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## **The authorities of the commune in Poland and France. Conclusions and postulates\***

### *Introduction*

The commune is the basic local government unit in Poland and France. In both these legal systems, it consists of two elements: the residents and the appropriate territory. This affiliation by way of law of a citizen to a commune creates for him, as an individual, specific rights and obligations in relation to a given local community, including the „secondary entities of authority”<sup>1</sup>, namely decision-making and executive authorities of the commune.

The issues raised in this article present the organization and the tasks of the commune authorities in the Polish and in the French legal system, indicating their decision-making and executive function. The regulations concerning the organization and the operation of the commune authorities, outlined on the basis of the statutory regulations and the internal regulations, the output of the doctrine and the jurisprudence of administrative courts, are intended to identify the elements common and specific to these bodies. Creating good relations between the community authorities is of fundamental importance for the efficient exercise of power at the local level, hence the present issues are deemed crucial. *De lege lata* analysis of the research problems at hand will help to raise comments and postulates in the final assessment in respect of the relations between decision-making and executive authorities in the commune of both a personal as well as functional nature.

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<sup>1</sup> A. Szewc, [in:] A. Szewc, G. Jyż, Z. Plawecki, *Ustawa o samorządzie gminnym. Komentarz [Act on local government in commune. Commentary]*, Warsaw 2010, s. 150ff.

### *1. The commune as the basic unit of local government in the Polish and in the French legal system – normative context*

Pursuant to art. 164 paragraph 1 of the Polish Constitution<sup>2</sup>, the commune is the basic unit of local government, implementing the principle of decentralization and subsidiarity in the Polish legal system. Other local government units have been left by the legislator in the statutory regulation, without indicating their names nor the division of responsibilities and competence between them. The legislator indicated, however, that the commune shall perform all the tasks of local government not reserved to other units of local government<sup>3</sup>. The fact of granting legal personality to the commune is determined by art. 165 paragraph 1 of the Polish Constitution. This attribute is also set forth in art. 2 paragraph 2 of the Act of 8 March 1990 on the communal local government<sup>4</sup>. The fact of granting legal personality to a commune means that this unit has acquired the status of a legal person and can be active in the course of the conduct of civil law transactions<sup>5</sup>. The concept of the authority in the commune corresponds to the performance of the tasks of the public authorities by the authorities of the commune that belong to the secondary entities of authority. The primary entities of authority are the residents who carry out certain decisions by means of public voting in the form of elections and the referendum<sup>6</sup>.

In the current territorial division of the country, under the provisions of the Act of 24 July 1998 on the introduction of three-tier division of the country<sup>7</sup>, the commune constitutes the basic unit of the territorial division. Creating, merging, dividing and liquidating communes, determining their boundaries and the seats of their authorities take place by way of a regulation of the Council of Ministers, after the consultation with the residents and pursuant to the requirements of law. According to these requirements, the commune should cover an area possibly most homogeneous from the perspective of the settlement and spatial system as well as from the point of view

<sup>2</sup> Act of 2 April 1997, the Constitution of the Republic of Poland (Journal of Laws, no. 78, item 483 as amended).

<sup>3</sup> See art. 164 paragraph 3 of the Polish Constitution.

<sup>4</sup> Act on commune local government of 8 March 1990 (Journal of Laws of 2016, item 446 as amended) – hereinafter referred to as commune local government act.

<sup>5</sup> See the judgment of the Supreme Administrative Court of 17 September 2009, (case file number: II OSK 1387/08, <http://orzeczenia.nsa.gov.pl>).

<sup>6</sup> See art. 11 of commune local government act. See A. Wiktorowska, [in:] *Prawo administracyjne [Administrative law]*, ed. M. Wierzbowski, Warsaw 2013, s. 227.

<sup>7</sup> Journal of Laws No. 96, item 603, as amended. This statute introduced, as of 1 January 1999, a three-tier territorial division of the country into communes, districts and provinces.

of social and economic ties, providing the ability to carry out public tasks. Specific issues in this regard are regulated by articles 4–4f of commune local government act. The commune is the basic institution of the political system of the state. According to art. 1 of the commune local government act, the community is understood as a local government community (formed by the residents) and the relevant territory<sup>8</sup>. The conjunction of these two elements is a *sine qua non* condition of its creation. This right and, at the same time, the obligation, in respect of a given territorial community, arises *ex lege* and is not transferable. The legal determinants of the commune as a local government community include<sup>9</sup>:

- the execution of public tasks by the commune in its own name and at its own responsibility,
- legal personality of the commune,
- legally protected autonomy of the commune,
- the determination of the rules and procedures of supervision over the activities of the commune, based on the criterion of legality.

The obligation of the affiliation of the resident to the communal community is correlated with certain privileges, for example, with the right to information in terms of the operation of its authorities, the right to articulate and promote one's interests, the benefits of one's entitlements provided for in art. 101 and art. 101a of the commune local government act<sup>10</sup>. Furthermore, the term „local government community” corresponds with the concept of „local interest”<sup>11</sup>, which *de facto* determines the rationale of the existence of a particular community, including the commune<sup>12</sup>.

<sup>8</sup> The territory of the commune is the territory of one of the kinds of units of the basic territorial division of the country, which means that when determining it, there should be taken into account the social, economic and cultural ties, in order to provide to a given commune the capacity to perform its public tasks.

<sup>9</sup> The classification adopted after A. Szewc – see A. Szewc, [in:] A. Szewc, G. Jyż, Z. Pławewski, *Ustawa o samorządzie gminnym. Komentarz* [Act on local government in commune. Commentary], Warsaw 2010, s. 35.

<sup>10</sup> See more on the entitlements: E. Olejniczak-Szałowska, *Konsultacje we wspólnocie samorządowej* [Consultations in the local government community], „Local Government” 1997, No. 1–2, s. 8.

<sup>11</sup> See B. Dolnicki, who emphasises that in the light of art. 6 and 7 of the commune local government act the commune matters have two characteristics: public character and local significance, thus clearly indicating the recognition by the legislator of the existence of local interest distinct from that of the state or social interest – B. Dolnicki, *Samorząd terytorialny* [Local government], Warsaw 2009, s. 63.

<sup>12</sup> See: M. Augustyniak, *Organizacja i funkcjonowanie rady gminy* [The organisation and the functioning of the commune council], Warsaw 2012, s. 19ff.

According to art. 72 of the Constitution of the Fifth Republic of 4 October 1958<sup>13</sup>, France introduced territorial division of the country into communes, departments and local government regions. The legislator also takes into account communities with special legal status and overseas territories governed by art. 74 of the Constitution of the French Republic. In accordance with the provisions of Code général des collectivités territoriales (hereinafter called the General Code of Territorial Communities or CGCT), each commune, department and region have been equipped by the legislator with decision-making and executive authorities. Territorial communities are not hierarchically subordinate, and there are excluded any supervisory powers among them. Territorial communities can take decisions on all matters which, in accordance with their competence, can be best implemented at their level. The French legislator based the operation of the territorial communities on the subsidiarity principle. The legislator granted to the authorities of the communities (commune council, departmental council and regional council) the power to issue local laws, including the power (on the basis of statutory authorizations) of derogating – albeit to a limited extent – the provisions of state laws relating to their competence. Along with the delegation of tasks to the community, the legislator has guaranteed a transfer of the relevant funds for these tasks. According to art. 72–2 of the Constitution of the French Republic, the legislator guarantees to the communities their own funds (as well as participation in taxes), that should be an essential part of their resources. It should be noted that the French legislator granted to the voters of each of the territorial communities the right to request the consideration of a particular matter by the council (decision-making authority of the community) and the right of the council to order a local referendum<sup>14</sup>. They were also granted the right to file a petition and the right to request the inclusion in the agenda of the council of the matters being of interest to them, within the scope of competence of this decision-making body.

Territorial community (*collectivité territoriale*) is a legal concept. The commune, being the basic type of such a community is a legal entity, performs its own tasks, it is independent from the central government (decentralization of tasks) and it holds the right to take decisions on local matters guaranteed by law. The fact of granting legal personality is associated with equipping the commune in decision-making bodies (in the form of commune council /

<sup>13</sup> Constitution du 4 octobre 1958 (JORF n° 0238 du 5 octobre 1958, page 9151) – hereinafter referred to as the Constitution of the French Republic.

<sup>14</sup> See art. 72–1 of the Constitution of the French Republic. See: P. Sarnecki, *Ustroje konstytucyjne państw współczesnych* [Constitutional regimes of modern states], ed. 5, Warsaw 2013, s. 229.

conseil municipal) and executive bodies (in the form of a mayor). A necessary condition for the existence of the community is its representativeness of the community, i.e. the requirement that the method of appointing the decision-making body should guarantee this property. The consequence of granting the commune with the legal personality is that it holds the capacity to be a party in court proceedings, hence the French commune can be a party to legal proceedings. The creation of a new commune takes place in the manner and on the terms specified in art. L2113-2 of CGCT.

*Conseil municipal* manages local matters, which belong to the competence of the commune council pursuant to the relevant laws of statutory rank. Decentralization in France took place on the basis of the Act of 1982<sup>15</sup>, which has set some goals: municipal council is elected in common public elections, the executive power is elected from among the municipal council and is not appointed by the state, the commune is vested with independence and legal autonomy, including financial autonomy, the mayor has his own competence, separate from the municipal (commune) council<sup>16</sup>.

The tasks of the commune include, among others:

- social and pro-health activities (kindergartens, nurseries, retirement homes, creating urban centres of social assistance);
- adoption of local rules of spatial planning and land use;
- activities related to cultural policy (municipal libraries, communal museums, municipal archives, elementary education in the field of music, dance, and drama);
- communal waste management;
- water management related to the tasks concerning drinking water distribution and treatment of this water;
- the creation and organization of communal public services (e.g. vital records office);
- management of communal property;
- developing programs in the field of housing;
- organization and preparation of elections;
- activities concerning education (primary education);
- activities concerning sport (construction and maintenance of local sports facilities);
- activities concerning infrastructure (communal roads and rail transport);

<sup>15</sup> Loi n° 82-213 du 2 mars 1982 relative aux droits et libertés des communes, des départements et des régions, JOFR du 3 mars 1982, s. 730.

<sup>16</sup> See also: E. Vital-Durant, *Les collectivités territoriales en France*, Paris 2013, s. 27.

- activities concerning transport (financing and organization of school transport in urban areas, the organization of public transport);
- activities concerning financial matters (e.g. adoption of the budget);
- tasks concerning public safety (*police municipale*);
- representation of the commune in public institutions<sup>17</sup>.

The act of 27 January 2014 (La loi MAPTAM du 27 janvier 2014) highlights the role of the city as a leader in respect of the conditions of the joint action of local authorities and their public institutions in the exercise of the powers relating to sustainable mobility, the organization of local public services, area planning and local development<sup>18</sup>.

## II. Decision-making authorities in the commune in the Polish and French legal order

Pursuant to art. 166 of the Polish Constitution, local government performs its own as well as delegated tasks. The commune's own tasks are public tasks whose purpose is to meet the needs of the local community and they are performed by the basic unit of the local government. According to art. 166 paragraph 2 of the Constitution, if it follows from the legitimate needs of the state, the statute may order the commune to perform other public duties. The said act specifies the mode of delegating and the manner of performing the assigned tasks<sup>19</sup>. Commune local government act formulates the principle of the presumption of tasks and competences of the commune as the basic unit of the local government. According to art. 6 of commune local government act, the scope of the activities of the commune comprises all public matters of local significance, not reserved by law to other entities. The legislator has determined that the task of meeting the collective needs of the community constitutes the commune's own responsibility. Art. 7 of the commune local government act presents an open (sample) catalogue of these tasks. They include both optional and compulsory tasks. Statutes determine which of them are compulsory<sup>20</sup>.

<sup>17</sup> See more broadly on this topic: J. Girardon, *Les collectivités territoriales*, 3e edition, Paris 2014, s. 94–96.

<sup>18</sup> More on this topic, see: E. Aubert, D. Cervell, *Les collectivités territoriales. Une approche juridique et pratique de la décentralisation*, Paris 2015, s. 47.

<sup>19</sup> More information on own and assigned tasks, see: B. Dolnicki, [in:] *Samorząd terytorialny w Polsce i w Portugalii. Analiza porównawczoprawna [Local government in Poland and Portugal. Comparative legal analysis]*, ed. D. Dolnicki, Warsaw 2015, s. 55ff.

<sup>20</sup> See, for example, art. 17 paragraph 1 of the Act of 12 March 2004 on social assistance (consolidated text: Journal of Laws of 2016, item 930, as amended). For more on this topic see: M. Augustyniak, [in:] *Prawo administracyjne [Administrative law]*, ed. M. Zdyb, J. Stelmasiak, Warszawa 2016, s. 383ff.

The elections to the commune council in Poland, according to art. 169 paragraph 2 of the Polish Constitution, are universal, equal, direct and shall be conducted by secret ballot. The rules and the procedure for nominating the candidates and conducting the elections as well as the terms of the validity of the elections are specified in the Election Code of 5 January 2011<sup>21</sup>. Depending on the number of inhabitants in a given commune, the number of councillors is set out in art. 17 of the commune local government act. The council consists of the councillors who, prior to the implementation of the mandate, are obliged to take the oath. The term of office of the council is four years. The commune council decides local issues at the council meetings, through resolutions which are a form of the decisions of a collegial body, preceded by a debate at the sessions and at the committee meetings. Standing and *ad hoc* committees, as the internal bodies of the council, represent the first place of the debate, a forum in which there are prepared positions, opinions and conclusions presented later to the commune council. The committees may have the right of initiative to adopt resolutions. The composition of the standing and *ad hoc* committees include only the communal councillors.

French communes are entitled to a presumption of competence in matters of local importance. This competence includes all local matters not reserved for the department and the region<sup>22</sup> or for government administration. In the French legal system, the commune council decides the local issues at the meetings of the council. *Conseil municipal* is a decision-making body, elected in common and direct elections for a period of 6 years. The number of councillors depends on the size of the population and in the communes of less than 100 inhabitants it amounts to 7 councillors, while in the communes consisting of at least 300,000 inhabitants, the maximum number of councillors is 69 (see art. L2121-2 of CGCT). Some exceptions are: Lyon (73 councillors), Marseille (101 councillors) and Paris (163 councillors). These cities are divided into districts called *arrondissements*. Paris, Lyon and Marseille have, respectively, 20, 16 and 9 *arrondissements*, while those in Marseille are joined by two in a given sector (district), hence there are in fact 8 of them. Each *arrondissement* or their group is equipped with the council which includes municipal councillors and *arrondissement* councillors elected in a given *arrondissement*, according to the principles stipulated by the election code

<sup>21</sup> The act of 5 January 2011 – Election Code (Journal of Laws No. 21, item 112, as amended), hereinafter referred to as the election code.

<sup>22</sup> The new division of powers between territorial communities (especially between the department and the region) has been introduced under the act on the new territorial organization of the Republic, called NOTRe (la loi portant nouvelle organisation territoriale de la République – NOTRe- JORF n°0182 du 8 août 2015 page 13705).



(see art. L271 to art. 273 of Code électoral<sup>23</sup>). The number of *arrondissement* councillors is two times the number of municipal councillors, while it may not be less than 10 or greater than 40 people (see art. L2511-8 of CGCT). The operation of the communes in Paris, Marseille and Lyon is governed by the rulings of the respective commune councils and by certain limited powers laid down in CGCT regulations by district/county councils (*conseils d'arrondissement*). The meetings of the municipal councils are prepared and conducted by the mayor, while the meetings of d'arrondissement council – by the mayor of the district / county (*le maire d'arrondissement*).

In the Polish legal system, the commune council meets in sessions convened as required, not less frequently than once a quarter. Organizing the work of the council and the conduct of its meetings rests within the competence of the chairman. The chairman is elected by an absolute majority of votes in the presence of at least half of the statutory composition of the council in a secret ballot. The same procedure applies also to his dismissal. The commune council may appoint one to three deputies from among its members, in a secret ballot, by an absolute majority of votes<sup>24</sup> in the presence of at least half of the statutory composition of the council. It should be noted that the chairman of the council and a deputy chairman are not the bodies of the municipal council, since they are not included in the scope of the entities referred to in art. 11a of the commune local government act whose catalogue is closed. The duties of the chairman shall be solely the organisation of the work of the council and the conduct of council meetings. The chairman may designate a vice-chairman to carry out his duties. In the absence of a chairman and in case of a failure of appointing a vice-chairman, the tasks of the chairman shall be performed by the oldest vice-chairman. The chairman shall convene a council meeting. The convention of the session consists of two elements: formal and material. The formal element includes a designation of: the place of the meeting, the date and the time of convening the session, while the material element includes the agenda and the draft resolutions to be submitted to the councillors in the form specified in the internal regulations (e.g. in electronic form). There shall be drawn the minutes from the council meeting and the minutes shall be placed in the bulletin of public information. The council adopts resolutions by a simple majority of votes in the presence of at least half of the statutory composition of the council, in an open vote, unless

<sup>23</sup> See: H. Cauchois, *Code électoral* 2014, Paris 2014, s. 198ff.

<sup>24</sup> The term „absolute majority of votes” should be understood as obtaining at least one vote more than the sum of the remaining valid votes cast, and therefore votes against and abstentions – see the judgment of the Provincial Administrative Court in Poznań dated 11 May 2011, II SA/Po 188/11.



otherwise provided by law. The commune council sits while maintaining the quorum, which covers at least half the councillors present at the session. The councillors vote in person. It is not permitted to vote by the representative.

In France, in turn, at the first meeting of the *conseil municipal*, the council shall elect a chairman, who at the same time becomes the mayor of the commune. Then, the council determines the number of mayor deputies and elects them by secret ballot. Council meetings are convened by the mayor, at least once a quarter, and also in each case when the mayor deems it necessary (see art. L2121-7 and L2121-9 of CGCT). The mayor notifies all councillors of the council meeting<sup>25</sup>. A failure to report or an incorrect notification of at least one councillor result in invalidating the conduct of the said meeting<sup>26</sup>. The convention of the meeting shall include the agenda, which is indicated in the registry of the session and is announced on the notice board at the mayor's office and made public<sup>27</sup>. At the beginning of each meeting the council shall elect from among its members the secretaries of the meeting who may be assisted by assistants selected from among the commune employees. These assistants cannot fail to participate in the session, and their role is to answer questions from councillors as well as to provide substantive and technical support of the meetings (see art. L2121-15 of CGCT). At the first meeting of the council, immediately after the election of the mayor and his deputies, the mayor reads out the oath of the councillor (*la charte de l'elu local*), according to art. L1111-1-1. of CGCT and provides a copy of this document to the councillors. According to art. L2121-13 of CGCT, every councillor has the right to be informed, through his exercised mandate, about all matters relating to the commune, which are the subject of the council meeting and which are available to the public. The councillors have the right to submit interpellations (oral questions - *questions orales*) concerning matters of a given commune. In the communes with more than 3,500 inhabitants, the principles and the procedure for submitting interpellations (including the frequency of their submission) and for providing answers to them are regulated by the provisions of the internal rules of procedure. The commune council sits at the meetings while maintaining the condition of a quorum, which means that the majority of the councillors is present at the meeting. As a rule, the resolutions are adopted by an absolute majority of votes (see art. L2121-20 second paragraph of CGCT). The councillors vote in person or by written proxy in the name of another councillor, absent on the day of the voting<sup>28</sup>. In the event of a tie (with the exception of a secret ballot), the

<sup>25</sup> See art. L2121-10 of CGCT.

<sup>26</sup> See CAA Nancy, 2 févr. 2006, Commune d'Amnéville, no 03NC0090, AJDA, 2006, s. 948.

<sup>27</sup> See art. L2121-10 of CGCT.

<sup>28</sup> See art. L2121-20 of CGCT.

chairman of the council has a casting vote. The voting at the council meetings is public. However, at the request of the mayor and three councillors, the council may decide (without holding a discussion on this subject), by an absolute majority of the councillors, to hold the meeting in camera (see art. L2121-18 of CGCT). In contrast, a secret ballot shall be carried out at the request of 1/3 of the council members present at the session or in personal matters relating to the nomination. There shall be prepared the minutes of the council meeting which shall be within a week from the date of the meeting posted on the website of the commune and shall be announced in the mayor's office. Every natural or legal person is entitled to request a copy of the minutes of the commune council meeting, of the financial statements, and commune regulations.

Both in the Polish and in the French legal system the councillors are obliged to participate in the meetings of standing and ad hoc committees (see art. 24 of the commune local government act and art. L2121-5 of CGCT). The commune council may decide to set up a committee at any of its meetings, stating its personal substrate and scope of activities. In both legal systems the committees are not equipped with decision-making competence. The principles and functioning of the committees shall be set forth, respectively, in the statutes of the commune / internal regulations of *conseil municipal*. As part of *conseil municipal* there are set up commune committees (*les commissions municipales*), which include a mayor (as a chairman of the committee by operation of law), deputies and councillors. The committees meet within eight days from taking the decision on their appointment. At the first meeting of the committee, the members of the committee shall elect a deputy chairman (*vice-président*), who has the power to convene the next meetings and to preside over them in the absence of the mayor or in case of the inability to perform these duties by him<sup>29</sup>. The council may appoint standing committees (e.g. the committee in respect of finances, culture, sport, employment, housing) as well as ad hoc or specialized committees to perform specific tasks. These committees prepare documents and reports on their activities, formulate opinions and *de lege ferenda* conclusions, presenting them to the commune authorities. Ad hoc committees, to be appointed ad hoc, include the committees formed with the aim of preparing the internal rules of procedure of the commune council, which present to the council the draft rules for their adoption<sup>30</sup>.

<sup>29</sup> See: *Comprendre la vie municipale. Communes et intercommunalités*, ed. P. Nicolle, J.P. Muret, Paris 2014, s. 23.

<sup>30</sup> According to art. L2121-8 of CGCT, municipal council in Lyon has set up an ad hoc committee to present the internal rules of procedure of the council, which for this purpose has gathered at the first and the last meeting of this committee on 18 June 2014.

In the Polish legal system the internal organization and the operation of the commune council and its bodies are defined by the statutes of the commune, which shall be published in the provincial official gazette, as an act of local law. It is the law that is not subject to a respective term of office<sup>31</sup>. Commune local government act defines obligatory regulations of the statutes (e.g. the principles and the mode of operation of the audit committee), possibly with the inclusion of the regulations of optional character. In France, in turn, the organization and the functioning of the commune council is determined by the internal rules of procedure of the council which should be adopted within 6 months from the election of the council (this provision applies to the communes with at least 3,500 residents – see L2541-5 of CGCT). The internal rules of procedure of the previous council shall apply until the adoption of new regulations. The absence of such regulations does not indicate the invalidity of all meetings of the council. However, if the chairman of the council refuses to submit to the council its regulations for the purpose of their adoption, this will be deemed as an abuse of power and the act of exceeding its authority<sup>32</sup>. However, the failure to comply with the internal rules of procedure adopted by the council may lead, under certain circumstances, to the annulment of the specific meetings<sup>33</sup>. The communes of over 3,500 inhabitants are required to adopt the internal regulations of the operation of the commune council for the term of their office. In small communes with fewer than 3,500 inhabitants, the adoption of the regulations in question is optional. The internal rules of procedure aim to specify the normative regulations concerning the functioning of the commune council, as defined in the General Code of Territorial Communities. The legal provisions refer to the detailed regulations contained in the internal rules of procedure of the councils within the following three procedures: the organization of the budget debate (art. L2312-1 of CGCT), the conditions for conducting consultations in respect of the contracts and public procurement (art. L2121-12 of CGCT), the conditions of submitting and answering the interpellations (art. L2121-19 of CGCT). The internal rules of procedure may be challenged to the administrative

<sup>31</sup> K. Korczak, *Statuty jednostek samorządu terytorialnego i jednostek pomocniczych gmin* [Statutes of local government units and of auxiliary units of communes], [in:] *Granice samodzielnosci wspólnot samorządowych* [Limits of the independence of local government communities], Rzeszów 2005, s. 137.

<sup>32</sup> Rep. min. no 42396, JOAN Q. 1er mai 2000, s. 2751 – see P. Lacaïlle, *L'élú municipal. Statut de l'élú et fonctionnement du conseil municipal*, Paris 2014 (5<sup>e</sup> édition), s. 173ff.

<sup>33</sup> CAA Douai, 5 juin 2002, Commune de Gaillon, CTI, no 16, janv. 2003, concl. A.F. Roul sur CE, 14 mars 2005, Élect. maire et adjoints de pignan, BJCL, no 5/05, s. 292.

tribunal<sup>34</sup>. In the French legal system, unlike in the Polish one, most of the regulations concerning the organization and functioning of the council are contained in the codes rather than in the regulations of a lower rank than a statute.

In the Polish legal system, the commune council is the decision-making and the controlling body. In the context of the decision-making powers, the council adopts resolutions that have different legal nature. Some of them have the value of the act of local law (e.g. the statutes of the commune, the zoning plan), while others not (e.g. the appointment of the chairman of the council). Within the framework of its controlling activities, the council supervises the activities of the mayor, of the commune organizational units and auxiliary units, hence the said control includes the performance of the commune's own as well as delegated tasks<sup>35</sup>. Controlling activity is carried out mainly through the actual operations (e.g. adopting the report on the activities of the mayor; inspections, interpellations, inquiries)<sup>36</sup>. Control is an important element of the subjectivity of the commune community<sup>37</sup>, which provides the opportunity of its proper management. Decision-making and control functions do not always have a dichotomous character (e.g. the resolution on the acknowledgement of the fulfilment of duties, which is an emanation of both the controlling institution as well as of decision-making powers of the commune council).

In the French legal system *conseil municipal* enjoys a presumption of competence which means that all matters not reserved for another body constitute its competence. The commune council adopts the budget, approves its implementation, discharges the mayor of his duties, creates and abolishes services and public utilities enterprises, and safeguards the communal property. One should note that a number of laws vesting the competence confer on the council specific tasks and competence in the area of local matters. The control on the part of the council is manifested in the mayor's obligation to inform the commune council about the manner of implementing the resolutions. The mayor is obliged to respond to questions addressed by the council collegially or to individual questions asked by the councillors, both during

<sup>34</sup> More broadly on this topic, see: B. Faure, *Droit des collectivités territoriales*, 3<sup>e</sup> édition, Paris 2014, s. 110ff.

<sup>35</sup> On the topic of delimitation of own and delegated tasks, see: E. Olejniczak-Szałowska, *Zadania własne i zlecone samorządu terytorialnego* [Local government's own and delegated tasks], Local Government 2000, No. 12, s. 3.

<sup>36</sup> See A. Szewc, T. Szewc, *Uchwalodawcza działalność organów samorządu terytorialnego* [Resolution-making activities of the local government bodies], Warsaw 1999, s. 16, 20.

<sup>37</sup> Cf. B. Kumorek, *Komisja rewizyjna i kontrola wewnętrzna w gminie* [Audit committee and internal control in the commune], Poznań–Zielona Góra 1996, s. 168.

the meeting and outside it. The council may adopt resolutions, expressing its position as to the manner of implementing its resolutions, but they do not involve any legal consequences, in particular the liability of the mayor. However, the mayor and the council must cooperate together, because the decision-making paralysis is the basis to resolve the council, resulting in cancellation of both these bodies. The cooperation also provides the electoral system guaranteeing a permanent majority in the council from which the mayor is elected<sup>38</sup>. Although the mayor is elected by the commune council, the latter has no right to dismiss him<sup>39</sup>. The commune council also has consultative powers. It issues opinions in cases required by law or if it is requested by the representative of the state. It expresses the expectations of the local community on all issues covered by the local interest.

### *III. Executive bodies of the commune in the Polish and in the French legal order*

In the Polish legal system the mayor is, by operation of law, the executive body of the commune, which means that he performs the tasks arising from the content of the resolutions of the commune council and performs legal duties assigned exclusively to him under law. The mayor has the possibility of issuing order regulations, referred to in art. 41 paragraph 2 of the commune local government act. It is the controlling and the supervisory body in relation to the bodies of the auxiliary units of the commune. The statutes of a given entity determine the scope and the forms of controlling and supervising the commune authorities (see art. 35 paragraph 3 point 5 of the commune local government act). The mayor also supervises the activities of the heads of commune organisational units<sup>40</sup>.

The mayor is the executive body in the commune, but also a local authority of the government administration, elected by the councillors from among the members of the commune (municipal) council. As a representative of the state, he organizes the elections and performs tasks related to security and public order. He has the status of an officer of the judicial police. Thus, the mayor has a dual legal status of a functional nature. The mayor performs the tasks entrusted by the commune, as defined in art. L2122-21 (e.g. property

<sup>38</sup> See art. L2122-16 of CGCT. See also: M. Krzemiński, [in:] *Prawo francuskie [French law]*, ed. A. Machowska, K. Wojtyczek, Zakamycze, Kraków 2005, s. 170.

<sup>39</sup> See: B. Faure, *Droit des collectivités territoriales*, 3<sup>e</sup> édition, Paris 2014, s. 246.

<sup>40</sup> See: A. Szewc, [in:] A. Szewc, G. Jyż, Z. Plawecki, *Ustawa o samorządzie gminnym. Komentarz [The act on commune local government. Commentary]*, Warsaw 2010, s. 364. See the supervisory decision of the governor of Łódź of 20 April 2008, ON-I-0911/242/08, LEX No. 492920.

and financial management of the commune and external representation of the communes) as well as other tasks entrusted by the state (e.g. the preparation of the vital records, the organization of elections). In the case of delegated tasks, the mayor is subject to the prefect or the procurator, who can address him with binding requests.

In the light of art. 169 paragraph 3 of the Polish Constitution, the principles and the procedure for electing the executive body of the commune in the Polish legal system are defined in the Election Code. The election of the commune head<sup>41</sup> (mayor, city president) takes place in common, equal and direct voting, by secret ballot. The mayor is the executive body of the commune where the seat of the authorities is located in the city placed in the territory of this commune. The executive body of the commune may be a person who holds Polish citizenship. According to art. 26 paragraph 4 of the commune local government act, in the cities of over 100,000 inhabitants, the executive body is the city president. This also applies to cities where until the date of entry into force of the said Act, the city president was an executive and managing authority. The commune head may appoint his deputy or deputies by way of an order, specifying their number. The number of deputies is proportional to the number of inhabitants, however, it cannot exceed a certain threshold specified in the Act (see art. 26a paragraph 2a of the commune local government act). The term of office of the commune head shall begin on the date of the commencement of the term of office of the commune council or on the date of his appointment by the commune council and shall expire on the date of the expiry of the term of office of the commune council. The commune head and his deputies are covered by the ban on combining certain statutorily specified functions and positions referred to in art. 27 of the commune local government act. According to this article, the commune head may not combine his function with the function of the commune head or his deputy in another commune, with his membership in the bodies of the local government units, including the commune in which he is the commune head or the deputy of the commune head, with the employment in the government administration or with the duties of a member of a lower or higher chamber of parliament.

The mayor is elected from among the councillors, in a secret ballot, by an absolute majority of votes. If, after two rounds of voting, no candidate received an absolute majority of votes, there shall be carried out a third round of voting, where the election is made based on the relative majority of votes. In the event

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<sup>41</sup> Whenever the article mentions the commune head, it should be understood as the mayor and city president.



of a tie, the oldest candidate is chosen as the mayor. The mayor is appointed at the first session of the council, for the term of six years, together with his deputies (*adjoints du maire*). Mayor deputies are elected in the number set by the commune council<sup>42</sup>, but not exceeding 30% of its number, in secret ballot, in the manner and on the terms specified in CGCT regulations<sup>43</sup>. The term of office of the mayor commences on the date of his election by the council (usually at the first meeting of the council) and ends with the expiry of the term of office of the commune council. The mayor assumes his duties at the moment of his election, which is evidenced by conducting the session of the commune council. The deputies of the mayor assume their offices at the moment when the mayor assigns duties to them. The mayor is subject to the ban on combining certain statutorily specified functions and positions referred to in art. L2122-4 of CGCT, including but not limited to the function of the chairman of the departmental and regional council. The councillor elected as a mayor or his deputy must have French nationality. The term of office of the mayor may, however, be shortened as a result of death, resignation submitted to the prefect, the loss of the eligibility due to a conviction or under a decree of the Council of Ministers, after an earlier order by the Minister of the Interior suspending the mayor in the exercise of his functions for a period of 1 month.

In the Polish legal system the commune head has its own competence, what makes him, in fact, the undisputed leader of the commune executive<sup>44</sup>. His competencies include implementing the resolutions of the commune council and the commune tasks prescribed by law. According to art. 30 paragraph 2 of the commune local government act, the catalogue of the competences of the commune head include, in particular:

- preparation of draft resolutions of the commune council;
- preparation of development programs in the manner specified in the regulations on the principles of development policy;
- specifying how the resolutions should be implemented<sup>45</sup>;
- management of commune property<sup>46</sup>;
- execution of the budget;
- hiring and dismissing the heads of the commune organisational units.

<sup>42</sup> See art. L2122-2 of CGCT.

<sup>43</sup> CGTC provides for another mode of electing the deputies in the communes with fewer than 1,000 inhabitants – see art. L2122-7-1 of CGCT.

<sup>44</sup> L. Rajca, *Pozycja ustrojowa zarządu gminy i jego przewodniczącego* [*The position of the board of the commune and its chairman*], ST 2002, No. 4, s. 4.

<sup>45</sup> See the judgment of the Provincial Administrative Court in Gorzów Wielkopolski of 8 January 2010 (II SA/Go 1011/09, Official Journal, lubuskie province, No. 29, item 450).

<sup>46</sup> See the judgment of the Provincial Administrative Court in Białystok of 13 November 2007 (II SA/Bk 632/07, LEX no. 460545).



In the implementation of the commune's own tasks the commune head shall be subject exclusively to the commune council<sup>47</sup>. This regulation restricts the interference of third parties in the sphere of the implementation of the commune's own tasks, without creating a new relationship between the decision-making body and executive body<sup>48</sup>.

The office is held by the head of the commune and the latter shall exercise the powers of the official superior in relation to the office staff and the heads of the commune organizational units. This entitlement cannot be taken over by the commune council<sup>49</sup>. The commune head may entrust the handling of certain issues of the commune to his deputy or to the commune secretary. The powers of the commune head include the management of the daily matters of the commune<sup>50</sup> (*pro foro interno*) and its representation *pro foro externo* in the sphere of public and private law.

The duties of the commune head include the development of an operational plan for flood protection. Additionally, the commune head announces and cancels flood emergency and alarm. The executive body of the commune may also order the evacuation of the areas directly threatened, if the immediate danger to human life or to property cannot be otherwise removed. In case of announcing the state of natural disaster the commune head operates pursuant to the principles set out in separate regulations. According to art. 39 paragraph 1 of the commune local government act, the commune head is the competent authority to issue decisions in individual cases, unless specific provisions stipulate otherwise. This regulation establishes a presumption of decision-making competence of the commune head. Issuing decisions by the executive authority is subject to the regime of the Administrative Procedure Code<sup>51</sup>. The commune head submits declarations of intent on behalf of the commune in respect of management of the property, either individually or it is undertaken by the deputy of the commune head, under the latter's authorisation, acting either individually or together with another

<sup>47</sup> See art. 30 paragraph 3 of the commune local government act.

<sup>48</sup> See: R. Budzisz, *Ustawa o samorządzie gminnym. Komentarz* [Commune local government act. Commentary], ed. P. Chmielnicki, Warsaw 2013, s. 529.

<sup>49</sup> See the judgment of the Provincial Administrative Court in Wrocław of 9 March 2010, III SA/Wr 857/09, LEX no. 574897.

<sup>50</sup> Current affairs require immediate action of the executive body, which means that they cannot be reserved for the matters falling within the exclusive competence of the council. The division of tasks into current and the remaining should be regulated by the statute – see: B. Dolnicki, *Wpływ nowych zasad wyboru wójta (burmistrza, prezydenta miasta) na relację z radą gminy* [The impact of new rules of electing the commune head (mayor, city president) on the relationship with the community council], PPP 2007, No. 1–2, s. 81.

<sup>51</sup> See the Code of Administrative Procedure of 14 June 1960 (unified text of 2016, item 23 as amended, hereinafter referred to as the administrative procedure code).

person authorised by the commune head<sup>52</sup>. According to art. 233 of the Act on public finances of 27 August 2009<sup>53</sup>, the commune head has an exclusive initiative in respect of drafting a budget resolution, an interim budget resolution or a resolution concerning the amendments to budget resolution. The commune head is also entitled to the exclusive initiative to draw up a draft resolution on the long-term financial forecast and its changes.

In the French legal system, the mayor performs the functions of a public official and of the official of the commune executive authority. As a public official, in accordance with art. L2122-27 of CGCT, the mayor performs the functions in respect of: the publication and the implementation of statutory provisions and secondary (executive) regulations, public order (he protects the overall functioning of the administration in the commune, including the organisation of the elections and the conduct of the general registry of the inhabitants) as well as he performs special duties assigned to him under statutes. The mayor is, at the same time, the civil state officer. This also applies to his deputies<sup>54</sup>. The mayor, as the executive authority of the commune, has the following powers:

- preparation of draft resolutions of the commune and their implementation (including the obligatory preparation of the draft budget);
- chairing the meetings of the commune council and its committees;
- hiring and dismissing the employees of the local government (the mayor is the head of the commune employees and security guards);
- external representation of the commune (including carrying out legal and procedural activities);
- submitting to the commune council the report on the implementation of the budget;
- management of the commune assets and the management of the commune services;
- the right to supervise and control the municipal enterprises<sup>55</sup>.

When executing the resolutions of the council, the mayor is vested with a margin of discretion. He can also affect their content using the right of the initiative to adopt resolutions. On the other hand, his actions are subject to the control of the council and of the local representative of the government. The commune council may authorize the mayor to perform certain activities in the scope of its duties, for example those concerning the management of

<sup>52</sup> See art. 46 paragraph 1 of the commune local government act.

<sup>53</sup> The act on public finances of 27 August 2009, unified text: Journal of Laws of 2013, item 885 as amended, hereinafter referred to as public finances act.

<sup>54</sup> See art. L2122-32 of CGCT.

<sup>55</sup> See art. L2122-21 of CGCT.

commune property, setting the charges (e.g. charges for road transport or for parking), conclusion and signing communal contracts (see art. L2122-22 of CGCT). These powers are strictly defined in the statute. The authorization to carry out these activities is granted for the duration of the mayor's mandate and is assigned to a given person, which means that it cannot be exercised by other persons who replace the mayor in the performance of his duties. The mayor is obliged to submit reports of the tasks performed under the mandate<sup>56</sup>.

The duties of the mayor also include the issues of security and public order. He also performs the functions of the commune police, thus providing local order. In the communes where there is no state police, the mayor performs the regulatory functions with the help of the commune police. The mayor is the chief of regulatory services in the commune. The commune council is devoid of the influence of exercising this competence, while the control in this scope is exercised by the local delegate of the government. The mayor also takes measures to prevent natural disasters. His duties also include issuing permits for the sale of alcoholic beverages and the authorization to hold assemblies, drafting army enlistments and verifying electoral lists. The mayor is the head of the commune administration (the officer holding the power of administration – see art. L2122-18 of CGCT). He may delegate some of his functions to the deputies. The power of attorney in this respect should be well defined and clearly limited as to its scope.

### *Conclusions and proposals*

The system of local government in Poland and France is based on the principle of subsidiarity and decentralization, however, it should be noted that the French local government functions, nevertheless, within a certain administrative duality. The French commune is the example of the administrative model combining the elements of decentralization and deconcentration, because, in fact, in the structure of the commune, the mayor, as an executive body, is at the same time the representative of the government (the power derived from the state – the element of deconcentration) and the power attributed to the territorial community (under the principle of decentralization).

In the Polish legal system, as a result of introducing the principle of direct election of the commune head, the legislator has in a fundamental way strengthened the position of the executive body in relation to the commune council as a decision-making and controlling authority. There is clearly visible a tendency to increase the role and the significance of the executive body of the commune and to

<sup>56</sup> See: M. Krzemiński, [in:] *Prawo francuskie [French law]*, ed. A. Machowska, K. Wojtyczek, Zakamycze, Kraków 2005, s. 170.

expand the independence of its actions. This tendency is gradually reinforced by the laws granting to it the exclusive competence (e.g. the Act on Public Finances of 27 August 2009). A strong legal position of the executive body refers not only to granting it more independence in implementing the tasks and greater powers, but also a certain independence of the personal relations between the authorities of the commune. The council may not dismiss the executive body elected in the direct and common elections, hence the council does not have influence on its decisions (as was often the case in the previous legislation, when the executive body was elected from among the members of the council). Without a doubt, the current mode of electing the commune head strengthens his position, but can contribute to more difficult relations with the council, especially when there is a lack of support for his activities in the form of the absence of the majority of the council. I agree with the views expressed in the doctrine<sup>57</sup> that the concept of restoring normal relations between the decision-making body and the executive body in the commune in the Polish legal system consists in placing the commune head with the leading function in the commune council, on the condition of the absence of the possibility of dismissing him by the council, as is the case in the French model. These two bodies should closely interact (and not compete) due to the purpose of their appointment, namely the purpose of performing local tasks and satisfying the needs of the residents of the units of the basic territorial division of the state.

The commune council begins to play a more consultative role than an equal role in respect of the executive body, therefore there should be raised a postulate to strengthen its position so that it does not become only the instrument that confirms or verifies the operations of the executive body. It should be noted that the commune council has a limited scope of the legal forms of interfering in the activities of the commune head<sup>58</sup>. The commune council does not hold any legal instrument to oblige the commune head to execute the resolution adopted by the council. The absence of any mechanisms for an effective influence on the commune head causes a weakening of

<sup>57</sup> J. Jagoda, *Tryb wyborów organów wykonawczych a ich relacje z organami stanowiącymi jednostek samorządu terytorialnego*, [w:] *Pozycja ustrojowa organów wykonawczych jednostek samorządu terytorialnego* [Procedures for the election of executive bodies and their relationship with the decision-making authorities of local government units, [in:] *Systemic position of executive bodies of local government units*], ed. M. Stec, K. Małyś-Sulińska, Warsaw 2014, s. 101. See also: M. Kulesza, *Konsolidacja zarządzania w samorządzie – wybrane zagadnienia. Uwagi do dyskusji* [Consolidation of management in local government – selected issues. Comments to a discussion], „Samorząd Terytorialny” 2006, no. 7–8, s. 8–9.

<sup>58</sup> See: B. Dolnicki, *Wpływ nowych zasad wyboru wójta (burmistrza, prezydenta miasta) na relacje z radą gminy* [The impact of the new rules to elect the commune head (mayor, city president) on the relations with the commune council], „Przegląd Prawa Publicznego” [Overview of Public Law] 2007, no. 1–2, s. 88.

the functional relationships between these authorities. This also applies to the controlling functions of the commune council, which tend to be apparent (e.g. the institution of discharging certain bodies from their duties and the consequences of a failure to discharge the executive body from its duties).

Mutual relations between the commune authorities guarantee the effective exercise of public duties, thus providing the foundation for the exercise of democracy at the local level. Hence, a beneficial arrangement of the levels of co-operation between the commune authorities allows an effective management of the local community. The relations between the executive and decision-making authorities should be to a greater extent based on the principle of cooperation<sup>59</sup>, including cooperation in the area of competence, rather than on the basis of exclusivity which often leads to the concentration of power in the hands of a single authority and to an abuse of competence and lack of cooperation between the authorities. Therefore, I do believe that the French model concerning the organization of the local administration is a model based on such division of powers between the commune authorities (including personal relations) that ensures a greater cooperation between the commune authorities, and thus an effective execution of the tasks of the local community<sup>60</sup>.

### **Abstract**

#### **The authorities of the commune in Poland and France.**

#### **Conclusions and postulates**

The issues raised in this article present the organization and the tasks of the commune authorities in the Polish and in the French legal system, indicating their decision-making and executive function. The regulations concerning the organization and the operation of the commune authorities, outlined on the basis of the statutory regulations and the internal regulations, the output of the doctrine and the jurisprudence of administrative courts, are intended to identify the elements common and specific to these bodies. Creating good relations between the community authorities is of fundamental importance for the efficient exercise of power at the local level, hence the present issues are deemed crucial. De lege lata analysis of the research problems at hand will help to raise comments and postulates in the final assessment in respect of the relations between decision-making and executive authorities in the commune of both a personal as well as functional nature.

**Key words:** the authorities of the commune, the commune as the basic unit of local government, effective execution of the tasks of the local community, mutual relations between the commune authorities, cooperation between the commune authorities

<sup>59</sup> Some form of cooperation in the French model is, for example, the mayor's chairing the standing committees, which aims to ensure constant coordination between the decision-making and the executive body of the commune.

<sup>60</sup> This aspect is emphasised by the French doctrine of the administrative law – see: B. Faure, *Droit des collectivités territoriales*, 3<sup>e</sup> édition, Paris 2014, s. 236.

## **Streszczenie**

### **Organy gminy w Polsce i we Francji. Wnioski i postulaty**

Problematyka poruszana w przedmiotowym artykule przedstawia organizację i zadania organów gminy w polskim oraz we francuskim porządku prawnym, wskazując na ich funkcję stanowiącą i wykonawczą. Unormowania dotyczące organizacji i działania organów gminy, nakreślone w oparciu o regulacje ustawowe oraz statutowe, dorobek doktryny, a także orzecznictwa sądownoadministracyjnego, mają na celu wskazanie elementów wspólnych dla tych organów oraz rozłącznych. Ułożenie dobrych relacji między organami gminy ma fundamentalne znaczenie w zakresie efektywnego wykonywania władzy na poziomie lokalnym, stąd ta problematyka jawi się jako istotna. Analiza de lege lata przedmiotowej problematyki badawczej pozwoli w ocenie końcowej na wysunięcie wniosków i postulatów dotyczących relacji między organami stanowiącymi i wykonawczymi w gminie zarówno o charakterze personalnym, jak i funkcjonalnym.

**Słowa kluczowe:** organy gminy, gmina jako podstawowa jednostka samorządu terytorialnego, efektywne wykonywanie zadań wspólnoty lokalnej, wzajemne relacje organów gminy, współdziałanie organów gminy