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## The Role of the Electoral Commissioner in the Division of Municipalities Into Constituencies

**Abstract:** The subject of this article is to analyze the role of the electoral commissioner in the process of creating constituencies for municipal elections. It presents the evolution of the position of the electoral commissioner with the focus on his functions in relation to the creation of constituencies by the municipality. The paper shows the legal nature of a resolution of the municipal council concerning the creation of constituencies and also of a replacement order issued by the electoral commissioner. In addition, the article discusses the problem of supervision and control of a resolution of the municipal council about creation of constituencies for the local elections. The main aim of the article is to show that the competence of the commissioner to issue a replacement order infringes Article 87 paragraph 2 of the Polish Constitution, because it grants him the right to enact local laws, and because the lack of possibility to file a complaint within the administrative court for there solution on creation of constituencies is at variance with Article 45 paragraph 1 of the Polish Constitution.

**Keywords:** electoral commissioner, constituencies, replacement order

**Słowa kluczowe:** komisarz wyborczy, okręgi wyborcze, postanowienie zastępcze

### 1. Introduction

Local elections are the manifestation of the independence of territorial self-government from the state authority and the organs of this local government are responsible for their organization. The electoral body which supervises the proper course of local elections is the electoral commissioner who has a number of competences in relation to the function performed by him.

One of them, granted under Article 17 § 2 of the Electoral Code<sup>1</sup> is the electoral commissioner's right to issue a provision on the creation of constituencies in municipal council elections if, after unsuccessful summoning of the municipal council to perform tasks in accordance with the law, the council did not do so on time or when its resolution on establishing constituencies is illegal. In addition, the Electoral Code pursuant to Article 420 regulated, differently than required by Article 101 of the Local Government Act<sup>2</sup> the possibility of lodging an appeal against the resolution of the commune council on creation of constituencies by voters. The indicated provisions raise doubts as to their compliance with the Constitution, which was also pointed out by the Supreme Administrative Court, which addressed a constitutional question to the Constitutional Tribunal to examine their compliance with the Constitution of the Republic of Poland<sup>3</sup>.

The subject of this article is to analyze the role of the electoral commissioner in the process of creating constituencies for municipal elections. It presents the evolution of the political position of the electoral commissioner, including the tasks in relation to the creation of constituencies by the municipality. The subject of consideration was the legal character of the resolution of the municipal council to establish constituencies and a substitute provision issued by the electoral commissioner. In addition, the article discusses the issue of supervision of the voivode and the review of the lawfulness of the resolutions of the municipal council for the formation of constituencies for municipal councils.

The purpose of the article is to demonstrate that the competence for substitute provision issuance of the commissioner violates Article 87 of the section 2 of the Constitution of the Republic of Poland, since it grants him the right to enact local law, while the inability to lodge a complaint to the administrative court for the resolution on creation of constituencies, pursuant to Article 101 of the LGL deprives voters of the right to access to court pursuant to Article 45 of the act 1 of the Constitution of the Republic of Poland. In addition, the lack of a legal measure against a substitute provision violates the independence of the municipality and deprives it of judicial protection guaranteed by Article 165 of the section 2 of the Constitution of the Republic of Poland.

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- 1 Act of 5 January 2011 – Electoral Code (Dz.U. z 2011 r. Nr 21, poz. 112 z późn. zm.) [Journal of Laws of 2011 No. 21 item 112 as amended], here in after referred to as EC.
  - 2 Act of 8 March 1990 Local Government Law (tekst jedn. Dz.U. z 2011 r. poz. 594) [the uniform text Journal of Laws of 2011 item 594], here in after referred to as LGL.
  - 3 A legal question of the SAC of 10 December 2013 available at the CT website: <http://trybunal.gov.pl/rozprawy/komunikaty-prasowe/komunikaty-po/art/7095-podzial-gminy-na-okregi-wyborcze-odwolanie-od-orzeczenia-panstwowej-komisji-wyborczej/s/p-514/>; P 5/14 (accessed on: 15.12.2014).

## **2. The division of municipality into constituencies by the electoral commissioner – a historical outline**

Division of the municipality into constituencies constitutes a special competence of the electoral commissioner. In the period of almost 25 years of the functioning of the institution of electoral commissioner, this competence has not been regulated in a homogeneous way.

Originally, in the EC for municipal council's elections<sup>4</sup>, this competence was awarded directly to the electoral commissioner. Provincial election commissioner was entitled, at the request of the competent board of the municipality (the city), to determine, separately for each council, the boundaries and numbers of the single-member constituencies or number of multi-member constituencies, their boundaries and numbers as well as the number of councilors elected in constituency. The decree of the provincial electoral commissioner regulating the constituencies was announced in the provincial official journal and informed the voters by posting the announcements no later than on the 45th day before the election day. These notices also mentioned the seat of the relevant territorial electoral commission (Article 14 sections 1 and 2). The Election ordinance for municipal councils in the Article 25 section 2 point 3, states directly that the tasks of the provincial electoral commissioner include creation of constituencies.

In the Election Act of 16 July 1998<sup>5</sup>, the electoral commissioner's competence in this area was initially not regulated. Only through Article 4, point 52 of the amending law of 15 February 2002, the provision of the Article 203a<sup>6</sup> was added.

This regulation did not authorize the commissioner either to divide the municipality into constituencies or to issue substitute solutions. It only authorized the commissioner to call the relevant municipal authorities to perform tasks related to the division of the municipality into constituencies in a lawful manner within the prescribed period, and in case of ineffective expiry of the deadline – to apply to the voivode for their substitutive performance.

The wording of the provision of Article 203a was amended by Article 1 pt 67 of the act of 20 April 2004 amending<sup>7</sup> the Ordinance on the day of the accession of

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4 Act of 8 March 1990 (Dz.U. z 1990 r. Nr 16, poz. 96) [Journal of Laws of 1990 No. 16 item 96]

5 Dz.U. Nr 95, poz. 602 [Journal of Laws No. 95 item 602]

6 Article 203a section 1 reads: 'If the competent authorities of a commune do not execute on time, in a manner consistent with the law, tasks related to the establishment electoral districts, establishment of district electoral commissions, preparation of electoral registers or division of a commune to electoral circuits, an electoral commissioner with territorial competence calls these authorities to execute tasks in a manner consistent with the law, within the prescribed time, and in the case of ineffective expiry of time limit, requests province governor for their replacement execution'

7 (Dz.U. z 2004 r. Nr 102, poz. 1055) [Journal of Laws of 2004 No. 102 item 1055]; Article 203a section 1 reads: 'If the competent authorities of a commune do not execute on time, in a manner

the Republic of Poland to the European Union. The new content of this provision authorized the electoral commissioner, first, to call on the bodies of the territorial self-government unit to perform, on time and in a manner consistent with the law, the tasks related to the division of municipalities into constituencies, and secondly to the substitute division of the municipality into constituencies in case of ineffective expiry of the deadline. After carrying out this task without delay, the electoral commissioner was obliged to inform the National Electoral Commission.

In the currently binding electoral law, the above solution was actually reproduced in extenso in Article 17 section 2 of the EC<sup>8</sup>. According to Article 167 § 3 of the EC, the electoral commissioner issues provisions in the scope of his statutory powers, which means that the performance of competences in the division of the municipality into constituencies requires the commissioner to issue such an act. Moreover, the EC entitled the commissioner to verify the resolutions of municipal councils in the constituency matters pursuant to Article 420 §§ 1 and 2 of the EC.

### **3. Legal character of the resolution on the division of municipalities into constituencies**

The resolution of the municipality council on establishing constituencies is essential for shaping the entire electoral process since it serves to ensure that the mandates of the municipal council are occupied favorably due to the place of residence of voters. Therefore, the principle in the creation of constituencies to municipal councils is for the division of the municipality into the constituencies to be performed according to a uniform standard of representation calculated by dividing the number of inhabitants of the municipality by the number of councilors elected to the particular council (Article 419 § 2 of the EC). The division of municipalities into constituencies is permanent (Article 419 § 1 of the EC). The judgment of the

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consistent with the law, tasks related to the establishment electoral districts, establishment of district electoral commissions, preparation of electoral registers or division of a commune to electoral circuits, an electoral commissioner with territorial competence calls these authorities to execute tasks in a manner consistent with the law, within the prescribed time, and in the case of ineffective expiry of time limit, immediately executes these tasks and notifies the national Electoral Commission of the fact’.

- 8 According to Article 17 § 1: ‘If the competent authorities of a commune do not execute on time, in a manner consistent with the law, tasks related to the establishment electoral districts or their change, appointment or changes in composition of electoral commissions, an electoral commissioner with territorial competence calls these authorities to execute tasks in a manner consistent with the law, within the prescribed time, and in the case of ineffective expiry of time limit, immediately executes these tasks and notifies the national Electoral Commission of the fact’; whereas Article 17 § 2 reads: ‘The provision of §1 shall apply accordingly, if the competent organ did not divide a commune, poviát or voivodeship into electoral circuits on time or in a manner consistent with the law’.

Voivodeship Administrative Court in Poznan of 22 September 2009 stated that ‘The guarantee of the durability of the division into constituencies is of great importance for ensuring the democratic character of electoral proceedings. [...] The essence of this regulation is to ensure the sustainability of once defined constituencies and, therefore, carrying out possible changes in the division of municipalities into constituencies was strictly regulated by the legislature and subject to strong control (of the voivode and electoral commissioner)’. The resolution of the municipal council on the formation of constituencies for the municipal council is an act of local law. Pursuant to article 87 of the act 2 of the Constitution of the Republic of Poland ‘Enactments of local law issued by the operation of organs shall be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments’. The creation of this right is a manifestation of the independence of the units of territorial self-government.

Adoption of a resolution on the division of municipalities into constituencies is an expression of the municipality’s independence, since the organization and conduct of local elections, including the division of municipalities into constituencies, is the municipality’s own task. This task is not included in the category, or tasks from the scope of the government, nor associated with the obligation from the scope of the preparation and conducting of general elections and referendums, which is regulated in Article 8 of the LGL. The creation of constituencies for the municipal council elections is the implementation of the unit’s own tasks. According to P. Dobosz ‘[...] conducting general elections and referenda by their very nature is non-governmental, unknown to territorial self-government in the sense that they do not belong to a category of the so-called own tasks. It is also difficult to consider them as government tasks, firstly because they are listed next to tasks in the field of government administration, and if they were, there would be no need to separate them, and secondly because they are rather categories of national tasks’<sup>9</sup>. According to T. Moll ‘the confirmation of the thesis cited above appears to be the solution adopted in Article 4a of the Act on Powiat Self-Government<sup>10</sup> and in Article 14 of section 3 of the Act on Voivodeship Self-government<sup>11</sup>, where the tasks in the scope of organization of preparations and conducting of general elections and referenda are clearly distinguished from other tasks of these units of territorial self-government. It should be added that not all the electoral issues are commissioned to the municipality.

9 IISA/Po350/09, available at website: [www.orzeczenia.nsa.gov.pl](http://www.orzeczenia.nsa.gov.pl) (accessed on: 15.12.2014).

10 P. Dobosz, (in:) K. Bandarzewski, P. Chmielnicki, P. Dobosz, W. Kisiel, P. Pryczko, M. Mączyński (eds.), *Komentarz do ustawy o samorządzie gminnym*, Warszawa 2004, p. 135.

11 Act of 5 June 1998 on Powiat Self-government (tekst jedn. Dz.U. z 2013 r. poz. 595 z późn. zm.) [Journal of Laws of 2013 item 595 as amended].

It is not commissioned to the municipality in this respect, in which it involves local elections<sup>12</sup>.

Resolution of the municipal council on the division of this unit into constituencies is an act of local law since it corresponds to the conditions, compliance with which is necessary for the act to be considered as generally applicable source of law. Firstly, the act of local law is a statutory act and has executive character in relation to the act. The detailed procedure for creating constituencies in local elections is provided for in Section VII, chapter 10 of the EC. The authorization to adopt a resolution on the creation of constituencies is contained in Article 419 § 1 of the EC. According to that provision, 'The division into constituencies, their boundaries and numbers, and the number of councilors elected in each constituency shall be determined, at the request of the mayor, by the municipal council according to a uniform standard of representation calculated by dividing the number of inhabitants of the municipality by the number of councilors elected to the council [...]'

Local law acts must have a normative character, i.e. they must contain general and abstract norms. They have a general character, i.e. they apply to the generally specified recipients and are addressed to external recipients. Resolutions being acts of local law are the law for all who are in a situation provided for therein<sup>13</sup>.

In addition to the aforementioned features, the acts of local law are also characterized by the fact that they usually directly define the principles of behavior of specific categories of addressees, and thus their rights and obligations. They are reproducible, cannot be consumed by a single use; they are protected by the possibility of applying sanctions<sup>14</sup>. The resolution of the municipal council on the division of the municipality into constituencies meets the above criteria, as it contains the general and abstract standards, and its recipients are the voters of the municipality. As emphasized by the Supreme Administrative Court in its judgment of 24 February 2010, 'These voters are not named by name, but in general, i.e., every resident of a municipality wishing to exercise their active electoral rights must comply with the arrangements contained in such a resolution. The abstractness of the directive should be confirmed using the same constituencies for the oncoming elections. The arrangements contained in the resolution are legally sanctioned by provisions guaranteeing the correctness of the voting process and calculation of election results'<sup>15</sup>.

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12 Act of 5 June 1998 on Voivodeship Self-government (tekst jedn. Dz.U.z 2013 r. poz. 596 z późn. zm.) [Journal of Laws of 2013 item 596 as amended].

13 T. Moll, (in:) B. Dolnicki (ed.), *Ustawa o samorządzie gminnym. Komentarz*, Warszawa 2010, p. 147.

14 More on features of local law acts: D. Dąbek, *Sądowa kontrola aktów prawa miejscowego – aspekt materialno-prawny*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2013, No. 3, pp. 76-103.

15 D. Dąbek, *Prawo miejscowe*, Warszawa 2007, p. 31.

The condition for the validity of the act of local law is its announcement in the provincial official journal. Pursuant to the article 419 § 2 of the EC, the resolution of the municipal council regarding constituencies is announced in the provincial official journal and it is made public in a customarily adopted manner. In addition, one copy of the resolution shall be forwarded immediately to the voivode and the electoral commissioner. The resolution on the division of the municipality into constituencies shall enter into force within 14 days from the day of announcement, pursuant to Article 4 section 1 of the Act of 20 July 2000 on promulgation of normative acts and certain other legal acts<sup>16</sup>.

Considering the above, it should be stated that the resolution on the division of the municipality into constituencies is an act of local law. Recognition of the resolution of the municipal council as the local law entails further consequences. Indeed, only the local acts adopted by the authorities of the municipality, poviát and the territorial self-government organs of the voivodeship shall be subject to surveillance and control by the administrative courts.

Thus, the normative acts issued by entities in the territorial self-government entities, but which are not bodies specified in the territorial self-government body acts, are not subject to the supervision of government administration bodies or judicial control. This applies in particular to the acts of supervisors of the organizational units of territorial self-governments, but also entities not included in the structure of territorial self-government, for example the electoral commissioner. In principle, these acts are not included in the constitutional sources of universally binding law and from that point of view, they are not entitled to complaint to the administrative court<sup>17</sup>.

Hence, it was rightly observed the Supreme Administrative Court that '[...] while entrusting in Article 419 § 2 of the EC the electoral competence to the municipal council to make local laws remains in accordance with Articles 94 and 87 section 2 of the Constitution of the Republic of Poland [...], entrusting this competence to the electoral commissioner in the provision of Articles 1 and 2 in conjunction with Article 420 § 1 of the EC violates these provisions. The electoral commissioner [...] is not an organ remaining in the local government structure. The electoral commissioner is undoubtedly the part of the structure of the electoral administration, but the scope of his powers, as well as the unique constitutional position does not him to be able to replace the body representing territorial self-government'<sup>18</sup>.

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16 IIOSK2001/09, available at website: [www.orzeczenia.nsa.gov.pl](http://www.orzeczenia.nsa.gov.pl) (accessed on: 15.12.2014).

17 Tekst jedn. Dz.U. z 2011 r. Nr 197, poz. 1172 z późn. zm. [The uniform text Journal of Laws of 2011 No. 197 item 1172 as amended].

18 M. Brzeski, Problemy kontroli sądownoadministracyjnej działalności prawotwórczej podmiotów samorządu terytorialnego niebędących organami tego samorządu, (in:) B. Dolnicki, J.P. Tarno (eds.), *Samorząd terytorialny w Polsce sądowna kontrola administracji*, Warszawa 2012, p. 39.

It seems that the substitute provision of the electoral commissioner should be included in local law, because it replaces the act of local law in the strict sense. Only the legislator acting in contradiction with Article 87 section 2 of the Constitution of the Republic of Poland entrusted the provision of this right to the competent body – the electoral body.

Moreover, the legislator assumed that since a substitute provision is not issued by the self-government body, it should not also be subject to publication in the provincial official journal. The act on promulgation of normative acts and other legal acts as well as the EC do not provide for the publication of a substitute provision in the provincial official journal.

However, doubts arise over the identification by the Supreme Administrative Court of the decision of the electoral commissioner issued on the basis of Article 17 of the EC with the provision issued pursuant to Article 420 § 2 of the EC. This provision, in contrary to Article 17 of the EC, does not state that the electoral commissioner should issue them in order to replace the resolution of the commune council, but it only regulates the complaint of the voters to the electoral commissioner for the municipal council's arrangements on constituencies, which the commissioner considers when issuing the provision. This provision does not refer to the proper application of the provision of Article 17 § 2, of the EC, nor does it speak of a legal nature of this provision: if this is a substitute provision or the provision shall prevail only for the compliance or noncompliance of the resolution.

The legal consideration of a substitute provision is not limited to the problem of whether it is an act of local law. The competence to issue a provision under Article 17 § 2 of the EC also points to the specific supervisory powers of commissioner over the activities of the municipal council. This problem is presented in the next part of the article.

#### **4. Electoral commissioner as a specific supervisory authority**

As mentioned in the introduction, the autonomy of territorial self-government is the systemic principle guaranteed in Article 16 section 2 and Article 165 of the Constitution of the Republic of Poland. In addition, the laws regulating the system of territorial self-government at all levels also state that the municipality, powiat and self-governmental voivodship perform public tasks on their own behalf and on their own responsibility, and this independence is subject to judicial protection<sup>19</sup>.

It is stressed in the literature that '[...] the essence of the autonomy of territorial self-government entities is that, in the framework of the applicable legal order, the

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19 M. Brzeski, Problemy kontroli sądownoadministracyjnej działalności prawotwórczej podmiotów samorządu terytorialnego niebędących organami tego samorządu, (in:) B. Dolnicki, J.P. Tarno (eds.), *Samorząd terytorialny w Polsce – sądowna kontrola administracji*, Warszawa 2012, p. 40.

municipality (powiat, voivodeship) on its own, without external dictates and top-down instructions, decides about all local (regional) matters, the purpose of communal property, the principles of using public facilities, spatial development, the scope of undertaken investments, the order, methods and means of their implementation, as well as related financial and material expenditures<sup>20</sup>. The autonomy of the territorial self-government, however, is not an absolute principle and its boundaries are set by criteria for supervision of territorial self-government unit. However, the Constitution of the Republic of Poland explicitly stipulates that the only criterion for supervision over legal acts is legality (Article 171 section 1), and exhaustively lists the supervisory authorities. Pursuant to Article 171 section 2 of the Constitution, these are the President of the Council of Ministers and the voivode, and in the area of financial matters, the regional chambers of auditors. Besides, the acts governing the powers of the supervisory authorities should clearly regulate the surveillance measures and the consequences of their use.

Judicial protection of the territorial self-government, which will be mentioned later in this article, is exercised by the ordinary courts, the Constitutional Tribunal, but above all by administrative courts, which under its jurisdiction, according to Article 3 § 2 pt 7 of the Law on procedure before the administrative courts, adjudicate on complaints against acts of supervision over the activities of the territorial self-government.

In this context, the question about the political position of the electoral commissioner is legitimate, which, although it was not passed by the Constitution of the Republic of Poland to the supervisory authorities, fulfills similar functions in the procedure of creating constituencies. The legislature granted him, in fact, on the basis of Article 17 § 2 of the EC the competence to examine the lawfulness of the resolutions on the division of municipalities into constituencies and, and in the case of finding a violation of the law or inactivity of the commune council, to issue a substitute provision regarding this matter. Such positioning of the electoral commissioner towards the municipal bodies, and especially his imperious interference in the operation of the municipal government may raise serious doubts from the point of view of compliance with the Constitution of the Republic of Poland.

The Supreme Administrative Court in its legal question to the Constitutional Tribunal noted that 'the electoral commissioner is not a supervisory body and cannot enter the sphere of independence of the territorial self-government unit'. Thus, the substitute provisions issued by the electoral commissioner cannot be included in the acts of supervision over the establishment of local law by territorial self-government bodies.

However, it should be noted that the legislator, by granting the commissioner the power to issue a substitute provision, also granted him a peculiar means of

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20 See footnote 3.

supervision. In the event of issuance of a substitute provision in a situation when the commune council adopted a resolution on the division of constituencies, but the commissioner declared its non-compliance, the commissioner's action resembles a voivode's supervision measure in the event of its annulment in the event of its unlawfulness pursuant to Article 91 of the LGL with the difference, however, that annulment has cassation nature and results in the elimination of a general legal act from legal transactions. The electoral commissioner does not have the competence to declare the invalidity of the resolution of division of the municipality into constituencies.

The resolution on the division of the municipality into constituencies is subject to the supervision of the voivode under the procedure applicable to acts of local all acts of local law pursuant to Article 91 of the LGL and 'supervision' of the electoral commissioner pursuant to Article 17 § 2 of the EC. The applicable law, thus, allows a situation when two legal acts with different content may exist – a resolution of the commune council to establish constituencies and a substitute provision of an electoral commissioner, which may be a serious problem in the case of their application.

On the other hand, a substitute provision of the commissioner recalls the legal nature of a substitute provision of the voivode issued in cases provided for by law. At present, the voivode issues a substitute provision in the event of inactivity of the commune council on adoption of a resolution on the expiration of the councilor's mandate or dismissal of persons indicated in Article 98 of the LGL<sup>21</sup> and based on Article 12 section 3 of the Act of 27 March 2003 on Spatial Planning and Development<sup>22</sup>, thus in a situation when the municipal council did not adopt a study of the conditions and directions of the spatial development of the municipality, did not commence its modification or by adopting such a study, did not specify areas of public-purpose investment of national and voivodeship importance, the voivode, after undertaking activities aimed at reconciliation the date of implementation of these investments and the conditions for introducing these investments to the study, calls on the municipal council to adopt the study or change it within the prescribed period; after its ineffective expiration, the voivode draws up a local zoning plan or its change for the area affected by the omission of the municipality, to the extent necessary for the feasibility of the public purpose investment and issues a substitute provision regarding this matter. Spatial Planning and Development Act states that the plan adopted in this mode has legal effects, such as the local zoning plan.

It is stressed in the literature that the substitute provision of the voivode is a special act of supervision, different in particular to supervisory decisions which

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21 See Article 2 of Local Government Law, Article 2 of Act on Powiat Self-Government and Article 6 of Act on Voivodeship Self-Government.

22 J. Jagoda, *Sądowa ochrona samodzielności jednostek samorządu terytorialnego*, Warszawa 2011, pp. 21-22.

remove a resolution or order issued by the commune authority from the legal market, but do not introduce new acts (replacing deleted ones) in this place, which gives rise to assigning them 'cassation' character<sup>23</sup>. While the essence of the substitute provision issued by the voivode is that it replaces, in the case of the municipal authority to idle, the relevant act, that this body should enforce<sup>24</sup>.

The substitute provision of the electoral commissioner is issued, however, not only in the case of the municipality's inaction in the form of failure to adopt a resolution on the creation of constituencies, but also in a situation when he finds that the resolution is unlawful.

In addition, it should be noted that Article 13 pt 8a of the Law on publication of normative acts requires for the supervisory decisions regarding acts of local law laid down by local government units to be announced in the provincial official journal. Due to the fact that the substitute provision of the electoral commissioner is not an act of supervision in the strict sense, it is not necessary to publish it in order to have legal effects.

It follows from the foregoing that the legislator has given the electoral commissioner a kind of supervision measure and thereby violated Article 171 section 2 of the Constitution of the Republic of Poland. The substitute provision violates the independence of territorial self-government unit since only the supervisors of a territorial self-government unit can entrust the legislator with the power to intervene in the independence of territorial self-government.

## **5. Control of the acts of local law legality by administrative courts – general remarks**

The issues related to the judicial review of local law acts are generally regulated by the provisions of the Act of 30 of August 2002. – Law on proceedings before

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23 Article 98 of Local Government Law: 'If the competent authority of a commune, against obligation resulting from provisions of Article 383 § 2 and 6 as well as Article 492 § 2 and 5 of the act referred to in Article 24b section 6, as well as Article 5 sections 2 and 3 of the act of 21 August 1997 on the limitation of conducting business activity by persons performing public functions, as regards respectively expiration of the mandate of a councilor, expiration of a mandate of a village mayor, recalling from the position or termination of a contract of employment with a deputy village mayor, secretary of a commune, a treasurer of a commune, head of organizational unit of a commune and a person managing or a member of body managing a communal legal person, does not adopt a resolution, does not recall from the position or does not terminate the contract of employment, a province governor calls the commune authority to undertake a proper act within 30 days.'

24 Tekst jedn. Dz.U. z 2012 r. poz. 647 z późn. zm [The uniform text Journal of Laws of 2012 item 647 as amended].

administrative courts<sup>25</sup>, which are applied or co-used with special procedural provisions contained in constitutional laws<sup>26</sup>. The control of the legality of local law acts may be direct when the local legal act law is appealed to the court, and interim when the act of supervision annulling the act of local law is contested<sup>27</sup>.

All acts of the local law are under the scope of judicial review<sup>28</sup>. The entities with locus standi in relation to local law acts include in particular: everyone whose legal interest or entitlement was violated by the act concerned<sup>29</sup>; voivodes, when they did not use the possibility of annulment of the act of local law under the supervision procedure<sup>30</sup>.

The competence of the administrative court during reviewing the legality of local law acts is determined on the basis of regulations of Article 147 of the LPBAC and on the basis of Article 94 of the LGL. The provision of Article 147 of the LPBAC in § 1 states that the Court, having regard to a complaint against a resolution or act

referred to in Article 3 § 2 points 5 and 6, annul this resolution or act in whole or in part or states that it was issued in violation of the law if the special provision excludes the annulment thereof. In accordance with the particular provision – Article 94 sections 1 and 2 of the LGL, the resolution or order of the municipal authority shall not be annulled after one year from the day of their adoption, unless the obligation to submit a resolution or order within the time limit set in Article 90 section 1, or if they are an act of local law. The second passage of this article provides, however, that if the resolution or order was not annulled due to the expiration of the deadline set out in section 1, and there are premises for annulment, the administrative court decides on their non-compliance with the law. A resolution or order shall cease to have legal force as of the day of ruling on their non-compliance with the law. The annulment of local law acts is not subject to a time limit; thus, it can occur at any time.

Indirect control of local law acts is a consequence of granting the territorial self-government the right to judicial protection of independence. The basic legal form of the protection of this independence is the permission of the authorities of the territorial self-government units to bring a complaint to the administrative court on the activities of the state agencies exercising supervision over this territorial

25 P. Chmielnicki, (in:) K. Bandarzewski, P. Chmielnicki (eds.), P. Dobosz, W. Kisiel, M. Kryczko, M. Mączyński, S. Płażek, *Komentarz do ustawy o samorządzie gminnym*, Warszawa 2007, p. 703.

26 A. Matan, (in:) B. Dolnicki (ed.), *Ustawa o samorządzie gminnym. Komentarz.*, Warszawa 2010, pp. 914-915.

27 Tekst jedn. Dz.U. z 2012 r. poz. 270 z późn. zm. [The uniform text Journal of Laws of 2012 item 270 as amended], here in after referred to as LPBAC.

28 In the case of communal acts of local law it is the act on communal self-government.

29 M. Stahl, *Zagadnienia proceduralne sądowej kontroli aktów prawa miejscowego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2013, No. 3, p. 53.

30 Article 3 § 2 pt 5 of LPBAC: 'Supervision over public administration activity by administrative courts covers adjudication on complaints against local law acts of bodies of self-government territorial units and local bodies of government administration'.

self-government. Therefore, Article 3 § 2 point 7 of the LPBAC courts provides for a complaint to the administrative court for acts of supervision over the activities of territorial self-government bodies. The provision of Article 92a of the LGL states that in the case of submission of a complaint by a municipal authority to a supervisory decision, the administrative court shall appoint a hearing no later than within 30 days from the date of receipt of the complaint to the court. The determination of the maximum 30-day deadline for the appointment of the trial by the administrative court at which the municipal authority's complaint is to be resolved for the supervisory decision was made due to the fact that, in the light of Article 92 section 1 of the LGL, delivery to the municipal authority of a supervisory decision confirming the invalidity of a resolution or order of a municipal body legally suspends the execution of this resolution or order, which in turn results in the inability to take any action based on it. The administrative court, considering the complaint of the body of the territorial self-government unit on the supervisory act, repeals this act (Article 148 of the LPBAC). The appointed provision does not mention any reasons to repeal the contested act by a court supervision. The standards resulting from the constitutional act do not make it either. In the light of the applicable legal status it must be stated that the court must repeal the surveillance act regardless of the degree of infringement of the law. It is due to the fact that the of sanctions of being declared null and void in relation to supervision acts that may be affected by qualified defects is excluded. A final judgment of the administrative court, including a complaint affects the completed supervisory proceedings in such a way that it opens the possibility of reconsidering the case and deciding on the merits.

## **6. Control of the legality of the municipal council's resolution on constituencies**

The legislator in the EC, even though the resolution of the commune council on constituencies is a local law act, shaped the issues regarding the control of its legality in a way that fundamentally deviates from the generally presented principles.

According to the EC, the direct control of legality exercised by administrative courts in relation to the acts of local law was replaced by a detailed regulation contained in Article 420 of the EC. On the basis of this regulation, the electoral commissioner obtained the right to verify the resolutions on constituencies. This procedure is triggered by a complaint, submitted by at least 15 voters within 5 days from the date of making the resolution public. The electoral commissioner examines the case within 5 days and issues a provision, delivering it promptly to the complainants and the municipal council (Article 420 § 1 of the EC). The decision of the electoral commissioner may be appealed to the National Electoral Commission

within 5 days from the date of its delivery. The decision of the National Electoral Commission is not subject to a remedy (Article 420 § 2 of the EC).

On the basis of this regulation, in court decisions it is assumed that the procedure of appealing against resolutions of municipal councils regarding electoral districts was regulated comprehensively in the EC. The provision of Article 420 of the EC introduces a special procedure for appealing against municipal council resolutions on constituencies. Its unambiguous wording excludes the substantive jurisdiction of administrative courts in such matters. Consequently, in such cases Article 101 of the LGL connected with Article 3 § 2 pt 5 of the LPBAC shall not apply. Complaints submitted in this mode are rejected<sup>31</sup>. This means that, as a result of this particular regulation the voters were actually deprived of judicial way to assess the legality of the resolution on constituencies. In the light of the principle of administrative court to consider whether any act of local law, this should be assessed as a breach of the principle of access to a court. In place of the administrative court, verification of such resolutions was entrusted to electoral administration bodies, while excluding the possibility of challenging the decision of the National Electoral Commission to the court. Contrary to what is said in the case-law, it is difficult to assume that the content of the regulation contained in Article 420 of the EC is ambiguous and comprehensively regulates the procedure of filing complaints regarding the division of municipalities into constituencies. First of all, as already pointed out before, it raises doubts about the content of the decision issued by the election commissioner because of the complaint. The legislator states only that the commissioner 'issues a provision'. Therefore, the question should be asked whether the wording 'issues a provision' is tantamount to giving the electoral commissioner also, in this case, the competence of the substitute division of municipalities into constituencies. Or if is this only the name of the form of implementation by the electoral commissioner of its statutory powers. If indeed the legislator was going to issue a substitute provision, why only Article 420 § 2 of the EC provides for a possibility of appeal against such decision to the National Electoral Commission (not provided for in Article 17 § 2 of the EC).

Analysis of the content of the justification of the legal question indicates that the Supreme Administrative Court identifies the phrase 'issues a provision' with the substitute provision referred to in Article 17 § 2 of the EC. It appears that the Supreme Administrative Court does not notice that the Article 17 § 2 of the EC and the Article 420 § 2 of the EC are regulated by two different institutions (two different competences of an electoral commissioner). In the case of Article 17 § 2 of the EC, the electoral commissioner acts as supervisory body, while in the case of Article 420 § 2 of the EC, as the authority to verify the resolution because of a complaint.

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31 Article 101 section 1 of LGL: 'Any person, whose legal interest or right were violated by a resolution or an order of a municipal body in the case concerning public administration, may – after ineffective letter of formal notice – contest a resolution before an administrative court'.

Another doubt is related to the fact that the analyzed provision does not specify material premises for lodging a complaint to the election commissioner, which may lead to the conclusion that the possibility of appealing against the municipal council's resolutions on constituencies occurs each time, without any doubts as to the legality of the resolution issued by the council. In other words, the literal interpretation of the Article 420 § 1 of the EC may lead to the conclusion that the commissioner is entitled to control the division of the municipality into constituencies not only in terms of compliance with the law, but also for all other reasons beyond the law (e.g. purposefulness, effectiveness).

Considering that the right to access to court expressed in Article 45 section 1 of the Constitution, it cannot be limited in the form of closing the court path, it should be stated that the special regulation in question should not exclude the possibility of challenging resolutions on the division into constituencies on general terms (under Article 101 of the LGL in conjunction with Article 3 § 2 pt 5 of the LPBAC). Hence, the rejection of complaints, brought on this basis, by administrative courts should be evaluated as defective.

As to the indirect control of the administrative court regarding the resolution on the division of the municipality into constituencies, it should be stated that this issue is regulated in two ways. The legislator while regulating in a special way the 'supervisory proceedings in the EC, did not exclude the voivode's supervision at the same time. This means that, on the one hand, supervisory proceedings will take place in relation to such a resolution on general terms in accordance with the provisions of Chapter 10 of the LGL. It follows from this regulation that in the event of a conflict with the law, the voivode declares its invalidity – Article 91<sup>32</sup> of the act 1 of the LGL. The commune council is entitled to lodge a complaint to this supervisory decision of the voivode to the administrative court on general terms – Article 3 § 2 pt 7 of the LPBAC. On the other hand, the legislator equipped the electoral administration body – electoral commissioner with the competence to call the bodies of the territorial self-government to execute on time, in a manner consistent with the law tasks regarding the division of the municipality into constituencies, and then to the substitute division of the municipality into constituencies in case of ineffective expiry of the deadline.

In this situation, the question should be posed whether the two procedures are competitive or complement each other. A kind of supervision exercised by the electoral commissioner is limited to the verification the conduct of municipalities. As a result of the action of the election commissioner, either the inactivity of the

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32 Article 93 section 1 of LGL: 'After the lapse of the time limit specified in Article 91 section 1, a supervisory authority may not in by itself declare the resolution or the order of the municipal body to be invalid. In such case, the supervisory authority may contest the resolution or the order before an administrative court'.

municipal council in the division of the municipality into constituencies is removed or the resolution adopted in this respect against the law is rectified. Whereas, the voivode's supervision is of a cassation nature, which amounts to eliminating a legally unlawful resolution from legal transactions. It appears that if both authorities declare a conflict between the resolution and the law, it is possible to talk about the complementary nature of the subject proceedings (the voivode 'cancels' such a resolution from legal turnover, and the electoral commissioner issues a verification substitute provision). As mentioned earlier, the situation becomes complicated when both authorities come to different conclusions, namely the voivode does not find any inconsistency with the law or finds an irrelevant violation (such a resolution remains in the legal circulation), and the electoral commissioner issues a substitute provision. Then, in the course of legal transactions, there will be two decisions regarding the division of municipalities into constituencies in this situation, a question arises regarding the binding power of each of these decisions.

The legislator, entrusting the electoral authority, which is not strictly a supervisory body, supervisory competences consisting in the possibility of replacing a municipal council in adopting a local law act, did not provide the municipal judicial protection in the scope of its independence, which should be considered a violation of Article 165 section 2 of the Constitution of the Republic of Poland. There is no special regulation that would provide for the possibility of challenging the substitute election commissioner's decision to the administrative court. For example, the special regulation on the ground of EC is Article 384 § 1. It provides that '[...] from the electoral commissioner's decision on expiration of the councilor's mandate [...], a complaint may be lodged to the administrative court'. It also does not seem that such a basis could be Article 3 § 2 pt 7 of the LPBAC since the substitute provision is a kind of supervisory decision.

## **7. Final conclusions**

The analysis of the political position of the election commissioner in the process of the division of municipalities into constituencies for municipal councils elections indicates that under the EC, the commissioner, who is primarily an electoral body, was granted a series of competences reserved for public administration authorities and administrative courts.

The legislator, introducing the possibility of issuing a provision pursuant to Articles 17 § 2 and 420 § 2 of the EC certainly having in mind the specifics of the electoral procedure. It was probably guided by considerations of speed of proceedings and trust in professional and apolitical preparation in the field of electoral law of electoral administration bodies. Nevertheless, as it was demonstrated above, those

rules give rise to serious doubts as to their conformity with the Constitution of the Republic of Poland.

First of all, they grant the electoral authority the right to establish local law. Issuing a provision on the basis of Article 17 § 2 of the EC replaces the resolution of the municipal council in the strict sense, which is contrary to Articles 87 section 2 and 94 of the Constitution of the Republic of Poland. Secondly, the procedure for appealing against a resolution pursuant to Article 420 of the EC, in principle, excludes the possibility of challenging a resolution on the creation of constituencies to the administrative court pursuant to Article 101 of the local government act and thus deprives voters of the right to access to court provided for in Article 45 section 1 of the Constitution of the Republic of Poland. Thirdly, they finally give the electoral body supervision over local authority and authorize it to legislate local law, while depriving the municipality of the possibility of appealing the substitute provision of the election commissioner to the administrative court. Such a solution is an infringement of the judicial protection of independence of the territorial self-government guaranteed in Article 165 of the Constitution of the Republic of Poland.

In the process of creating constituencies for municipal councils elections, the electoral commissioner should be able to safeguard the proper course of this process, but in no case, can he imperviously interfere in the activities of the territorial self-government. Therefore, it appears to be justified to formulate the following conclusions *of the law as it stands*. First of all, the electoral commissioner, instead of issuing a substitute provision, should, on the ground of the Election Ordinance of 16 July 1998, apply to the voivode for a relevant act. Secondly, the voters must be guaranteed the right to access to court and the opportunity to challenge any local law regardless of their subject. Only the electoral process formed in this way will correspond to the standards of a democratic state ruled by law<sup>33</sup>.

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