

Monika Augustyniak

PhD, assistant lecturer in the Faculty of Law, Administration
and International Relationships,
Andrzej Frycz Modrzewski Krakow University

Legal position of the executive body in a commune in Poland and in France: In search for a normative pattern¹

Introduction

The term of the executive power in this article will be limited only to the monocratic executive body of a commune in both Polish and French legal orders. I will present selected issues concerning the systemic position of this body in a comparative perspective. Moreover, the article will present tasks and competences of a *maire/vogt* (mayor, president of a city) as grouped into own tasks, delegated ones and tasks executed on behalf of the state. All the above mentioned aspects of the legal position of an executive body will be presented from the perspective of systemic and legal regulations of the territorial self-government in Poland and territorial communities in the French Republic.

The aim of all the subjects of the research is to lead to conclusions and postulates *de lege ferenda* in respect to shaping of the legal position of the monocratic executive body in a commune in the Polish legal order. The deliberations in this article should contribute to the discussion of the model, pattern of an executive body in the contemporary territorial self-government, which should take into account the current social needs of inhabitants of a local community and ensure effective execution of tasks in commune self-government. Search for a normative pattern of an executive body in a commune is still a challenge

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for the territorial self-government, in particular in the light of expectations of inhabitants of a commune, that is prospect electorate.

The term of executive power in a commune in the Polish and French legal orders – systemic and legal issues

In the Polish legal order the term of power in a commune corresponds to its primary and secondary subjects.² Pertaining to article 11 of the Act on Commune Self-Government of 8 March 1990³ inhabitants of a commune decide in a public vote (that is elections and referenda – the primary subject of power) or via commune bodies (secondary subject of power).

According to article 169 items 1 and 3 of the Constitution of the Republic of Poland⁴ a commune, being the basic unit of a territorial self-government, executes its tasks via decision-making and executive bodies. The constitutional legislator decided that the principles and mode of elections of the executive body of a commune is defined in a law. Initially, the Act on Territorial Self-Government introduced a collective executive body in a commune in form of a management council. This body consisted of a vogt (mayor, president of a city) as a chairperson, deputy chairperson and other members. Initially, the management council consisted of 4–7 persons and since 1995 of 3–7 persons.⁵ A management council consisted of councillors and persons from outside councils. Until 2002 the executive body of a commune in the Polish legal order was of collective nature. The procedure of dismissal of a management council was often used by a commune council to influence specific decision of the management council, which resulted from its organisational and functional weaknesses. The Act on Direct Election of Vogt, Mayor and President of a City of 20 June 2002⁶ introduced the monocratic executive body in a commune. The previous indirect election of a management council through a commune council was replaced by direct elections of vogts (mayors, presidents of a city) by inhabitants of a given commune. It should be noted that a change of the

² Cf. A. Szewc [in:] A. Szewc, G. Jyż, Z. Pławewski, *Ustawa o samorządzie gminnym. Komentarz* [The Act on Municipal Self-Government. Commentary], Warszawa 2010, p. 150 et seq.

³ The Act on Commune Self-Government of 8 March 1990 (consolidated text in Journal of Laws of 2016 item 446, as amended)

⁴ The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws no 78, item 483, as amended), hereinafter referred to as the Constitution of the Republic of Poland.

⁵ This change was introduced with provisions of article 1 point 14 of the Act of 29 September 1995 on amendment of the Act on Territorial Self-Government and other Acts (Journal of Laws no 124, item 601).

⁶ Cf. Act on Direct Election of Vogt, Mayor and President of a City of 20 June 2002 (Journal of Laws no 113, item 984).

procedure of election of an executive body entailed a change of the procedure of dismissal of an executive body of a commune. The above mentioned act was repealed under article 10 point 4 of the Provisions introducing the Electoral Code.⁷ *De lege lata* the executive body of a commune is elected in general and direct elections, which guarantees its autonomy and independence from a commune council. Principles and procedure of election of a monocratic executive body in a commune is defined by the provisions of the Electoral Code of 5 January 2011.⁸ Pertaining to article 471 of the Electoral Code a voigt is elected in general, equal, direct elections in form of a secret vote. It should be emphasized that the executive bodies of a poviát and voivodeship are elected indirectly. The elections of executive bodies on a level of department and region in France are also of indirect nature, although these are not collective bodies like in the Polish legal order (poviát management council and voivodeship management council).

As far as the French legal order is concerned, commune bodies consist of a commune council and a maire. A maire is an executive body in a commune, and also a territorial body of governmental administration. A maire is elected by councillors among members of a municipal council⁹ for a period of 6 years. As the representative of the state, a maire organises elections and fulfils tasks related to security and public order. A maire has a status of an officer of judiciary police.¹⁰ This means that a maire has a double legal status of functional nature. A maire fulfils tasks assigned by a commune, as specified in articles L.2122-21 of CGCT¹¹ (e.g. property and financial management in a commune and representing a commune in external contacts) and other tasks assigned by the state (e.g. civil registration¹²).

It should be noted that an executive body in a French commune originates only from the decision-making body. Although as a monocratic executive body in a French commune, the maire has his/her deputies to make decisions collectively as a commune council (bureau municipal), the French administrative jurisdiction points out clearly that the executive body of a commune is not of collective nature,¹³ also if certain rights of a decision-making body are delegated

⁷ Cf. the Act of 5 January 2011 – Provisions Implementing the Electoral Code (Journal of Laws of 2011 no 21, item 113).

⁸ The Electoral Code of 5 January 2011 (consolidated text in Journal of Laws of 2017, item 15).

⁹ Cf. S. Velley, *Droit administratif*, Paris 2015, p. 83.

¹⁰ Cf. Pierre Chapsal, *Les collectivités territoriales en France*, 5^e édition, Paris 2015, s. 30.

¹¹ Code général des collectivités territoriales (the General Code of Territorial Collectivities, CGCT) – source: <https://www.legifrance.gouv.fr> [accessed: 21.12.2017].

¹² Cf. Pierre Chapsal, *Les collectivités territoriales en France*, 5^e édition, Paris 2015, p. 31.

¹³ Cf. the decision of the Council of the State of 9 November 1983, *Saerens, Lebon*, p. 453.

to him/her. Therefore it should be concluded that competences of an executive body in both Polish and French communes are assigned to a monocratic executive body, but the election of this body is different in the Polish legal order.

In the French doctrine of administrative law, deputies of an executive body are considered to be auxiliary bodies of the executive power in a local community.¹⁴ In the French legal order, a number of deputy maires is defined by a commune council freely but not discretionary, since it may not be higher than 30% of members of the council. The limit is controlled strictly by a court of law, which may decide on the issue in result of so called *déféré préfectoral* (that is a prefect can challenge a legal act of a territorial community in an administrative court), but not upon a petition filed by citizens. The French legislator provides for a possibility to establish one or more additional positions of special deputies, but only in case of combination of communes (article L. 2113-6 of CGCT) or if communication between a commune's seat and a part of such seat is impeded or hazardous (article L. 2122-3 of CGCT). Since enactment of the Act on Direct Democracy of 27 February 2002,¹⁵ in order to reduce a distance between councillors and citizens in towns of at least 80,000 inhabitants, it is possible to appoint deputies who are accountable for one or more districts, but their number must not exceed 10% of the statutory number of councillors in a commune council. Such deputies are responsible for all issues related mainly to a district(s), for which they are responsible. They take care for notifying inhabitants and facilitate their participation in life of a district (article L. 2122-18-1 of CGCT).

In the Polish legal order, a vogt (mayor, president of a city) may appoint his/her deputy/deputies in a decree and determine their number. A number of deputies is proportionate to a number of inhabitants, but may not be higher than a specific limit defined in the act (see article 26a item 2 of the Act on Commune Self-Government). It is also the vogt's right to dismiss his/her deputy through a decree that should inform on reasons of such action.¹⁶ Dismissal of a deputy vogt "is equivalent to termination of a labour relationship with such person".¹⁷ If a number of deputy vogts, as determined by a vogt, is larger

¹⁴ Cf. J. Ferstenbert, F. Priet, P. Quilichini, *Droit des collectivités territoriales*, Paris 2016, p. 262.

¹⁵ Loi n° 2002-276 du 27 février 2002 relative à la démocratie de proximité (JORF du 28 février 2002 page 3808).

¹⁶ Cf. the award of the Voivodeship Administrative Court in Poznań of 9 December 2010 (IV SA/Po 903/10, LEX no 758634).

¹⁷ Cf. C. Martysz, [in:] *Ustawa o samorządzie gminnym. Komentarz* [The Act on the Commune Self-Government. Commentary], ed. B. Dolnicki, Warszawa 2016, p. 656. Cf. also a decision of the Supreme Administrative Court of 16 July 2010 (II OSK 919/10, LEX no 673896), where the Supreme Administrative Court pointed out that "the fact that dismissal of a deputy vogt from his/her position in compliance of article 26a item 1 of the Act on Commune Self-Government is an act under labour law does not mean that at the same time it is an act within the scope of public administration".

than one, in a decree on their appointment a vogt shall specify full names of the first deputy and subsequent ones. Since no statutory scope of responsibilities of a deputy vogt is defined by the legislator, a vogt is allowed to determine freely their obligations, for instance delegate judicial functions (article 39 item 2 of the Act on Commune Self-Government) or delegate representation of a commune at a meeting of an intermunicipal union (article 70 item 2 of the Act on Commune Self-Government). In practice, in communes with auxiliary units, mainly districts, one of deputies of an executive body ensures proper organisation and functioning of auxiliary units in a given commune. It means a similar practical approach of a local authority entitled to adopt resolutions to tasks of a deputy of an executive body in a commune.

In as French commune, contrary to a French department and region, there is no standing commission that may be assigned specific tasks and competences of a decision making body.¹⁸ It should be emphasized that the statutory prohibition of subdelegation that refers to this commission, covers the budget issues. Although it may not be included in a group of authorities in a department or a region, a standing commission is an expression of decision making rights of a council, so it may be considered an authority of department/region in functional sense. In the Polish legal order, the legislation did not provide for legal possibilities to appoint a commission concerned, either. There are standing and ad hoc commissions in a council of a commune, but the scope of subjects assigned to them is limited to presentation of opinions and consulting functions. The legal grounds of their functioning were based on the provisions of the Act on Commune Self-Government of 8 March 1990 and in provisions of commune's charters. It should be emphasized that the Act on Partial Modification of the System of Territorial Self-Government of 23 March 1933¹⁹ allowed establishment of standing or temporary commissions or commissions devoted to certain issues within the structure of a commune councils. Such commissions consisted of council members and if necessary, of inhabitants who were eligible for election to the council. A commune council could delegate to them examination and preparation of opinions on various issues related to commune's administration and management, drafting petitions for the council and also decide on individual issues requiring a resolution in substitution for the council. Such structure corresponded in a way to the structure of a standing commission that functions now in a department council or regional council in France. However, pertaining to article 45 item 2 of the Act concerned, a man-

¹⁸ Cf. article L. 4221-5 of CGCT.

¹⁹ Cf. Act on Partial Modification of the System of Territorial Self-Government of 23 March 1933 (Journal of Laws, item 294).

agement council of a commune also had a right to appoint commissions among its members and councillors (or inhabitants of communes who were eligible for election to the council). Such commissions could be appointed only for the purpose of preparation of opinions and preparation of petitions on commune's administration and management, that required a resolution of a management council or decision of commune's superiors. I believe that it would be good to return to the legal provisions in this respect, presenting a postulate *de lege ferenda* concerning establishment of consulting commissions in a commune self-government, cooperating as obligatory consulting bodies with the monocratic executive body in a Polish commune. However, it requires amendments to the act on the system of self-government in this respect.

Competences²⁰ of executive power in both legal orders

In the French legal order, the competences of an executive body are explicitly reserved to it, but they are its original competences. Such competences are executed directly on behalf of a community or in result of delegation, and in case of a maire and his/her deputies – sometimes on behalf of state sometimes. In the Polish legal order, competence of an executive body in a commune were explicitly specified in the systemic act and other acts of substantive law. Therefore, a voigt is obliged to fulfil certain tasks of a commune (own and assigned tasks²¹), that were directly assigned to it. If any task of a commune was not assigned precisely to specific authorities of a commune, it should be included in the scope of responsibility of a council, rather than the executive body of a commune (in compliance with the presumption of competence of a commune council (see article 18 item 1 of the Act on Commune Self-Government)).²²

Below there is a classification of competences of an executive body on the basis of their division adopted in the French legal order, in order to determine similarities and differences in the scope of competences of a voigt (mayor, president of a city).

²⁰ As pointed out by Z. Leoński, the notion of competences of a body should be understood as a set of rights and obligations of a body, including forms of activities, that is forms of performance of activities, while the notion of tasks should be understood as an objective that must be achieved by the self-government – Z. Leoński, *Samorząd terytorialny w RP* [Territorial Self-Government in the Republic of Poland], Warszawa 2001, p. 29.

²¹ Own and assigned tasks – see H. Izdebski, *Samorząd terytorialny. Podstawy ustroju i działalności* [Territorial Self-Government. Ground of the System and Activities], Warszawa 2014, p. 152 et seq.

²² Cf. A. Szewc, [in:] A. Szewc, G. Jyż, Z. Pławewski, *Ustawa o samorządzie gminnym. Komentarz* [The Act on Municipal Self-Government. Commentary], Warszawa 2010, p. 113.

Competences of an executive body of a commune exercised on behalf of a local community

In the French legal order, the competences exercised on behalf of a territorial community include two groups of competences: the first ones are competences assigned directly under legal provisions, and the other – rights obtained in result of their delegation. Due to the legal comparative perspective, the competences of a *vogt* (mayor, president of a city) will be also presented on the basis of this division of competences and tasks of a *maire*.

The first group of competences assigned to a *maire* by the French legislator is preparation and execution of resolutions of a decision-making body. Execution of resolutions is an obligation of an executive body. A *maire* is not allowed to change a resolution of a council even slightly on any issues. The executive body in a commune works out and presents an estimated budget, approves expenditures and supervises generation of incomes (article L 2122-21 item 3 of CCCT).

Pertaining to article L. 2122-18 of CGCT, a *maire* is the only body administering a territorial community, excluding rights that have been delegated by him/her (but assigned functions remain under his/her supervision and responsibility).

A *maire* manages the property of his/her community (L. 2122-21 item 1 of CGCT). A *maire* has rights appropriate for the police, which means that he/she has numerous prerogatives in this field on is/her own, that is without participation and supervision of a commune council (article L. 2122-24 of CGCT).

The competences of a *maire*, as an executive body together with the decision-making body, include appointment of council representatives in external bodies (article L. 2121-33 of CGCT). Such delegates may be replaced by other persons any time and on the same conditions.

A *maire* takes legal action on behalf of a community and upon consent of a decision-making body granted in respect to every legal action and appeal. A commune council may grant to a *maire* (but not to his/her deputy) a general authorisation to represent the community in court of law. At the same time, of *maire's* interests contradict to the interests of a commune, the commune council shall appoint one of its members to represent a commune in court of law or in an agreement.

Tasks and competences of an executive body in a commune in the Polish order are the same as competences and tasks of a *maire* imposed by law and executed on behalf of a local community. A *vogt* has own competences, which means that he/she is an unquestionable executive body in a structure of a commune and outside. His/her competences include execution of resolution

of a commune councils and tasks of a commune defined in legal provisions. Pertaining to article 30 item 2 of the Act on Commune Self-Government, the competences of a vogt include in particular preparation of draft resolutions of a commune council, preparation of development plans in the manner defined in the provisions on developmental policy and deciding on a manner of execution of such resolutions.²³ It may include management of municipal property,²⁴ execution of a budget and issues related to employment and dismissal of managers of organisational units of a commune. The competences of an executive body in both legal orders are similar. When executing his/her tasks, a vogt is subordinated to a commune council only.²⁵ This provision restricts interference of external bodies into the sphere of own tasks fulfilled by a commune, but does not establish a new relationship between the decision making body and the executive body.²⁶

A vogt is the head of the office and he/she is a superior of the staff of the office and heads of organisational units of a commune.²⁷ Vogt's competences include managing ongoing business of a commune²⁸ and its representation outside a commune in the sphere of public and private law.²⁹ An executive body

²³ Cf. award of the Voivodeship Administrative Court in Wrocław of 23 January 2013 (III SA/Wr 507/12, LEX no 1274822), in which the Voivodeship Administrative Court pointed out that: "Tasks of a vogt include decisions who, when and by what means and in what manner is to execute tasks resulting from a resolution. Execution of resolutions, as understood in such way, is only the vogt's responsibility (article 30 item 2 of the Act on Commune Self-Government)".

²⁴ Cf. award of the Voivodeship Administrative Court in Gorzów Wielkopolski of 30 July 2014 (II SA/Go 394/14, LEX no 1519881): "Ongoing management of municipal property is the responsibility of an executive body of a commune, while the decision-making body decides on issues that are directly assigned to it by legal provisions and within the limits of such provisions. A commune council may not undertake activities from the executive sphere, since it would infringe the constitutional principle of division of bodies of a territorial self-government into executive bodies and decision-making bodies".

²⁵ Cf. article 30 item 3 of the Act on Commune Self-Government.

²⁶ Cf. R. Budzisz, *Ustawa o samorządzie gminnym. Komentarz* [The Act on Commune Self-Government. Commentary], ed. P. Chmielnicki, Warszawa 2013, p. 529.

²⁷ The issue of municipal organisational units is discussed in more detail in M. Augustyniak, T. Moll, *Tworzenie, przekształcanie i likwidacja jednostek organizacyjnych samorządu terytorialnego* [Establishment, Transformation and Liquidation of Organisational Units of a Territorial Self-Government], Warszawa 2015, p. 19 et seq.

²⁸ Ongoing issues require immediate response of an executive body, which means that they cannot be reserved as issued under exclusive competence of a council. Division of tasks into ongoing ones and the other should be regulated in by-laws. Cf. B. Dolnicki, *Wpływ nowych zasad wyboru wójta (burmistrza, prezydenta miasta) na relację z radą gminy* [Impact of the New Principles of Election of a Vogt (Mayor, President of a City) on Relationships with a Commune Council], *Przegląd Prawa Publicznego* 2007, no 1–2, p. 81.

²⁹ Cf. award of the Supreme Administrative Court in Warsaw of 5 August 2010 (II OSK 1033/10, LEX no 737686): "If a vogt (mayor, president of a city) is entrusted with execution of a resolution, it should be assumed that this body was authorised to undertake all activities

of a commune is responsible for its correct financial management. Its exclusive competence include in particular incurring liabilities with a coverage ensured by amounts of expenses set in a resolution on the budget and issuance of securities (in both cases within the scope of authorisation granted by a commune council), to make budget expenditures, propose amendments to a budget of a commune and dispose with reserves in a budget of a commune.³⁰

Competences of an executive body in both legal orders are considered competences enforced on behalf of a local community, are granted directly with legal provisions and are in general of the same nature. Contrary to a maire in a French commune, a monocratic executive power in a commune in the Polish order has no rights of the police. So his/her priority role in respect to security in a commune should be pointed out. But it should be noted that a voigt (mayor, president of a city) may order evacuation from directly endangered areas in circumstances when direct hazards for human life or property may not be dealt with otherwise. A voigt (mayor, president of a city) is the competent body in respect to crisis management issued in a commune in compliance with provisions of articles 19 and 20 of the Act on Crisis Management of 26 April 2007.³¹ Moreover, under the Act on Municipal Police of 29 August 1997³² a voigt adopts the regulation of municipal police³³ and supervises its activities. In relation to fulfilment of its tasks, a municipal police cooperates with the Police, so a voigt (mayor, president of a city) may enter into an agreement on cooperation of municipal police and the Police with a competent Police commissioner.³⁴ However, his/her legal position in relation to the security policy seems to be weaker than the position of a maire in a French commune.

As far as rights obtained through delegation are concerned, a position of a maire is much more favourable as compared to a chairperson of a department council or region council. During his/her term of office, he/she can receive functions from a commune council that are performed under its authorisation and that are subject to a report presented at every meeting of a council of a commune. In article L. 2122-22 of CGCT the French legislator

aimed at enforcement of such resolution, which includes also appearing before a court of law, if such act is challenged”.

³⁰ Cf. article 60 item 2 of the Act on Commune Self-Government.

³¹ The Act on Crisis Management of 26 April 2007 (uniform text in Journal of Laws of 2017, item 209).

³² Cf. The Act on Municipal Police of 29 August 1997 (uniform text in Journal of Laws of 2016, item 706).

³³ The executive body of a commune imposes regulation on a municipal police, while a commune council decides on a position of a municipal police in the structure of a commune office – cf. article 6 item 2 of the Act on Municipal Police.

³⁴ Cf. article 9 item 4 of the Act on Municipal Police.

distinguishes among 26 categories of rights that may be assigned to a maire. A council of a commune may also take back delegated competences from a maire, and – unless it decides otherwise in its resolution – make decisions on a subject concerned if a maire is not able to execute it (article L. 2122-23 of CGCT). Since the act of 13 August 2004 entered into force,³⁵ unless a decision contradictory to a resolution delegating powers is taken, decisions adopted within the scope of this delegation may be signed by one of deputies or one of councillors in a commune. The latter case takes place in case of absence of deputies or their inability to do this of when all deputies have been already delegated (article L. 2122-18 of CGCT). In result of a delegation, part of the rights of an executive body (also rights delegated by a maire to his/hr deputy in respect to municipal police) may be executed under supervision and responsibility of a maire by a deputy maire(s) or other councillors authorised to obtain such delegations in compliance with the above mentioned reservations. Such delegations remain in force until they are withdrawn. A withdrawal of a delegation does not need an obligatory justification.³⁶ Delegation may not be made at all, or may be made in relation to some deputies only. This freedom of choice means that election of delegates does not need to be made in a specific order (in particular according to their ranks). Numerous delegations may be granted, they may differ with a scope of application or priority set. However, as from enactment of the act no 2014-125 of 14 February 2014³⁷ members of local councils, who are members of the national parliament of the EU Parliament cannot obtain or maintain delegation (article L. 2122-18 item 3 of CGCT), unless it refers to rights exercised on behalf of the state.³⁸

A delegation is legal, if it meets specific requirements. No delegation may be granted on a specific issue with omission of the provisions that allow such delegation. Only a part of rights of an executive body may be subject of delegation. It has to be made in writing, because an oral or implied delegation is illegal. In the doctrine of French administrative law and judicature it is pointed out that a delegation must precisely define delegated functions. It should include a name of a person, to whom rights are delegated and by properly published (ordinary information in a bulletin of a commune (bulletin municipal) is not

³⁵ Loi n° 2004-809 du 13 août 2004 relative aux libertés et responsabilités locales.

³⁶ Cf. J. Ferstenbert, F. Priet, P. Quilichini, *Droit des collectivités territoriales*, Paris 2016, p. 269.

³⁷ Loi organique n° 2014-125 du 14 février 2014 interdisant le cumul de fonctions exécutives locales avec le mandat de député ou de sénateur, JORF n°0040 du 16 février 2014 page 2703.

³⁸ A maire may also delegate an authorisation to sign documents on various issues to the management of organisational units of a territorial community (article L. 2122-19 of CGCT), save for management of organisational units left for disposal of the territorial community.

considered appropriate).³⁹ It should be pointed out that a decree on delegation is a legal act⁴⁰ like a decree that ends a delegation. As such, these acts do not require presentation of reasons, but are to be provided obligatorily to the representative of the state.

A delegation does not prevent the delegating person from enforcement of rights which have been delegated, if it is allowed under a resolution of a commune council. It is also possible in a situation, when the first deputy substitutes a maire if the latter cannot fulfil his/her function.⁴¹ Remuneration of deputies is linked with their delegations and cannot be paid in case of no delegation or when it has been withdrawn.⁴²

In the Polish legal order, a council of a commune cannot delegate its tasks and competences in the scope of its exclusive competence. However, it should be noted that pertaining to article 18 item 2 of the Act on Commune Self-Government it may establish certain normative frameworks of operations of an executive body of a commune outside the scope of ordinary management, in respect to: issuance of bonds and determination of the principles of their sale, purchase and redemption by a vogt (article 18 item 2 point 9 letter b); determination of the maximum value of short-term loans and credits contracted by a vogt during a budget year (article 18 item 2 point 9 letter d); determination of the principles of contribution, withdrawal and disposal of shares and stock by a vogt (article 18 item 2 point 9 letter g); determination of the maximum value of loans and securities granted by a vogt during a budget year (article 18 item 2 point 9 letter i). In a resolution a commune council determines the maximum amount for a vogt to incur liabilities on his/her own (article 18 item 2 point 10 of the Act on Commune Self-Government). But the above mentioned provisions can be hardly considered rights acquired by an executive body of a commune in consequence of a delegation of rights by a council. But another issue is a possibility of the vogt (mayor, president of a city) to delegate his/her competences to his/her deputies or other persons, e.g. judicial competences. Pertaining to article 39 item 2 of the Act on Commune Self-Government, an executive body of a commune may authorise its deputies or other staff of a commune office to issue administrative decisions on behalf of the vogt (mayor, president of a city).⁴³ In an award dated 20 May 2008, the Voivodeship Ad-

³⁹ Cf. J. Ferstenbert, F. Priet, P. Quilichini, *Droit des collectivités territoriales*, Paris 2016, p. 270.

⁴⁰ Cf. CAA – award of the Administrative Court of Appeal in Douai of 4 March 2004, *Cne de Brébières*, no 02DA00332.

⁴¹ Cf. J. Ferstenbert, F. Priet, P. Quilichini, *Droit des collectivités territoriales*, Paris 2016, p. 270.

⁴² Cf. the Council of the State of 29 April 1988, *Cne d'Aix-en-Provence, Lebon*, p. 174.

⁴³ There is an exception, that is a commune council may grant an authorisation in form of a resolution to executive bodies of auxiliary units or organisational units of a commune to issue administrative decisions under article 39 item 4 of the Act on Commune Self-Gov-

ministrative Court in Rzeszów pointed out that “an authorisation referred to in article 39 item 2 of the Act on Commune Self-Government should be made in writing and be addressed to a specific person, and include a specification of the scope of authorisation to act on behalf of a vogt”.⁴⁴ Pertaining to article 46 item 1 of the Act on Commune Self-Government, a declaration of will on behalf of a commune in respect to property management shall be made individually by a vogt or his/her deputy acting under his/her authorisation individually or jointly with another person authorised by a vogt. Such authorisation should be treated as an authorisation under substantive law, which is based on the provisions of the Civil Code.⁴⁵

The Voivodeship Administrative Court in Poznań was right to point out in its award dated 20 July 2016 that „A mayor has competences to manage ‘the ongoing business of a commune’ and in this respect it may delegated his/her competences to his/her deputy. But may not delegate competences related to introduction of amendments to a budget of a commune. This is the competence of the authority, not of the head of the office.”⁴⁶

The competences of an executive body of a commune exercised on behalf of the state

The maire exercises some rights as an official representative of the state.⁴⁷ Therefore, maire’s responsibilities include publication and enforcement of laws and regulations, ensuring general security means and performance of special functions defined for him/her in the legislation.⁴⁸ These activities, when undertaken, entail responsibility of a state, not a commune. Examples of “special functions” include for instance certifying copies as true copies, issuance of certificates of life, certificates of goods standing, participation in electoral activities, providing access to electoral registers for the electorate, candidates and political parties, forwarding requests for issuance of national ID documents

ernment. Cf. the award of the Voivodeship Administrative Court in Białystok of 22 March 2017 (I SA/Bk 396/16, LEX no 2267343): “A council of a commune may not delegate competences granted under an Act on maintaining Cleanliness and Order in Communes to a vogt, mayor or president of a city to arrange individual issues related to waste management to other entities on the basis of article 39 item 4 of the Act on Commune Self-Government”.

⁴⁴ Cf. the award of the Voivodeship Administrative Court in Rzeszów dated 20 May 2008 (II SA/Rz 723/07, LEX no 499842).

⁴⁵ Cf. the award of the Court of Appeal in Łódź dated 25 June 2014 (I ACa 6/14, LEX no 1496481).

⁴⁶ Cf. the award of the Voivodeship Administrative Court in Poznań dated 20 July 2016 (III SA/Po 419/16, LEX no 2087522).

⁴⁷ Cf. article L. 2122-27 to article L. 2122-34 of CGCT. More in S. Velley, *Droit administratif*, Paris 2015, p. 83.

⁴⁸ Cf. M. Thoumelou, *Collectivités territoriales. Quel avenir?*, Paris 2016, p. 96.

to the prefecture and subprefecture and in the educational field – accepting children from outside a commune to public schools. It should be pointed out that when fulfilling an instruction of a prefect or a minister, a maire acts in a capacity of an official representative of the state, which is also confirmed by opinions published in the French court judicature.⁴⁹

Moreover, on behalf of the state a maire and his/her deputies act in the capacity of criminal police officers (art. 16 item 1 of Code de procédure pénale – the Code of Penal Procedure). When performing this function, which in fact takes place occasionally, they are not subordinate to a prefect but to judicial authorities, like in case of the function of registrar. The status and functions of a criminal police officer and registrar are assigned to deputies directly by law. So they do not need delegation for fulfilment of those functions, and those functions remain in force in case of withdrawal of a delegation, which is underlined by judicature of administrative courts.⁵⁰ But to fulfil a function of a registrar, if it cannot be fulfilled by a maire and his/her deputies, councillors of a communes must have a delegation granted by a maire. Special deputy, competent for a part of commune remote from its capitol (article L. 2122-3 of CGCT⁵¹), fulfils the registrar's functions and may be instructed to execute laws and regulations concerning the police, although he/she is not a criminal police officer himself/herself and may not receive a delegation from a maire.

Thus in respect to the Polish legal order one cannot discuss tasks of a vogt performed on behalf of the state. These are rather competences and tasks, whose construction falls within the scope of assigned tasks. Assigned tasks “are responsibility of the governmental administration, but due to the fact that there are no governmental administration bodies in a commune, such tasks are performed by territorial self-government bodies.”⁵² The difference between assigned tasks and own tasks results from the fact that assigned tasks are not aimed to satisfy needs of a self-governing commune, but rather justified needs of the state.⁵³ The legislator defined two ways for a commune to take over assigned tasks: obligatory – resulting from detailed provisions and voluntary, that is executed on the basis on an agreement of bodies of a commune with governmental administra-

⁴⁹ Cf. the Council of the State, 19 January 1951, *Town de Menton, Lebon*, p. 35.

⁵⁰ Council of the State, sect., 11 October 1991, *Ribaute and Balança, Lebon*, p. 331; GADD no 24.

⁵¹ Pertaining to article L. 2122-3 of CGCT, if any obstacle or distance impedes communication between a seat of a commune and another part of its territory or temporary renders it impossible, a council of commune may appoint a special deputy in a resolutions (presenting respective reasons). If communes are combines, it is possible to establish one or more positions of special deputies.

⁵² B. Dolnicki, *Samorząd terytorialny* [Territorial Self-Government], Warszawa 2016, p. 357.

⁵³ Cf. A. Wiktorowska, *Prawne determinanty samodzielnosci gminy*, Warszawa 2002, p. 136.

tion bodies.⁵⁴ In the previous legal status the legislator provided for directly in article 30 item 2 point 6 of the Act on Commune Self-Government that the executive body is the competent body to perform assigned tasks. This provision was repealed by article 1 point 36 of the Act of 11 April 2001 (Journal of Laws 01.45.497) amending this Act as from 30 May 2001 and *de lege lata* assigned tasks falling in the scope of capacities of the governmental administration are fulfilled by two bodies of a commune – the decision-making one and executive one. Like in the French legal order a vogt (mayor, president of a city) is the registrar. Pertaining to article 6 items 4 and 5 of the Act on Civil Status Records of 28 November 2014⁵⁵ in administrative districts of less than 50,000 inhabitants a vogt (mayor, president of a city) employs a deputy registrar and may also employ another person on a position of a registrar. While in case of administrative districts of more than 50,000 inhabitants, an executive body of a commune employs another person on a position of a registrar and may also employ deputy registrar(s).

Conclusions: in search of a normative pattern

Presented issued in the scope of legal status of an executive body in the Polish and French legal orders enable the following conclusions.

An executive body in a French commune originates from the decision-making body contrary to the Polish legal order, where a monocratic executive body of a commune has been elected in direct general elections since 2002. Therefore the personal relationships between decision-making bodies and executive bodies are shaped differently, but it should be pointed out that a commune council in France may not dismiss a maire with its resolution, which undoubtedly strengthens maire's legal status in relation to a decision-making body.⁵⁶ Personal relationship have impact on the shape of functional relationships⁵⁷ of

⁵⁴ Cf. article 8 items 1 and 2 of the Act on Commune Self-Government .

⁵⁵ Cf. the Act on Civil Status Records of 28 November 2014 (consolidated text in Journal of Laws of 2016, item 2064 as amended).

⁵⁶ J. Jagoda points out that “the concept that would resume correct relationships between the decision-making body and executive body in a commune is to have a council of a commune chaired by a vogt (mayor, president of a city)” – see J. Jagoda, *Tryb wyborów organu wykonawczych a ich relacje z organami stanowiącymi jednostek samorządu terytorialnego* [The Manner of Election of Executive Bodies and Their Relationships with Decision-Making Bodies of a Territorial Self-Government], [in:] *Pozycja ustrojowa organów wykonawczych jednostek samorządu terytorialnego* [Systemic Position of Executive Bodies in Units of Territorial Self-Government], red. M. Stec, K. Małysa-Sulińska, Warszawa 2014, p. 101.

⁵⁷ To find out more about personal and functional relationships see R. Budzisz, *Kilka uwag w dyskusji nad modelem organu wykonawczego w gminie* [A Few Comments in the Discussion of a Model of an Executive Body in a Commune], *Samorząd Terytorialny* 2007, no 1–2, p. 37.

decision-making bodies and executive bodies in both legal orders. Therefore one should note a wider scope of maire's competences specified not only in legal provisions, but also delegated by the commune council (*conseil municipal*). Issues that may be delegated to a maire were listed in the Code General of Territorial Collectivities.

The competences of the executive body in both legal orders are included in the scope of competences fulfilled on behalf of a local community and assigned under legal provisions are in general of the same nature. It should be pointed out, however, that a *vogt* in the Polish legal order has no rights of a police officer contrary to a maire in the French commune. Thus, the maire's status seems to be a wider scope, since it includes also issues related to public safety. That is why it may be stated that a maire's position is hedged with normative rights. The issues related to delegated competences are completely different, because in fact they are not present in the Polish legal order. However, it should be mentioned that pertaining to article 18 item 2 of the Act on Commune Self-Government, a commune council may define certain normative framework of an executive body of a commune, e.g. adopting resolutions on issues related to commune's assets beyond the scope of ordinary management and concerning for instance: issuance of bonds and determination of the principles of their sales, purchase and redemption by a *vogt*.

Competences fulfilled on behalf of the state constitute the last type of maire's competences. A maire exercises some rights as an official representative of the state. For instance, maire's obligations include publication and enforcement of acts and regulations, and ensuring general safety means and performing special functions defined for a maire by the legislature. Moreover, a maire and his/his deputies act as criminal police officers on behalf of the state. A maire performs also functions of a registrar.

As far as the Polish legal order is concerned, it is difficult to discuss *vogt's* tasks fulfilled on behalf of the state. These are rather competences and tasks, whose structure is included in the scope of assigned tasks. Like in the French legal order, an executive body of a commune is the registrar. But he/she does not act in the capacity of a criminal police officer. He/she has no such competence.

When discussing the model of an executive body from a perspective of competence allocated to it, it may seem that the French model – in particular to delegated competences – guarantees that relationships between bodies of a commune will be based on the principles of the concomitance principle, that is so much needed in execution of tasks on a local level. Therefore, I believe that work reflection on possible receipt of some competences that create the level of relationships based on cooperation among bodies, which may also contribute to adoptions of the French legal systemic solutions in the scope of personal and functional relationships in a local community.

Abstract

Legal position of the executive body in a commune in Poland and in France: In search for a normative pattern

The article presents the legal status of an executive body in a commune in the Polish and French legal orders, including selected issues related to the systemic position of this body in a comparative perspective. The tasks and competences of a maire/vogt (mayor, president of a city) were presented and grouped into own tasks, delegated ones and the ones fulfilled on behalf of the state. All presented problems of research enabled conclusions and postulates *de lege ferenda* in respect to shaping of a legal position of a monocratic executive body in a commune in the Polish legal order. The considerations presented in this article should lead to a discussion of a model, pattern of an executive body in the contemporary territorial self-government, which should take account of current needs of inhabitants of a local community and ensure effective execution of tasks in commune self-government.

Key words: personal and functional relationships among authorities of a commune, the legal status of an executive body, own and assigned tasks, normative patterns, a monocratic and collegial body, competences executed on behalf of a community, own competences, delegated competences and competences exercised on behalf of the state

Streszczenie

Pozycja prawna organu wykonawczego w gminie w Polsce i we Francji. W poszukiwaniu wzorca normatywnego

Artykuł przedstawia pozycję prawną organu wykonawczego w gminie w polskim i francuskim porządku prawnym, w tym wybrane zagadnienia dotyczące pozycji ustrojowej tego organu w perspektywie porównawczej. Zaprezentowano zadania i kompetencje mera/wójta (burmistrza, prezydenta miasta) – z podziałem na własne, oddelegowane oraz te wykonywane w imieniu państwa. Całość przedstawionej problematyki badawczej pozwoliła na wysunięcie wniosków oraz postulatów *de lege ferenda* w zakresie kształtowania pozycji prawnej monokratycznego organu wykonawczego w gminie w polskim porządku prawnym. Rozważania prowadzone w artykule powinny przyczynić się do dyskusji na temat modelu, wzorca organu wykonawczego we współczesnym samorządzie terytorialnym, który będzie uwzględniać aktualne potrzeby mieszkańców wspólnoty lokalnej i zapewniać efektywne wykonywanie zadań w samorządzie gminnym.

Słowa kluczowe: relacje personalne i funkcjonalne między organami gminy, status prawny organu wykonawczego, zadania własne i zlecone, wzorzec normatywny, organ monokratyczny i kolegialny, kompetencje wykonywane w imieniu wspólnoty, kompetencje własne, oddelegowane i wykonywane w imieniu państwa