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Controlling Public Expenditure in the Light of Constitutional Standards in Poland and the Czech Republic: Selected Aspects

Abstract: This paper aims to answer the following research problem: what are the models of reasonable (proper) implementation of public expenditure arising from specific constitutional rules, and what are the standards for such spending? The authors present a thesis that the constitutional principle of legality, as well as the principle of public finance as a good which is protected constitutionally, sets general models, which consequently determine the standards of reasonable (proper) spending of public funds in the broad sense, i.e. in the context of legality and economy (purpose, economy, effectiveness and efficiency). Notably, these models and standards meet the postulate of complete financial control, i.e. at every stage of the budget procedure (budget design, planning and execution). The article uses so-called non-reactive research methods, based on the analysis of the content and availability of source information, i.e. theoretical and legal publications as well as legal regulations (especially constitutional ones) crucial from the point of view of the selected subject.

Keywords: constitutions, control of public expenditure, judicial control, legal basis of public expenditure, principle of legality

Introduction

Compared to the Constitution of the Czech Republic, the Polish Constitution regulates public finance more broadly and in a more detailed way, even given the fact that the Polish constitutional act includes Chapter 10, entitled 'Public Finance', devoted exclusively to this issue.[1] Moreover, other parts of the Polish Constitution contain problems from this perspective, e.g. regulations regarding local government units' finance (Chapter 7, Arts. 167–168). However, in the Czech Constitution, public finance is treated in very general terms, which will be discussed later in this paper. Generally, its provisions concern issues from this perspective indirectly, as exemplified by the indication in Art. 97 that the supreme control body is the Supreme Audit Office (Nejvyšší kontrolní úřad). Thus it may be stated that in the Czech Constitution, the problem of financial control appears indirectly. A parallel institution in Poland implementing the tasks of such control is the Supreme Audit Office, included in Arts. 202–207 of the Polish Constitution. However, it needs to be stated again that in relation to both of these institutions, Polish constitutional regulations are more precise than the Czech ones.

Regardless of the above observations, it needs to be emphasised that in both these constitutional acts, the issue of public funds, and also the control of their spending, remains beyond the scope of their regulation. This should not be surprising, however, since constitutional acts, due to their character, cover general and fundamental issues for the system of the state. This situation does not prevent one formulating a statement that general constitutional principles are the basis for setting a kind of model or standard for implementing public expenditure by broadly understood public authorities and structures subordinated to them, both at state and local government levels. Significantly, these models and standards will constitute reasons for financial control in the *ex ante* phase, what should be meant as checking the correctness of the actions taken to appropriate public funds (not only in the context of their legality).

Taking into account the character of *ex ante* control in relation to the spending of public funds, this is not covered by the classic definition of financial control, which consists of such actions as recognition of the facts (execution), recognition of the binding state (designation), and comparing both these elements in order to establish

1 Constitutional Act no. 1/1993 Coll., the Constitution of the Czech Republic, as amended ('Ústava České republiky'), hereinafter referred to as 'the Czech Constitution'; Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, no. 78, item 483, as amended), hereinafter referred to as 'the Polish Constitution'.

their compliance or lack of it.[2] The classic dimension of financial control does not preclude treating it more broadly, i.e. including within it actions taken to assign public funds (preparatory actions), thus at the *ex ante* stage. Ruśkowski draws attention to such a broad aspect of financial control, at the same time suggesting using the term 'public finance control' to cover the entirety of public financial management, and also including actions to improve management (e.g. revisions of plans, advisor actions, etc.).[3]

Even if one is to challenge such a broad recognition of financial control of public finance, the issue of examining the actions taken to make expenditure from public funds is crucial for two reasons. Firstly, in the formal-legal sense, this issue is determined by those models and standards resulting from the constitution, as the authors have been trying to prove. Secondly, *ex ante* checking may prevent improper use of public funds by public authorities, e.g. when a given body in the administration structure responsible for preliminary scrutiny does not accept the expenditure, or when there is a possibility to appeal against the decision, based on which public funds are designated for a given aim but before they are actually spent.

Regarding the above initial considerations, the authors present the thesis that constitutional principles of legality and public finance as a constitutionally protected good determine general models, which then determine standards of reasonable (proper) implementation of public expenditure in the broad sense, i.e. in the context of legality and economy (purpose, economy, effectiveness and efficiency). Importantly, these models and standards meet the postulate of complete financial control, i.e. at every stage of the budget procedure (budget design, planning and execution). In connection with this formulated thesis, the aim of the article is to answer the following research problem: what are reasonable (proper) models of implementing public expenditure arising from the constitutional principles indicated, and what are the standards of this implementation?

The article uses so-called non-reactive research methods, based on the analysis of the content and availability of source information, i.e. theoretical and legal publications as well as legal regulations (especially constitutional ones) crucial from the point of view of the selected subject. The structure of this paper is in two basic parts. The first relates to the analysis of the significance of the principle of legality in the context of allocating public funds by the authorities. This analysis will be mainly based on the provisions of the Polish and Czech Constitutions; statutory provisions will also be included. The second part will present the principle of economy of public funds (also called the principle of sound financial management), having its source

2 L. Kurowski, H. Sochacka-Krysiakowa, Kontrola finansowa, Warsaw 1971, p. 19 ff.

3 E. Ruśkowski, Kontrola finansów Publicznych w Polsce, Białystok 2021, pp. 21–22; E. Ruśkowski, On Priority Research Problems in the Scope of Public Finance Control in Poland, 'Bialystok Legal Studies' 2021, vol. 26, no. 4, pp. 9–18.

in the principle of public finance as a constitutionally protected good. Moreover, the control of financial management (spending) will be discussed. The authors would like to note that the problems addressed are quite broad, and the framework of this paper does not allow them to be discussed thoroughly. Thus, in the authors' opinion, the problems indicated are general but fundamental, and therefore should be the subject of more comparative studies.

1. The principle of legality as a basic model of spending public funds

1.1. The principle of legality in the Polish Constitution and spending of public funds

The principle of legality regulated in Art. 7 of the Polish Constitution is a development and clarification of the rule of law included in Art. 2 of this act, under which 'the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice'. It indicates the primacy of the law over the state and is a kind of directive on the functioning of the state and its bodies based on law; in other words, they are bound by this law.[4] At the same time, the rule of law constitutes the basis for the formulation of a hierarchical system of the sources of law, in which the Constitution has the highest rank, and among sub-constitutional acts, an ordinary act has precedence, to which legislation from the executive authorities is subordinated.[5]

The principle of legality, according to which 'the organs of public authority shall function on the basis of, and within the limits of, the law' (Art. 7 of the Polish Constitution), is a formal representation of the rule of law (the so-called 'formal rule of law') in the sense that public authorities should demonstrate explicit (and not just alleged) legal legitimacy in their actions.[6] Such acting 'on the basis of the law' means the requirement of the public authority to be empowered (authorised) to take any actions (exercising public authority), which, as the Constitutional Tribunal (CT) has stated, does not always have to mean an indication of the competence basis of the decision based on it. The competence itself cannot be alleged but must be clearly and precisely specified in a legal provision.[7]

The second element of the principle of legality, 'functioning within the limits of the law', should be understood as a constitutional obligation of public authorities regarding strict compliance not only with the norms determining their tasks and com-

4 W. Skrzydło, Konstytucja Rzeczypospolitej Polskiej. Komentarz, Kraków 2002, p. 15; Z. Witkowski (ed.), Prawo konstytucyjne, Toruń 1998, pp. 64–65.

5 Z. Witkowski, Prawo…, *op. cit.*, p. 65; L. Garlicki, Polskie prawo konstytucyjne. Zarys wykładu, Warsaw 2002, pp. 65–66.

6 Z. Witkowski, Prawo…, *op. cit.*, pp. 65–66.

7 Judgment of the CT of 16 March 2011, K 35/08, OTK ZU no. 2/A/2011, item 11.

petences (in the context of not exceeding their competences) but also not infringing any other binding norms arising from different provisions: substantive, procedural and concerning the system of proper state bodies.[8] In conclusion, the principle of legality is broad and sets limits for executing public authority. It covers legislature in all its forms and actions in applying the law by executive and judicial authorities, as well as law enforcement.[9]

Relating the principle of legality to the processes of spending public funds, it needs to be emphasised that it determines a specific model, deviating from the 'standard model' of competence defined in Art. 7, i.e. the action of the public authority on the basis of law. Assigning public funds is based on a strict rigour consisting of the obligation to maintain 'a double legal basis'. This means that distribution of these funds, on the one hand, generally must in the first place arise from substantive-procedural provisions determining the content and the character of the expenditure as well as the mode of its implementation; on the other hand, this expenditure should be included in terms of an amount in the financial plan (budget). Of course, the requirement of a proper competence norm, based on which a given body (an authorised party) has been authorised to implement the expenditure, remains outside the discussion.

The first of the above elements, the substantial-procedural legal basis of expenditure, must be enshrined by an act. Generally, such a legal form arises from the primacy of the statute among sub-constitutional acts, which is determined in the rule of law analysed above. At the same time, Art. 216(1) of the Polish Constitution cannot be omitted, since it directly states that spending funds on public aims (as well as their accumulation) must take place in the manner indicated in the act. Although the doctrine holds the position that this provision is general and has a framework character,[10] it still does not change the fact that the legislator emphasises the high rank of the act as coming from the legislative authority and belonging to the primary source of binding law.[11]

The statutory form of the regulation regarding actions of collecting and spending public funds cannot be ostensible, which could mean adopting the act as such but

8 *Ibidem*; Judgment of the CT of 22 September 2006, U 4/06, OTK ZU no. 8/A/2006, item 109.

9 Judgment of 16 March 2011… *op. cit.*, item 11.

10 W. Sokolewicz, Finanse publiczne (komentarz do art. 216 ust. 1 Konstytucji RP), (in:) L. Garlicki (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz IV, Warsaw 2005, p. 9; T. Dębowska-Romanowska, Prawo finansowe. Część konstytucyjna z częścią ogólną, Warsaw 2010, pp. 116–117; M. Masternak-Kubiak, Komentarz do art. 216 Konstytucji RP, (in:) M. Haczkowska (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warsaw 2014.

11 W. Sokolewicz, Finanse…, *op. cit.*, pp. 2–3; W. Skrzydło, Komentarz do art. 216 Konstytucji RP, (in:) W. Skrzydło (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warsaw 2013; M. Florczak-Wątor, Art. 216. Gospodarka finansowa, (in:) P. Tuleja (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, wyd. II, LEX/el. 2021.

that its content would not actually regulate such actions.[12] Instead it would only give general stipulations about public funds, and refer to relatively lower-degree acts, in which a particular body could make detailed regulations. The CT in its judgments has indicated the failure of such ostensible actions, stating that 'it needs to be possible to establish the general level of expenditure of a local government unit already on the basis of a statutory regulation, i.e. such regulation has to maintain a proper degree of precision and details, and cannot be limited to blanket references to implementing rules'.[13]

The statutory regulation of public expenditure specified in Art. 216(1) of the Polish Constitution imposes another obligation on the legislator, i.e. maintaining a proper level of detail for the provisions regarding the character and amount of expenditure, which may be determined as a minimum for statutory regulation. The act should be precise enough to establish on its basis the general level of expenditure,[14] as well as to identify its type and from which budget (financial plan) it will be incurred. This will allow establishment of the unit which will be obliged to incur the expenses and reimburse them. As a consequence, all the indicated elements will be the subject of financial control.

The rule of maintaining a statutory form of expenditure and a proper level of detail does not preclude formulating statutory provisions authorising the issuing of acts of lower rank, which would regulate formal and substantial elements of the public expenditure incurred. It is justified in as far as the act would be too casuistic and 'as a result not practical, and doomed to be repeatedly circumvented by interested subjects'.[15]

The possibility of formulating statutory authorisations is, however, under specific restrictions. Firstly, it cannot replace an act, otherwise the latter would have empty meaning. Secondly, the content of the authorisation has to be precise through an unambiguous specification of elements subject to regulation in a lower-rank act, and in particular the body authorised to issue the act and elements of the subject of the regulation (also including the procedure). Thirdly, and this is a general comment, a lower-rank act cannot cover in its scope the previously indicated minimal level of statutory regulation, which results from Art. 216(1) of the Polish Constitution. Fourthly, the act based on statutory authority cannot limit or exclude the possibility of controlling the legality of the spending of public funds by depriving or restricting

12 T. Dębowska-Romanowska, Prawo finansowe…, *op. cit.*, p. 117.

13 Judgment of the CT of 24 March 1998, K 40/97, OTK ZU 2/1998, item 12; Judgment of the CT of 24 November 1998, K 22/98, OTK ZU 7/1998, item 115.

14 Judgment of 24 March 1998…, *op. cit.*, item 12; Judgment of 24 November 1998…, *op. cit.*, item 115.

15 W. Sokolewicz, Finanse…, *op. cit.*, p. 4.

the right to verify the legality of such spending, in particular within a broadly understood appeal procedure or by preventing financial control *ex post*.[16]

The second *sine qua non* which determines the possibility of incurring expenditure legally is its recognition in the public-law financial plan. Pursuant to Art. 44(1) of the Act of 27 August 2009 on public finance (APF),[17] public expenditure may be incurred for the purposes and in the amount specified in the budget act, the budget resolution of a local government unit or in the financial plan of units of the public finance sector. As regards the purpose of the expenditure, its allocation, determined in a separate act regulating this expense, should be indicated in the financial plan, and at the same time the expenditure should be included in the proper place in the budgetary classification. In this way, the principle of transparency and detail regarding public finance will be fulfilled.[18] Moreover, a separate act, as has been mentioned before, will determine the figure of the expenditure, whether by direct indication of its general or unit amount or by determining elements (ratio, indexes) which allow its calculation.

The amount of public expenditure included in the financial plan (budget) has a double significance in the sense that on the one hand, it is an authorisation for the authorised party implementing the plan to incur the expense, and on the other hand, it is a limit (expenditure limit) which shall not be exceeded, pursuant to Art. 52(1)(2) of the APF. Action causing an infringement of the limit is classified as a breach of public finance discipline, specified in Art. 11 of the Act on responsibility for a breach of public finance discipline as making an unauthorised expenditure from public finance (where the expenditure is not recognised in the financial plan) or breaching the scope of this authorisation.[19]

Both forms – special act and public-law financial plan – must happen simultaneously for the legal implementation of public expenditure. In other words, even the adoption of a special act does not authorise expenditure if it is not included in the fi-

16 See E. Kornberger-Sokołowska, Finanse publiczne w Konstytucji (refleksje po 25 latach obowiązywania regulacji dotyczących budżetów publicznych), 'Państwo i Prawo' 2022, no. 10, pp. 306–319.

17 Act of 27 August 2009 on public finance (consolidated text, Journal of Laws of 2022, item 1634, as amended).

18 It needs to be stated that the principle of the transparency of public finance is multi-dimensional, and includes also social aspects; more in J.M. Salachna, M. Tyniewicki, The Principle of Substantial Transparency of Public Finance and the Creation of the Active Citizenship, (in:) M. Radvan, J. Gliniecka, T. Sowiński, P. Mrkývka (eds.), The Financial Law towards Challenges of the XXI Century (Conference Proceedings), Brno 2017, pp. 81–83, http://hdl.handle.net/11320/5794, https://is.muni.cz/publication/1378725 (28.09.2022).

19 Act of 17 December 2004 on responsibility for a breach of public finance discipline (consolidated text, Journal of Laws of 2021, item 289, as amended).

nancial plan. In addition, entering an expense into a financial plan is not a basis for incurring it if there is no special act.[20]

1.2. The legality of spending public funds in the light of the constitutional and statutory regulations of the Czech Republic

1.2.1. Constitutional standards for the implementation of public expenditure by public authorities

The equivalent of the provisions of Art. 7 of the Polish Constitution ('The organs of public authority shall function on the basis of, and within the limits of, the law') can be found in the provisions of Art. 2(3) of the Czech Constitution, which provides that 'State power serves all citizens and can be exercised only in cases, within the limits and in the ways laid down by law', or in the provisions of Art. 2(2) of the Resolution of the Presidium of the Czech National Council no. 2/1993 Coll. (the Charter), 'State power may be exercised only in the cases and within the limits set by law and in the manner prescribed by law.' These provisions are primarily perceived as a safeguard against the arbitrariness of the state or public authorities in relation to persons against whom their actions are directed.[21]

In relation to the implementation of public expenditure, it is necessary to point out that public expenditure in the Czech Republic is also implemented by authorities and institutions that are not the bearers of state power. In relation to the definition of the state power, commentaries agree that the term used by both the Czech Constitution and the Charter includes the exercise of public power in general, i.e. not only power exercised by the state authorities but also power exercised by self-governing bodies (e.g. municipalities, regions, public universities) and de facto derived from state power.[22] The implementation of public expenditure by local government units is part of the economic basis of the constitutional right to self-government under Art. 8 of the Czech Constitution.[23]

Constitutional laws and laws as primary or original legislation are adopted by the bicameral Parliament in the Czech Republic, with the exception of the State Budget Act, the adoption of which, according to the provisions of Art. 42(2) of the Czech Constitution, is the exclusive competence of the Chamber of Deputies (i.e. the lower chamber of the Parliament).[24] For the sake of completeness, it is necessary to add that primary or original standard-setting power in the Czech Republic is also vested in

20 See Decision of the CT of 6 February 2007, K 16/06, OTK ZU 2A/2007, item 13.

21 Commentary on Art. 2, Listina základních práv a svobod: komentář, Prague 2012; P. Rychetský, Ústava České republiky: ústavní zákon o bezpečnosti České republiky: komentář, Prague 2015.

22 *Ibidem*.

23 For details, see D. Czudek, Analýza ústavních limitů regulace řízení a kontroly veřejných financí ve vztahu k územní samosprávě, Brno 2022; https://www.mfcr.cz/assets/cs/media/2022–09-27_Analyza-ustavnich-limitu-ve-vztahu-k-USC.pdf (28.10.2022).

24 V. Knapp, Teorie práva, Prague 1995, p. 157; Art. 15 of the Czech Constitution.

municipal and regional councils, in addition to the Parliament of the Czech Republic, based on the provisions of Art. 104(3) of the Czech Constitution, which stipulates that 'the councils may, within the limits of their competence, issue generally binding decrees'.[25]

The Czech Constitution does not regulate public finance as understood by the science of financial law, nor does it regulate the management of public funds.[26] It states only in general terms that the Supreme Audit Office shall audit the management of state property and the implementation of the state budget, with details to be laid down by law. The definition of the power of control in the Czech Constitution means that it can be regarded as a traditional way of supplementing the checks and balances within the framework of the separation of powers in a democratic state governed by the rule of law, rather than as a necessity. In the Czech Republic, the control of the management of public funds is also within the competence of other control bodies, without them needing to be enshrined in the Constitution. In this respect, reference may be made to the reasoning of the Constitutional Court of the Czech Republic and its decision on the assessment of the constitutionality of Act no. 23/2017 Coll., on the rules of budgetary responsibility. In its conclusion, the Constitutional Court, among other things, accepts the limitation of the constitutionally guaranteed right to self-government by means of the statutory regulation of the control of management and the possible subsequent application of appropriate corrective measures.[27] Applying the argument *ad minori ad maius*, it can be stated that the conclusion made by the Constitutional Court also applies to the state and its bodies in the exercise of state power, as understood in Art. 2(3) of the Czech Constitution and Art. 2(2) of the Charter. In this context, it should be added that in the Czech Republic, the question of a possible extension of the audit competence of the Supreme Audit Office to public funds of local government units and other bodies and institutions which do not primarily manage state budget funds or state property has long been discussed. In view of the fact that the audit competence of the Supreme Audit Office is enshrined in the Czech Constitution, its extension is conditional on an amendment to the Constitution, which is subject to the consent of a qualified majority of members of both chambers of Parliament.[28] However, no government has so far succeeded in obtaining such broad support within the legislature.[29]

25 V. Knapp, Teorie…, *op. cit.*, p. 157.

26 For details of the former, see M. Kozieł, Public Finances as Integral Part of Financial Law, (in:) P. Mrkývka, Systems of Financial Law: General Part 1, Brno 2015, pp. 88–100, https://www.law.muni.cz/sborniky/system-of-financial-law/general-part.pdf (28.10.2022).

27 For a detailed analysis of the case law, see D. Czudek, Analýza ústavních..., *op. cit*.

28 Art. 39(4) of the Czech Constitution.

29 For details, see D. Czudek, Challenges in the Public Financial Management and Control of Territorial Self-Governing Units, (in:) P. Mrkývka, J. Gliniecka, E. Tomášková, E. Juchniewicz, T. Sowiński, M. Radvan (eds.), The Financial Law towards Challenges of the XXI Century (Conference

1.2.2. The extent of the statutory powers of public authorities and the degree of discretion of those authorities in implementing public expenditure

The legal framework for the implementation of public expenditure by public authorities in the Czech Republic is quite broad. The legal regulation of public funds management is fragmented into a number of regulations. The basic rules for spending public funds are contained in particular in Act no. 218/2000 Coll., on budgetary rules and on amendments to certain related acts (budgetary rules), as amended, Act no. 250/2000 Coll., on budgetary rules for territorial budgets, as amended, Act no. 320/2001 Coll., and Act no. 23/2017 Coll., on the rules of budgetary responsibility, as amended. An indispensable part of the rules for the implementation of public expenditure is, of course, the Law on the State Budget, which is adopted for the respective budget (calendar) year. In terms of the discussed issue, the Law on the State Budget includes, among other things:

- the amount of total state budget expenditure;
- a general overview of state budget expenditure, i.e. the total amount of expenditure attributable to individual central government bodies or, where appropriate, other bodies provided for by law;
- binding indicators defining the earmarking of the state budget;
- the amount of contributions to the budget of the European Union;
- the amount of contributions to the budgets of regions and municipalities in aggregate by region and the capital city of Prague;
- a list of selected subsidies from the General Treasury Administration chapter.[30]

With regard to the focus of this paper, the provision of Art. 5(3) of Act no. 218/2000 Coll. is crucial, which implies that the state budget and the State Budget Act are not synonymous. In addition to the State Budget Act, the state budget contains a number of other financial documents, namely the breakdown of state budget indicators, detailed budgets of organisational units of the state and amendments to these documents. For the sake of completeness, it should be noted that, although the Czech legal system provides for medium-term planning instruments, in particular the medium-term outlook on which the state budget must be based,[31] their effectiveness is very low, as they are not binding on the authorities and institutions managing public funds.[32] It can therefore be concluded that, given their non-binding nature, the im-

Proceedings), Brno 2020, pp. 937–949, https://www.law.muni.cz/sborniky/the_financial_law_challenges.pdf (27.10.2022).

30 Arts. 5 and 8 of Act no. 218/2000 Coll. Cf. Act no. 449/2022 Coll., on the state budget of the Czech Republic for 2023.

31 Art. 5(5) of Act no. 218/2000 Coll.

32 For details see M. Kozieł, Multi-Annual Planning of Public Budgets as a Way of Rationalising Public Expenditure, (in:) G. Hulkó, R. Vybíral, European Financial Law in Times of Crisis of the Euro-

plementation of the medium-term outlook in the context of the implementation of a specific expenditure during the budget year lacks any sense. Similarly, the control of legality, i.e. the control of the implementation of the aggregate indicators or the total amount of expenditure in the individual chapters of the state budget, which are contained in the relevant State Budget Act, does not produce a result that is relevant from the point of view of sound management. This conclusion is also consistent with the fact that the budget, even though a part of it is approved in the form of a law, i.e. a generally binding legal regulation, remains a financial plan which is based on certain assumptions; the extent to which they will be fulfilled only during the course of the financial year in question depends on a number of factors. Since the public expenditure included in the state budget is, by its very nature, a variable that changes over time and cannot therefore be determined in detail in advance, it is all the more important to lay down transparent and meaningful rules for the management of public funds which guarantee that the expenditure implemented meets the principles of sound financial management, i.e. the principles of effectiveness, economy and efficiency.[33] Whether these rules are complied with should therefore be the central motive for the control of legality. In this context, it should be noted that the fact that the rules laid down have been complied with does not automatically mean that the principles of sound financial management have also been. It follows that the principles of effectiveness, economy and efficiency cannot be dispensed with.

The creation of lower-order acts, i.e. derivative legislation, which is contained in the provisions of Arts. 92–94 of the Constitution of the Republic of Poland, is in the Czech Constitution regulated by the provisions of Arts. 78 and 79(3).[34] Art. 78 provides for the so-called general power to issue government regulations: 'in order to implement the law and within its limits, the Government is authorised to issue regulations. Orders shall be signed by the Prime Minister and the relevant Member of the Government.' Art. 79(3) regulates the constitutional power to issue subordinate (secondary) legislation by ministries, other administrative authorities and local government bodies. Lower-order legislation in the Czech Republic, by its nature, in the view of the constitutional definition of its competence, is not the basis or framework for spending public funds by public administration bodies, but rather contains technical details (e.g. Decree no. 421/2021 Coll., on budgetary composition, as amended).

pean Union, Budapest 2019, pp. 327–334, https://www.researchgate.net/profile/Witold_Srokosz/publication/341072412_Local_Government_Financial_Institution_and_FinTech/links/5eac03f4a6fdcc70509e088e/Local-Government-Financial-Institution-and-FinTech.pdf (26.09.2022).

33 For details, see D. Czudek, Komentář k § 4, (in:) D. Czudek Kranecová, D. Czudek, T. Koucká Höfferová, A. Vuongová, Komentář k zákonu o finanční kontrole ve veřejné správě, Plzeň 2021.

34 V. Knapp, Teorie…, *op. cit.*, p. 157.

2. Public finance as a constitutionally protected good and a model of reasonable implementation of public expenditure

2.1. The constitutional framework for reasonable (proper) implementation of public expenditure

From the legal perspective, the terms 'reasonable' or 'proper' implementation of public expenditure are very broad and ambiguous, and thus, when there is no legal definition of public spending, this creates conditions for their wide interpretation. As a rule, constitutional acts do not include such definitions, since it is not their role or aim. As indicated above, the subject of regulating of public finance in the Polish and the Czech Constitutions have been regulated with different degrees of detail, similarly to other European countries.[35] Regardless of how public finance is framed in the constitution, it is not difficult to prove that it is a constitutionally protected good and should be preserved by the public authorities.[36] Two basic arguments need to be indicated here.

Firstly, the accumulation of public finance is generally conducted in an authoritarian manner through interference in civil liberties, and in particular in the sphere of economic freedom.[37] Imposing public levies is made at the expense of citizens' resources (assets, income, revenue), what means *de facto* taking over a part of them. It is a single-sided and one-way transfer of money from taxpayers to other subjects, conducted by the public authorities (redistribution of public finance).[38]

Secondly, public finance serves to implement aims and public tasks, which is connected with the allocation of (providing) goods and services to citizens, local communities and the whole of society (allocation of public finance).[39] It is the citizens and social groups that become beneficiaries of the public funds distribution, e.g. they get certain benefits.[40]

35 C. Kosikowski, Finanse publiczne w świetle Konstytucji RP oraz orzecznictwa Trybunału Konstytucyjnego (na tle porównawczym), Warsaw 2004, pp. 12–18; Z. Ofiarski, Źródła prawa finansowego i problemy legislacji finansowej, (in:) C. Kosikowski (ed.), System prawa finansowego. Teoria i nauka prawa finansowego, t. I, Warsaw 2010, pp. 191–196.

36 See M. Gutowski, P. Kardas, Wykładnia i stosowanie prawa w procesie opartym na Konstytucji, Warsaw 2017; M. Piechowiak, Dobro wspólne jako fundament polskiego porządku konstytucyjnego, Warsaw 2012, pp. 441–442.

37 See E. Lotko, Konstytucyjny obowiązek płacenia podatków a spójność aksjologiczna, 'Prawo i Więź' 2021, vol. 38, no. 4, pp. 546–570; E. Lotko, Postawy motywacyjne polskich podatników wobec płacenia podatków, 'Przegląd Prawa i Administracji' 2021, no. 125, pp. 11–23.

38 S. Owsiak, Finanse publiczne. Teoria i praktyka, Warsaw 1999, p. 58.

39 *Ibidem*, pp. 56–57.

40 A. Gomułowicz, Sprzeczność interesów a sprawiedliwe opodatkowanie – zasadnicze dylematy, (in:) W. Konieczny (ed.), *Ius suu quique. Studia prawnofinanoswe. Księga jubileuszowa dedykowania Profesorowi Wacławowi Gronowskiemu*, Warsaw 2005, p. 116.

In both processes – accumulation and allocation of public finance – one more element needs to be included, namely the theory of scarcity, which determines the need to ensure public finance by its protection and the rationalisation of expenditure. Scarcity results from the coexistence of two opposite phenomena – unlimited human needs and the limited scope of the resources which are to satisfy these needs. In the sphere of public finance, the theory of scarcity has a stronger impact than in the private sector because public means are accumulated (taken over) as a part of citizens' assets, as has been discussed above.[41]

Due to the fundamental meaning of public finance for the whole state and society, the fact that it is a constitutional good and thus specially protected seems to be indisputable. At the same time, public authorities, naturally, have the constitutional responsibility to conduct financial management rationally, not only in the purely economic dimension but also in the social and moral ones.[42] As a consequence, the constitution as a fundamental systemic act determines the general model of a reasonable financial economy, including the model of making public expenditure. However, on the level of acts of a lower order than the constitution, and mainly within legislation, precise standards of management should be designated which will comprise the principle of economy (its part will be the principle of proper expenditure execution) or the principle of sound financial management. The manner in which the standards of managing public funds are implemented, and in particular the result of this management, should be subject to control, and particularly financial control.[43]

It is worth adding that the principle of sound financial management was literally indicated in EU law, specifically in the financial regulation of 18 July 2018.[44] Pursuant to Arts. 33–36 of this regulation, this principle refers to the use of public funds according to the following specific rules: economy, effectiveness, efficiency, *ex ante* evaluation and retrospective assessment, financial impact assessment, and effective and efficient internal control.

41 J.M. Salachna, M. Tyniewicki, Wpływ norm moralnych na kształtowanie się prawa wydatków publicznych – perspektywa polska, 'Przegląd Ustawodawstwa Gospodarczego' 2022, vol. 887, no. 5, p. 6.

42 J.M. Salachna, M. Tyniewicki, The Impact of Moral Norms on the Creation of Public Expenditure Law: The Polish Experience, 'Opole Studies in Administration and Law', vol. 19, no. 4, pp. 73–88.

43 A. Borodo, Selected Contentious Issues of Public Finance in Polish Constitution, 'Optimum. Economic Studies' 2018, vol. 93, no. 3, pp. 16–25.

44 Regulation (EU, Euratom) 2018/1046 of the European Parliament and the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) no. 1296/2013, (EU) no. 1301/2013, (EU) no. 1303/2013, (EU) no. 1304/2013, (EU) no. 1309/2013, (EU) no. 1316/2013, (EU) no. 223/2014 and (EU) no. 283/2014 and Decision no. 541/2014/EU, and repealing Regulation (EU, Euratom) no. 966/2012 (OL J 193 30.07.2018, p. 1, as amended).

2.2. The validity and control of public expenditure in Polish legislation

The Constitutional Tribunal has emphasised many times, with regard to the provisions of Arts. 216(5) and 220(1) of the Polish Constitution, that ensuring the sound finance of the state, including the budgetary balance, constitutes values (principles) protected constitutionally.[45] The importance of these rules often allows the repeal of other constitutional principles, such as the protection of acquired rights or the order of a proper *vacatio legis*.[46] At the same time, budget balance and financial stability do not have an absolute character,[47] since 'the Constitutional value which is the budget balance may not serve to legitimise limitations on rights and freedoms in the situation when a threat to the budget balance is not in exercising these rights and freedoms by individuals but is a direct consequence of legislative actions violating this balance'.[48]

In Polish legal regulations, there are no general principles of sound financial management or proper implementation of expenditure formulated literally, but detailed standards (a kind of directive) determining the rules of proper public spending are specified. In particular, the Act on Public Finance regulates in detail the following principles: purpose, economy (both Art. 44(3)(1)), efficiency (Art. 44(3)(1)(a)), optimisation (Art. 44(3)(1)(b)), timelines (Art. 44(3)(2)), committing expenditure (Art. 46) and fair competition (Art. 47).

The problem of financial control, including the implementation of public expenditure, is enshrined in the provisions of the Polish Constitution, which, as with the character of this act, are quite detailed. Art. 203 of the Constitution indicates several criteria based on which the Supreme Audit Office, as the highest body of state control, performs its control functions in relation to specific bodies of public authority, its organisational units or other entities using public funds. These criteria include legality, purpose and reliability. Detailed rules regarding control and control proceedings are contained in the Act of 23 December 1994 on the Supreme Audit Office.[49]

Moreover, there is also the control of the legality of financial actions taken by local government units. Such a type of control is called exercised supervision and is conducted by regional chambers of auditors pursuant to Art. 171(2) of the Polish

45 Judgment of the CT of 4 December 2000, K 9/00, OTK ZU 2000, no. 8, item 294; Judgment of the CT of 13 December 2004, K 20/04, OTK ZU 2004, no. 11A, item 115; Judgment of the CT of 4 May 2004, K 40/02, OTK ZU 2004, no. 5A, item 38.

46 Judgment of the CT of 9 March 2004, K 12/02, OTK ZU 2004, no. 3A, item 19; Judgment of the CT of 15 July 2013, K 7/12, OTK ZU 2013, no. 6A, item 76.

47 More on this topic in E. Lotko, Ogólne zagadnienia dotyczące deficytu i długu publicznego, (in:) E. Lotko, U.K. Zawadzka-Pąk, Prawnofinansowe instrumenty ograniczania deficytu i długu publicznego w Polsce na tle doświadczeń europejskich, Białystok 2018, pp. 66–70.

48 Judgment of the CT of 6 March 2013, Kp 1/12, OTK ZU 2013, no. 3A, item 25; see also the Judgment of the CT of 17 December 1997, K 22/96, OTK ZU 1997, nos. 5–6, item 71.

49 Journal of Laws of 2022, item 623.

Constitution. Detailed regulations on this matter are included in the Act of 7 October 1992 on regional chambers of auditors, on the basis of which the chambers control the financial management of local governments under the following criteria: compliance with the law, compliance of documents with the facts, purpose, reliability and economy.[50]

2.3. The validity and control of public expenditure in Czech legislation

The scope of verification prior to the implementation of public expenditure is related to the basic obligation in the management of public funds according to the provisions of Art. 4 of the Financial Control Act, namely to comply with legal regulations and measures adopted by public administration bodies within the limits of these regulations in the management of public funds, to ensure the specified tasks of these bodies and to ensure efficient, economical and effective management of public funds.[51] Decree no. 416/2004 Coll., implementing Act no. 320/2001 Coll., on financial control in public administration and on amendments to certain acts (Act on Financial Control), as amended by Act no. 309/2002 Coll., Act no. 320/2002 Coll. and Act no. 123/2003 Coll., as amended (hereinafter referred to as the 'Decree on the Financial Control Act') is a kind of exception, yet a significant one, to the rule that implementing decrees regulate mainly technical details., in addition to the details of control methods and procedures, also regulate the detailed content of the control that must be carried out before any public expenditure is made (the so-called preliminary management control). In accordance with the provisions of Arts. 13(2) and (4) of the Decree on the Financial Control Act, this control checks in particular:

- compliance of the operation under preparation with the set tasks and the approved objectives and targets of the public administration body;
- compliance with legal provisions and measures adopted by public administration bodies within the limits of these legal provisions, including compliance with the rules laid down by specific legal provisions for financing the activities of a public administration body;
- compliance with the criteria laid down for the economic, efficient and effective performance of public administration;
- compliance with approved public expenditure, programmes, projects, concluded contracts or other decisions on the use of public funds;
- the adoption of measures to eliminate or mitigate operational, financial, legal, budgetary and other risks that may arise in the implementation of the operation under preparation;

50 Journal of Laws of 2022, item 1668.

51 For details on the main objectives of financial control, see D. Czudek, Komentář k § 4..., *op. cit.*

– substantiating the operation to be carried out with factually correct and complete supporting documents.

From the point of view of the interpretation of this basic rule, it is essential that it is contained in the Financial Control Act and not in the legislation governing budgetary rules, whether at the level of the state or local government. The legislature took this step quite deliberately and purposefully, as public funds are managed in the Czech Republic by bodies and institutions that are not financed from the state budget or the budget of local government units. A typical example is public health insurance companies, which are characterised by fund management. The basic rule that all public expenditure must be made in accordance with the law and the principles of effectiveness, economy and efficiency is further supplemented by a list of specific obligations falling on the relevant authorities and institutions, the fulfilment of which is verified in the context of *ex ante* management control before the implementation of a specific expenditure. These obligations are laid down both by the laws governing the budgetary rules at both national and local government levels and by the laws governing the establishment and functioning of the institutions and bodies concerned. These include, for example, the provisions of Art. 7(2) of Act no. 551/1991 Coll., on the General Health Insurance Fund of the Czech Republic, as amended, and the provisions of Art. 16(4) of Act no. 280/1992 Coll., on departmental, branch, company and other health insurance funds, as amended, which regulate the rules for the use of public funds allocated in compulsorily created prevention funds. The prevention funds cover services with a demonstrable preventive, diagnostic or curative effect beyond the scope of routinely reimbursed medical care. The prevention funds are of interest to the Czech Republic's supervisory authorities because they are tools that can be abused by health insurance companies. They are used as a means of advertising to attract new clients or keep existing ones. The supervisory authorities therefore carefully check whether health insurance companies comply with the conditions laid down by law and actually use the prevention funds only for services for which a preventive, diagnostic or curative effect has been demonstrated.[52]

In the case of subsidies provided from the state budget and from the budgets of local government units and voluntary associations of municipalities, the provider must always define the purpose for which the subsidy is provided.[53] In practice, however, this may be defined relatively broadly. The subsidy may be granted, for example, for the operation of the beneficiary of the subsidy; for example, sport is supported

52 For example, Audit Conclusion of the Supreme Audit Office Audit Action no. 20/24, Funds collected on the basis of the law for the benefit of the General Health Insurance Fund of the Czech Republic, https://www.nku.cz/cz/pro-media/tiskove-zpravy/hospodareni-vzp:-nejvyraznejsi-chyby-odhalil-nku-u-fondu-prevence--kontrolori-zjistili-netransparentni-postup-i-skryte-financovani-vyzkumu-id12526/ (28.10.2022).

53 Cf. the definition of subsidy according to Arts. 3(3)(a) and 10a(1)(b) of Act no. 250/2000 Coll.

in this way in the Czech Republic.[54] Even such a broad definition of the purpose for which the subsidy is granted does not in itself mean that the recipient of the subsidy may dispose of the funds arbitrarily. The recipient must not only comply with the specific grant conditions set by the provider, including the purpose for which the grant was awarded, but must also comply with the related legislation and ensure that the principles of effectiveness, economy and efficiency are fulfilled. It is the responsibility of the competent control authorities to verify whether all these obligations have actually been fulfilled by the beneficiary.[55] Verification of the fulfilment of the principles of effectiveness, economy and efficiency is in fact a part of the control of legality, as it is a verification of the fulfilment of an obligation laid down by law. From the point of view of the fulfilment of the purpose, it is the fulfilment of the principle of effectiveness that is central, the essence of which is precisely the assessment of the extent to which the activities carried out have achieved the objectives pursued.[56] The importance of the fulfilment of legality, effectiveness, economy and efficiency in the implementation of public expenditure is reinforced by the fact that failure to comply is punishable as a breach of budgetary discipline, pursuant to the provisions of Arts. 44 and 44(a) of Act no. 218/2000 Coll., or Arts. 22 and 28 of Act no. 250/2000 Coll., by the levy of a charge on the number of public funds unduly used and a corresponding penalty.[57]

Conclusions

The legal-comparative analysis conducted in this paper proves that the problem of public finance in the constitutions of Poland and the Czech Republic has been regulated with different degrees of detail. Although in both acts the issue of public funds, including the control of their implementation, remains beyond further regulation, it does not prevent the formulation of a statement that public finance is of fundamental importance for the whole state and society. It is a constitutional good and therefore specially protected. At the same time, authorities have a constitutional obligation to conduct financial economy reasonably, in the broad meaning of this word, i.e. not only in the economic but also in the social (moral) context. The constitution as a fundamental systemic act sets models for legal and reasonable financial management

54 For example, via the National Sports Agency; Národní sportovní agentura, Dotační výzvy neinvestiční v roce 2022, https://agenturasport.cz/dotace-neinvesticni/provoz-a-udrzba-2022/ (28.10.2022).

55 Cf. Art. 11 of the Financial Control Act. For details, see A. Vuongová, Komentář k § 11, (in:) J. Czudek Kranecová, D. Czudek, T. Koucká Höfferová, A. Vuongová, Komentář…, *op. cit*.

56 D. Czudek, Komentář k § 2, (in:) J. Czudek Kranecová, D. Czudek, T. Koucká Höfferová, A. Vuongová, Komentář…, *op. cit*.

57 For details, see D. Czudek, Analýza porušení rozpočtové kázně, Brno 2022; https://www.mfcr.cz/assets/cs/media/2022–09-27_Analyza-poruseni-rozpoctove-kazne.pdf (28.10.2022).

conducted by the authorities and their structures, both on the government and local government levels.

Reasonable (proper) implementation of public expenditure should mainly result from the rule of law. This principle constitutes the basis for formulating a hierarchical system of the sources of law, in which the highest rank is given to the constitution, and among sub-constitutional statutes primacy is given to an ordinary act. A formal representation of the rule of law is the principle of legality, which determines the limits of public authority. It includes legislative activity, thus law-making in all its forms, the activity of applying the law by bodies of executive and judicial authorities as well as law enforcement. Therefore, it should be assumed that the constitutional principles of legality and public finance as a constitutionally protected good set models which then determine standards of the reasonable (proper) implementation of public expenditure in the broad sense, i.e. in the context of legality and economy (purpose, economy, efficiency and effectiveness).

Relating the principle of legality to spending of public funds, it needs to be emphasised that in this regard a specific model is designated. Namely, the appropriation of public funds is based on a strict rigour consisting of a 'double legal basis'. This means that the distribution of funds must, on the one hand, result from the substantive-procedural provisions determining the content and character of the expenditure as well as the mode of its implementation; on the other hand, the expense should be included in the financial plan (budget). Moreover, the substantive-procedural legal basis of expenditure must be covered by an act, which is provided for in Art. 216(1) of the Polish Constitution, pursuant to which implementing funds for public purposes (as well as their accumulation) has to be conducted in the manner determined in the act. Therefore, detailed standards of management should be designated within the act, and will comprise the principle of economy (its part being the principle of proper expenditure execution) or the principle of sound financial management. The manner of implementing the standards of public funds management, and more precisely the result of this management, should be subject to control – i.e. financial control on every stage of the budget procedure, from designing and planning to executing the public budget.

On the other hand, regarding the legal system of the Czech Republic, its Constitution does not regulate public finance, nor the rules of management of public funds. It only states in general terms that the Supreme Audit Office shall audit the management of state property and the implementation of the state budget. In addition, the legal framework for the implementation of public expenditure by public administration bodies in the Czech Republic is very broad. The legal regulation of public funds management in the Czech Republic is fragmented into a whole range of regulations. An unmistakable part of the rules for the implementation of public expenditure is, of course, the State Budget Act, which is adopted for the relevant budget (calendar) year. Since public expenditure included in the state budget is by nature a variable

that changes over time and cannot be determined in detail in advance, it is all the more important to establish transparent and meaningful rules for the management of public funds that guarantee that the expenditure implemented meets the principles of sound financial management, i.e. the principles of effectiveness, economy and efficiency. Whether these rules are complied with should therefore be the central issue of the legality audit. In this context, it should be noted that the fact that the rules laid down have been complied with does not automatically mean that the principles of sound financial management have also been met. It follows that the principles of effectiveness, economy and efficiency cannot be dispensed with. The verification of the principles of effectiveness, economy and efficiency is part of the control of legality, since it is a verification of compliance with an obligation laid down by the law. The importance of ensuring legality, efficiency, economy and effectiveness in the implementation of public expenditure is reinforced by the fact that non-compliance is sanctioned as a breach of budgetary discipline.

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