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Independence of primary local government units in organizing and providing municipal services in the light of the European law and the Polish legal regime

Abstract

The dissertation concerns the scope of independence of the local government in defining and providing municipal services, and the analysis is based on the EU laws, French and Polish law. Using a descriptionism-based method, a review has been made of concepts connected with the operation of local government under the EU, French and Polish laws in terms of defining and providing municipal services.

Solutions existing in those legal regimes, often relating to the same elements, are differently defined or interpreted. In consequence, there is no terminological consistency already at the level of defining the key concepts for those issues, which further translates into additional disparities in their understanding and practical application.

This can to a large extent be observed in Polish law, mainly because of the focused and ad-hoc model of EU law transposition, without a systemic approach to specific issues.

The discretion points out that it is not the absence of legal solutions but to a large extent the random approach, focusing on isolate issues, to the enactment of legal regulations, often in conflict with the postulated *systemic* approach to regulating a given area or legal realm, which is the main problem creating actual legal barriers in effectively managing municipal matters.

Based on the example of the competences of the primary units of local government as entities organizing and providing municipal services, similarities and differences among those legal regimes have been presented; the existence of those similarities and differences affects both the definition, interpretation and practical application of certain concepts.

Both in the first (defining) and second (providing) instance there are rules of conduct that delineate the limits of admissibility and legal compliances of measures undertaken. Those limits are derived, on the one hand, from internal regulations concerning the position of the local government, often arising from the political system adopted in a given country,

and on the other hand, from the growing influence of the EU law. The latter is reflected not only in the increasing scope of activities covered by specific legislative acts, but also the interpretation of terms contained in those acts by the European Union institutions – often it is based on an analysis of specific factual circumstances reviewed in the light of solutions adopted in individual EU member states, and hence, embedded in their internal legal systems. What is important, because there are still difference in the internal administrative structure of Member States and the role of the EU law in this respect is limited, direct transposition of theses from the case law of the Court of Justice of the European Union to legal and factual environment in other Member States is not always appropriate, and more importantly, reasonable.

Despite the growing importance of the EU law, those regulations emphasize the powers of the Members States to provide, contract and finance public services, in particular, the special segment of general business services. Hence, the role of Members States, including local authorities in deciding about the manner of performing their services is recognized. This is a part of their national identity expressly recognized in Article 4(2) of the Treaty on European Union.

The right to local government is reflected not only in the legislation of Members States, but also follows from the European Charter of Local Self-Government signed by all European Union Members States within the Council of Europe and ratified by most of them.

Preservation of national (constitutional) identity should not be understood as respecting absolutely all national constitutional principles. If that were the case, national constitutions could become an instrument allowing Members States to liberate themselves from the EU law in certain areas, which would jeopardize the basis for the functioning of the European Union.

The area which, to a great extent, is harmonized at the EU level is public procurement, and more recently also – though to a lesser extent – concessions. Both constructs belong to a model under which the local government may provide municipal services. It is important to point out that the EU law in its present form does not oblige Members States, and hence, local government units, to provide those services, leaving them freedom in this respect. This applies to both the choice of model for providing those services and the manner, that is, whether they intend to perform those services on their own (in-house), or with the involvement of private partners. In both cases, the EU law defines criteria the fulfilment of which is a condition for applying a certain model or form of providing those services.

The dissertation discusses limits and possibilities of the definition and provision of municipal services by local government units themselves or outsourcing them, i.e., in particular, by involving private entities in their performance. Both in-house model for

municipal services provision, and any forms of outsourcing, should be undertaken on transparent conditions, having regards to competition laws, in particular, those concerning broadly understood public procurement and state aid.

A separate issue is identifying a source (sources) of solutions created at the EU level and demonstrating that though they often represent autonomous concepts, they are not developed in isolation from traditions, ideas and legal constructs of individual Members States. In other words, they reflect legal solutions that are well known and more importantly, well understood in those countries, and passing on those concepts to the EU level is the question of the impact of those countries.

A comparison of EU and national, i.e., Polish and French, solutions serves to show differences, but also to demonstrate that the EU law is often modelled on Members States' legislation. Referring to the sources, in this case, the French conceptual framework for public service (French: *service public*) helps to better understand the context, purpose and the entire environment from which a given institution has evolved. Even if at the level of the EU law it seems to exist independently, its transposition to the national law may still prove to be imperfect when deprived of such context.

Despite the strong and growing influence of EU regulations, also on the realm of local government activity (so-called europeization), we still have to remember that as part of internal structures of each of the 28 Members States of the European Union, issues related to the place and role of local government are regulated, including the choice of model for organizing and providing municipal services.

However, this means that Members States have to play the key role in structuring their internal regulations in such a way that on the one hand they would be most adequate to the national constitutional model, and on the other hand, would be consistent with the EU law requirements.

Just as a reference by a Member State to its national or constitutional identity should not prejudice obligations arising from the EU law, also in the internal legal system it will be advisable to respect different constitutionally protected values. Hence, the principle of independence of local government units is not *absolute*. Such non-absolute nature should also be a basis for reviewing the scope of other principles, including the principle of competition. The understanding and applying the principle of proportionality is of the key importance in balancing values such as – on the one hand – independence of the local government (also independence in organizing municipal services), and on the other hand, freedom of enterprise and fair competition.

The dissertation puts forward a proposition that when creating legal solutions and interpreting the already existing ones, the freedom of activity of local government should not be excessively limited, but at the same time, regulations should be developed in such

a manner that they will warrant the protection of other values recognized in a given country as constitutional.

The dissertation hopes to contribute to the advancement of the postulate expressed in the middle of the 20th century by Tadeusz Kuta for creating law on public services.