition of the municipal officer as a municipal organ. His view has been shared – it seems – by Niewiadomski and Szreniawski, who argue that the municipality officer is a "de facto" municipal organ [Niewiadomski and Szreniawski, 1991, 51], by Leoński [1998, 91], who asserts that a municipal officer is a monocratic organ with its own competencies, and by Zimmermann [OSP, 1993] who, in addition, indicates the duality of the a municipal officer's legal position as board chairperson and administrative organ.

Finally, Adamiak and Boć [1998, 183] recognise a municipal officer or mayor as a one-person municipal organ.

Also, court jurisdiction in the matter discussed above is not unequivocal. Although the Supreme Court (*Sąd Najwyższy*) and the Supreme Administrative Court (SAC – *Naczelny Sąd Administracyjny*) have not undertaken this problem directly, it was touched upon in some places as if "by the way". The most radical view – it seems – against recognising a municipal officer or mayor as a municipal organ was voiced by the SAC (*NSA*) in its decision of 13 August, 1991 [OSP, 1992a], which recognised only the council and board as municipal organs, whereas a municipal officer was described as a municipal representative. The SAC made a similar declaration in the resolution of 30 September, 1996, arguing that "even though a range of competencies has been conferred to a municipal officer or mayor [...], it is difficult to assign to them the character of an organ in isolation from the municipal board and thus realising any autonomous tasks" [ONSA, 1997b].

A completely opposite standpoint was presented by the SAC in the resolution of 18 September, 1995, when it stated that "the municipal officer [...] is a municipal organ at least in the sphere of the activities of territorial self-government, which encompasses dealing with individual matters decided by administrative decisions. As an organ eligible to make administrative decisions, they have their own autonomous competencies and duties, which are separate from any other municipal organs, including the municipal board, and which stem from the rules of the executive law [ONSA, 1995]."[5] A similar standpoint was also taken by the SAC in its decision of 26 November, 1991, in which the court, allowing the possibility of the municipal board making administrative decisions, stated that "the municipal board and the municipal officer (mayor, city president) are separate municipal organs possessing their specific competencies. Therefore, one municipal organ cannot trespass into the competencies of another municipal organ. moreover, the operation of one municipal organ cannot be recognised as the operation of another municipal organ [ONSA, 1992]." Although the decision discussed above was meant to emphasise the division of competencies of administrative organs to make decisions, nevertheless the municipal officer was described there as a municipal organ in a way which left no doubts to any commentators. In turn, in one of the decisions, the municipal officer was recognised as a one-person municipal organ [ONSA, 1996].[6]

[5] In an earlier decision the municipal officer was recognised as a public administration organ separate from the board [ONSA, 1994].

[6] According to the SAC's decision of 10 january, 1995, "the binding regulations do not envisage a legal-formative function of one-person municipal organs" [ONSA, 1996].

SAC's declaration of 9 December, 1992, formulated in a similar tone, asserted that "a municipal council shall be a constitutive organ due to the method of its election, and the remaining organs mentioned in Chapter 3 of the Law on Territorial Self-government shall bear the character of executive organs. Its board, selected by the municipal council, shall be such an executive organ – as shall the collegial executive organ, and the municipal officer or mayor (city president) shall be a one-person organ [OSNCP, 1993]." Also, in the commentary to its decision of 15 April, 1996, the SAC, discussing the principles of the cession of the judiciary competencies of a municipal officer or mayor to the officers organisational units of a municipality, asserted that "[s]uch authorisation is a cession [...] of the competencies of an appropriate executive organ of the municipality (municipal officer, mayor, city president) to the officer of a organisational unit [Wokanda, 1996; ONSA, 1997]."[7] The SAC thus clearly refers to the term "municipal executive organs" used in the Amendment to the Constitution of the Republic of Poland of 8 March, 1990. Finally, in the Act of 20 May, 1996, the SAC, referring to this standpoint, states that the meaning of "municipal organ" encompasses not only a municipal council and board "but also a municipal officer (mayor or city president) [ONSA, 1997a]."

As can be seen, the problem of recognising a municipal officer or mayor as a municipal organ has stirred controversies both in theory and practice. A negative evaluation of this fact cannot be changed by the argument that some theoreticians as well as representatives of the judiciary – while not recognising municipal officers or mayors as municipal organs – agree that they can be recognised as municipal organs, at least in the range in which they make administrative decisions. It should be stressed that a municipal officer (or mayor) performs his/her duties in various legal forms. Nevertheless, the setting of administrative acts retains a dominant position in day to day activities. What is more, as Leoński rightly observes, within the range of authorising a municipal officer to set individual legal acts, one can not only find the right to make administrative decisions in APC (*kpa*) mode, but also the right to issue other individual acts directed "outside", according to procedures separate to the APC [Leoński, 1998, 91]. Also, representing the municipality outside and managing its business (Art. 31 of CSGL) means that, despite the imperfections of the existing legal regulations, it enables recognition of a municipal officer or mayor as a municipal organ, since they possess all the traits characteristic of such an organ in the theory of administrative law. Therefore, the opinion that it is necessary to make decisions re-

[7] Also in the commentary to the 25 April 1996 decision [Wokanda, 1996], the SAC stated that in the range of

garding this matter in CSGL, which is justified by the discrepancies existing in the assessment of their legal position, both in theory and court jurisdiction, was topical until recently [Stahl, 1993, 40]. It would also allow for an easier determination of the position of municipal organs for them to conduct administrative jurisdiction. It is regrettable, then, that numerous projects to amend CSGL did not envisage such a solution, restricting themselves to even clearer divisions between two municipal organs, *i.e.* the council and board.

The legal position of a municipal officer or mayor significantly influenced – it seems – the solutions accepted in DSGL and VSGL in regard to the position of an alderman and voivod marshal. Apart from the role of chairing a board, these organs have tasks similar in their range to those of municipal officers or mayors. Some minute differences [Martysz, 1999] do not influence their legal position. However, both DSGL (except the regulation contained in Art. 89) and VSGL do not explicitly recognise an alderman or marshal as self-government organs. Thus, the postulate to clearly regulate this problem in the law on the system of self-government is current also in the context of districts and voivodships [Dolnicki, 1999, 165].

These remarks allow us to arrive at the conclusion that even though board chairpersons have not been directly recognised in the regulations of the system as organs of territorial self-government, both administrative law theory and court jurisdiction make it possible to apply this term. Their legal position designated in these laws, and also in detailed regulations and – above all – in APC, permits calling them monocratic local government organs, particularly in the range in which they fulfil their judicial functions in individual cases.

The legal position of the monocratic local government organs presented above will undergo a fundamental change, but only at the level of municipal self-government. This will happen as soon as the Law of 20 June 2002 on the Direct Election of Municipal Officers, Mayor and City President cited above has come into force, and will significantly change municipal self-government law. As a result, a municipal officer, mayor and city president will become executive organs of their municipalities instead of their boards. At present the municipal council is the legislative organ and the board is the executive one. After the amendment a municipal officer, mayor and city president will perform their present competencies and, in addition, the competencies of the board, simply because the latter organ will cease to exist at the municipal level. A municipal council's legal influence on a municipal officer will also be limited, which, as a consequence, will considerably strengthen the position of an officer. For example, a municipal officer's (mayor's, city president's) deputies will not be elected by the municipal council as they are today, but they will be personally nomi-

nated by the municipal officer (mayor, city president) personally, yet the number of deputies cannot be higher than stipulated by law. A municipal council will not be able to dismiss a municipal officer according to the current rules, but only as a result of a referendum conducted in this matter and motioned by the council. A municipal officer will be able to issue by-laws in emergencies and, on behalf of the municipality, receive and manage property left in a will to the municipality.

This change of the system carries some other consequences with it, since the passing of this law requires numerous amendments to the existing regulations of executing law. All tasks and competencies belonging to a municipal council must be transferred to other organs. Two options were, therefore, considered: either all these tasks and competencies should be handed over to municipal officers (mayors, city presidents) or transferred to other organs, *e.g.* the municipal council. Analysis of the law passed shows that the former option has been chosen.

The departure from a collegial model of the executive organ in a municipality will also have some consequences in administrative jurisdiction [Martysz, 2000, 179 ff.]. In many instances, the present regulations of particular laws stipulate the necessity of collaboration between a municipal officer or mayor (city president) and the municipal (city) board. This collaboration consists of the necessity of consulting the board when examining individual cases resulting in the making of an administrative decision by the municipal officer or mayor (city president). A lack of such collaboration was a serious flaw of administrative procedure resulting in the annulment of administrative decisions. What is more, the party discontented with a municipal board's decision was able to make a formal complaint to the Self-Government College of Appeal, which guaranteed to protect the interests of this party. After the amendment, such a party will be devoid of such protection but, on the other hand, this will speed up the administrative procedure, and such a party will be able to appeal the administrative decision itself settling the matter in its entirety or partially.

It is too early to make a more complete assessment of the changes in the law on municipal self-government, yet one thing is certainly undeniable: the changes will have a fundamental influence on the system and rules of operation of a municipality and of its organs. A municipality, as the basic territorial self-government unit, will differ considerably in its internal structure from those of a district or voivodship.

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