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Dissolution of the Municipal Council and the Person Designated to Perform the Functions of the Municipal Council: Remarks De Lege Lata and De Lege Ferenda

Rozwiązanie rady gminy a osoba wyznaczona do pełnienia funkcji rady gminy. Uwagi de lege lata i de lege ferenda

ABSTRACT

The circumstances in which the municipal council, as the decision-making and controlling body in the municipality, is dissolved are exceptional situations. They can be found in the provisions of the Act of 8 March 1990 on municipal self-government, as well as in the provisions of the Act of 15 September 2000 on local referendum. If there are grounds for dissolving the municipal council, it is necessary for the President of the Council of Ministers to appoint a person who will act as the dissolved municipal body. The applicable statutory provisions are imprecise and the solutions they contain are far from the ideas of a rational legislator. Their interpretation leads to an indication of the extent to which it is possible to make them more precise and to provide more detail in the legal regulations, which would contribute to their more effective application in practice.

Keywords: municipality; municipal council; dissolution of the municipal council; appointed person; President of the Council of Ministers

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INTRODUCTION

The legislature included a quite peculiar legal construct in the provisions of the Act of 8 March 1990 on municipal self-government[1] and the Act of 15 September 2000 on local referendum:[2] "a person designated to perform the function of a municipal council", which is related to the special circumstances in which a situation occurs when the legislative body in the municipality, i.e. the municipal council, is dissolved. The legislature had to find a solution in such an exceptional situation, but still, it carries certain ambivalence. The application of the formal-dogmatic method and the analysis of the provisions of both the AMSG and the Local Referendum Act made it possible to formulate conclusions concerning the practice of the application of these provisions, to show the imprecision of the statutory solutions, loopholes in legal provisions, and contributed to the formulation of the conclusions for the law as it stands (*de lege lata*) and as it should stand (*de lege ferenda*) concerning the implementation of legislative changes in this area.

According to Article 164 (1) of the Polish Constitution[3] and Article 1 AMSG, the municipality is the basic unit of territorial self-government. Authority in the municipality is vested in its residents, who exercise it directly through the institutions of local referendum and elections – Article 11 (1) AMSG, and indirectly through municipal bodies – Article 11 (2) AMSG which include the municipal council and the mayor (village mayor, town mayor, city president), as indicated by Article 11a (1) (1) and (2) AMSG. Both municipal bodies are staffed through direct local elections conducted according to the provisions of Section VII (Articles 369–449) and Section VIII (Articles 470–493) of the Electoral Code,[4] and the term of both bodies is 5 years from the date of the elections. In the classic setup, we have two parallel functioning municipal bodies as the basic unit of territorial self-government during the term.

The legislature, however, provided for situations in which there is a need for the appearance in the municipality of the so-called "person designated" by the President of the Council of Ministers. This occurs under: the provision of Article 96 (1) AMSG; Article 4f of AMSG; Article 67 (2) and (3) of the Local Referendum Act. All these situations have in common, firstly, the necessity of dissolving the municipal council before the end of its term, and secondly, the need for the Pres-

[1] Act of 8 March 1990 on municipal self-government (consolidated text, Journal of Laws 2023, item 40, as amended), hereinafter: AMSG.

[2] Act of 15 September 2000 on local referendum (consolidated text, Journal of Laws 2023, item 1317, as amended).

[3] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended).

[4] Act of 5 January 2011 – Electoral Code (consolidated text, Journal of Laws 2023, item 2408, as amended).

ident of the Council of Ministers to designate a person to assume responsibilities of the municipal council until a new municipal council is elected and takes over.

DISSOLUTION OF THE MUNICIPAL COUNCIL IN LIGHT OF THE PROVISIONS OF THE ACT ON MUNICIPAL SELF-GOVERNMENT

As set out in Article 96 (1) AMSG, where repeated breaches of the Constitution or laws by the municipal council occur, the Sejm of the Republic of Poland, at the request of the President of the Council of Ministers, may dissolve the municipal council by way of a resolution. If the municipal council is dissolved, the President of the Council of Ministers, at the request of the minister responsible for public administration, designates a person to perform the function of the municipal council until the new municipal council is elected. The activity of the local government, including municipalities, as stipulated in Article 171 (1) of the Polish Constitution, is subject to supervision in terms of legality, while the bodies supervising the activity of the local government units are the President of the Council of Ministers and the provincial governors, and for financial matters the regional chambers of audit – Article 171 (2) of the Polish Constitution. The legislature has also considered an exceptional situation where the Sejm, upon the request of the President of the Council of Ministers, may dissolve the legislative body of the local government, i.e., in this case, the municipal council, if the body grossly violates the Constitution or laws, which results from Article 171 (3) of the Polish Constitution. The dissolution of the municipal council through a resolution of the Sejm is not a classic supervisory measure, due to the fact that the Sejm is not a supervisory body, but only has this specific competence.[5]

Supervising the activities of local government is undoubtedly an essential element of the concept of decentralisation of public authority and entails the need to harmonise actions of the decentralised public authorities with the entirety of actions of the state bodies. The construct of supervision is closely related to the autonomy of the entities being supervised; it is assumed that the boundaries set by the law for the institution of supervision are, at the same time, boundaries delimiting the scope of autonomy of entities whose activities are subject to supervision. Supervision is therefore considered to be a measure of some kind to determine the extent or degree of autonomy of supervised entities. Supervision therefore constitutes a "certain sum of powers" of the supervising entities towards the supervised entities and a legal relationship is created between them, the content of which is the sum

[5] W. Wytrążek, *Komentarz do art. 96*, [in:] *Ustawa o samorządzie gminnym. Komentarz*, eds. P. Drembkowski, P. Suwaj, Warszawa 2023, p. 627.

of those powers.[6] Supervision is the influence of one entity over another, which is based on the former's specific competence to intervene in a sovereign manner in the sphere of rights and obligations of the supervised entity.[7] The supervising entity may use its powers only in cases specified by the legislature in the provisions of the law generally applicable and with use of the measures provided for by this law. Moreover, the supervisory relationship between the supervised entity and the supervising entity creates a permanent arrangement by the fact that the circle of entities authorised to supervise is clearly defined in advance, and this relationship should be characterised by repeatability and mutual substantive relationship of supervisory dispositions. It is only when all these guidelines are met that, according to E. Knosala, it is possible to define with some precision what supervision is.[8] The Constitutional Tribunal, in its resolution of 27 September 1994 (W 10/93),[9] stated that supervision should be understood as certain procedures that give the relevant state authorities, equipped with appropriate powers, the right to establish the facts as well as the right to correct the activities of the supervised entity. The existing supervision is of a state supervision nature, as stressed by M. Zdyb. It is executed and implemented by central-government administration bodies. The institution of supervision may not lead to a breach of the autonomy and independence of the activities of the entities subject to supervision. Supervision should be clearly separated from the so-called instance supervision, which is linked to individual acts, e.g. administrative decisions, and to the possibility of challenging them before second instance bodies.[10] A. Wiktorowska points to the peculiar nature of supervision over local government, i.e. supervision performed in the decentralised administration system, where, by definition, the units are supervised by independent entities, equipped with legal personality, and their autonomy of operation is subject to judicial protection. The existence of state supervision over local government means the existence of a connection between them, which is stronger the more intense the scope of supervision is. Supervision, together with its existence, on the one hand, limits, and on the other hand, secures the autonomy of operation of the supervised entity.[11] Supervision is a limitation of autonomy through state's interference in the activities of a supervised entity and at the same time it safeguards the autonomy and self-governance of local government units in their actions towards the state. The need for supervision is clearly based on the nature of local government, which

[6] Z. Niewiadomski, *Samorząd terytorialny. Ustrój i gospodarka*, Bydgoszcz–Warszawa 2001, pp. 203–204.

[7] M. Wierzbowski (ed.), *Prawo administracyjne*, Warszawa 2006, p. 93.

[8] E. Knosala, *Prawne układy sterowania w administracji publicznej*, Katowice 1998, p. 26.

[9] OTK 1994, no. 2, item 46.

[10] M. Zdyb, *Samorząd a państwo. Nadzór nad samorządem*, Lublin 1993, pp. 114–115.

[11] A. Wiktorowska, *Prawne determinanty samodzielności gminy. Zagadnienia administracyjnoprawne*, Warszawa 2002, p. 192.

is a form of decentralisation of public authority. The supervision is intended to protect the rights of residents of local government communities against possible unlawful actions of local government units.[12]

As part of supervision, the group of so-called personal measures should be distinguished; they are directed towards local government bodies in connection with specific actions they take that cannot be accepted by the supervisory authorities.[13] These measures are also referred to as extraordinary supervision measures[14] due to the fact that they interfere with the structures of local government bodies, leading to their liquidation (in the case of dissolution) or suspension of operation of local government bodies.[15]

One of such measures was provided for by the legislature in Article 96 (1) AMSG, and it concerns the dissolution of the municipal council, which results in the further need for the President of the Council of Ministers to designate a person who will perform the functions of the dissolved body. The condition for applying a supervisory measure resulting in the dissolution of the municipal council is that this body repeatedly violates the Constitution or laws. According to the provision of Article 171 (3) of the Polish Constitution, the body empowered to take appropriate action is the Sejm, which may make the dissolution decision upon a relevant request submitted by the President of the Council of Ministers.[16] The Sejm adopts an appropriate resolution in this matter, the procedure for its adoption being specified in the provisions of the Resolution of the Sejm of the Republic of Poland of 30 July 1992 – Rules of Procedure of the Sejm of the Republic of Poland,[17] and the resolution is then published in the Polish Monitor.[18] It should be noted that the act of dissolution is performed by the Sejm, but what is important, this act is performed by an authority that is not counted by the legislature as a body of supervision over local government, because as it follows from Article 171 (1) of the Polish Constitution, as well as Article 86 AMSG, the supervisory bodies are only the President of the Council of Ministers, provincial governors and regional chambers of auditors in financial matters. The solution which gives the power to dissolve the municipal council "into the hands" of the Sejm should be assessed positively in all respects, and the adoption of such a model

[12] *Ibidem*, pp. 191–195.

[13] B. Dolnicki, *Ewolucja nadzoru nad samorządem terytorialnym – wnioski de lege ferenda*, [in:] *Podmioty administracji publicznej i prawne formy ich działania. Materiały i studia. Księga pamiątkowa z okazji 80. urodzin Profesora E. Ochendowskiego*, Toruń 2005, p. 133.

[14] W. Chróścielewski, Z. Kmieciak, *Postępowanie w sprawach nadzoru nad działalnością komunalną*, Warszawa 1985, p. 109.

[15] E. Knosala, *op. cit.*, p. 81.

[16] J. Sługocki, *Prawo administracyjne. Podstawowe zagadnienia ustrojowe*, Warszawa 2007, p. 440.

[17] Polish Monitor 2022, item 1204.

[18] A. Agopszowicz, Z. Gilowska, *Ustawa o samorządzie terytorialnym*, Warszawa 1999, p. 500.

has its profound rationale, and moreover "it protects the local government from the possibility of the legislature transferring this right to another body".[19] Dissolution of the municipal legislative body is an action that causes far-reaching factual and legal effects. The radical nature of this situation lies in the fact that a democratically elected local government body representing the residents of a given municipal community is being liquidated. This is so because the municipal council is "a kind of counterpart" of the Sejm. Here we are dealing with a local government body authorised to make local law generally applicable in the territory of a given municipality, while the Sejm, in accordance with Article 95 of the Polish Constitution, is the highest legislative body of the Republic of Poland, which adopts legal provisions binding on all citizens throughout the country.[20] Therefore, granting the Sejm the right to dissolve the legislative body of the municipality stems from the fact that the legislature has not found another body that, due to its significance in the state, would be acceptable for such a drastic supervision measure. The dissolution of the municipal council takes place by way of a resolution of the Sejm, which, as emphasized by scholars in the field, may not be challenged before an administrative court.[21] The Constitutional Tribunal addressed this issue in its resolution of 5 October 1994 (W 1/94).[22] The Tribunal has ruled that the act of dissolving the legislative body of a local government unit is not a supervisory decision, but only a repressive measure in a situation where a municipal body breaches the Constitution or laws. Moreover, the Constitutional Tribunal has stated that the Sejm is not a supervisory body, and the measure provided for in Article 96 (1) AMSG is not a means of supervision over the activities of the local government. The position presented by the Constitutional Tribunal is reflected in the content of the statutory regulation. Article 98 (1) AMSG provides for the possibility for local government authorities to appeal against supervisory decisions to the provincial administrative court. The provision does not indicate that such a possibility exists in relation to a resolution of the Sejm dissolving the municipal council.

A number of reservations should be formulated about the manner in which the prerequisites for the application of the supervisory measure in question are defined. The criterion for the dissolution of a municipal council is the repeated violation by the municipal council of the Constitution or laws. The legislature does not mention anything about breaching other normative acts listed in Article 87 of the Polish Constitution as the sources of generally applicable law, so there is no mention of

[19] D. Dąbek, *Prawo miejscowe*, LEX/el. 2007.

[20] E. Knosala, *op. cit.*, p. 82.

[21] The same view is shared by A. Agopszowicz, Z. Gilowska, *op. cit.*, p. 500; A. Szewc, G. Jyż, Z. Pławecki, *Ustawa o samorządzie gminnym. Komentarz*, Warszawa 2000, p. 458; B. Dolnicki, *Klasyfikacja środków nadzoru nad samorządem terytorialnym w ustawodawstwie polskim*, "Samorząd Terytorialny" 1997, no. 6, p. 52; M. Ofiarska, J. Ciapała, *Zarys prawa samorządu terytorialnego*, Poznań 2001, p. 335.

[22] OTK 1994, no. 11, item 47.

ratified international agreements, regulations, or acts of local law. According to A. Matan, it is difficult to provide a rational justification for such a limitation made by the legislator.[23] The legislator refers to a "repeated" violation of the Constitution or laws by the municipal council, but has failed to indicate what nature the violation would have to be to meet the statutory criterion.[24] It is assumed in case law that since the legislator uses the plural number in the provision of Article 96 (2) AMSG, at least two breaches of law must have occurred.[25] In the opinion of the Constitutional Tribunal, the dissolution of the municipal council is reasonable in the situation of repeated application of supervisory measures confirming the violation of the Constitution and laws, which did not bring the desired effect.[26] Thus, using the principle of proportionality, the breaches justifying the dissolution of the municipal council must not only be repetitive but, above all, significant – it will therefore not be possible to apply this solution to breaches which, in accordance with the principle of legality, can be eliminated by supervisory measures of a less radical nature, in particular by informative and corrective measures.[27]

It is noted by scholars in the field that these violations should have a "gross nature".[28] According to B. Adamiak, gross violations of law include cases of incorrect application of a legal norm that is not in force, incorrect determination of the meaning of a legal norm, erroneous application of a legal norm to the factual situation, and incorrect determination of a legal consequence by adjudicating a consequence not provided for by the norm.[29] Also, the very issue of "repetitive nature" of violations has not been specified. A single violation of the Constitution or laws by the municipal council cannot be considered a sufficient ground for applying this supervisory measure; one should agree that such violations must occur at least several times.[30] Even a double violation of the Constitution or laws, if sufficiently gross, may form the basis for the Sejm to pass a resolution on the dissolution of

[23] A. Matan, *Komentarz do art. 96*, [in:] *Ustawa o samorządzie gminnym. Komentarz*, ed. B. Dolnicki, LEX/el. 2021.

[24] P. Chmielnicki, *Komentarz do art. 96*, [in:] *Ustawa o samorządzie gminnym. Komentarz*, ed. P. Chmielnicki, LEX/el. 2022.

[25] Judgment of the Supreme Administrative Court of 17 October 2007, II OSK 491/07, LEX no. 438637; A. Rzetecka-Gil, *Samorząd gminny. Sposoby ustania mandatu wójta (burmistrza, prezydenta miasta) oraz przyczyny jego niewykonywania. Komentarz*, LEX/el. 2015.

[26] Resolution of the Constitutional Tribunal of 5 October 1994, W 1/94, OTK 1994, no. 11, item 47.

[27] W. Wytrążek, *op. cit.*, p. 628.

[28] B. Dolnicki, *Klasyfikacja środków nadzorczych…*, p. 52.

[29] B. Adamiak, *Rozstrzygnięcia nadzorcze a środki nadzoru w postępowaniu administracyjnym*, [in:] *Administracja publiczna u progu XXI wieku. Prace dedykowane prof. zw. dr. hab. Janowi Szreniawskiemu z okazji jubileuszu 45-lecia pracy naukowej*, ed. Z. Niewiadomski, Przemyśl 2000, p. 43.

[30] Judgment of the Voivodeship Administrative Court of 10 November 2006, II SA/Wa 1260/06, LEX no. 214225.

the municipal council, district council or provincial assembly.[31] Therefore, there is no precisely defined ground for applying the measure in question, which may pose a potential threat of using political elements that can play a significant role in assessing not only the fact but also the degree of violation of the Constitution or laws by the legislative bodies of local government units.[32]

The dissolution of the municipal council is carried out by the Sejm by means of a resolution, but it does so upon a request submitted by the President of the Council of Ministers. The request itself, without which the entire procedure cannot be initiated, is therefore of crucial importance. It is the President of the Council of Ministers who is the first to assess the situation as to whether the violations of the Constitution or laws that have been committed meet the prerequisite for the application of the measure in question.[33] There is thus a situation in which there is no municipal council as a body of municipal government.[34] The President of the Council of Ministers, upon the request of the minister responsible for public administration, designates a person to fulfil the function of the dissolved body until new election is held.[35] In fulfilling their role, the appointed person will perform all the tasks, exercise the powers of the previously dissolved municipal council.[36] The person assumes their duties upon appointment and performs them until new bodies are elected.[37]

Another situation in which the dissolution of the municipal council entails the need of appoint by the President of the Council of Ministers is provided for by the legislator in the provision of Article 4f AMSG, which was added as a result of amendments introduced by the Act of 26 May 2011 amending the Act on municipal self-government and certain other acts,[38] which entered into force on 14 July 2011. The application of a specific model of territorial divisions of the state, as laid down in Article 15 (2) of the Polish Constitution, should take into account "social, economic or cultural ties", ensure "the ability of local government units to perform public tasks". The adopted model affects the determination of the scope of public participation in the management of a specific area, the demarcation of the boundaries of individual territorial divisions affects the determination of the scope of territorial jurisdiction of local public authori-

[31] A. Szewc, *Legalność uchwał organów gminy (zagadnienia wybrane)*, "Samorząd Terytorialny" 1998, no. 6, p. 19.

[32] P. Chmielnicki, *Komentarz do art. 96*, [in:] *Ustawa o samorządzie gminnym. Komentarz*, ed. P. Chmielnicki, Warszawa 2010, pp. 688–689.

[33] K. Podgórski, *Nadzór nad samorządem gminnym*, "Samorząd Terytorialny" 1991, no. 1–2, p. 34.

[34] A. Szewc, G. Jyż, Z. Pławecki, *op. cit.*, p. 459. See also A. Agopszowicz, Z. Gilowska, *op. cit.*, p. 500.

[35] P. Przybysz, *Instytucje prawa administracyjnego*, LEX/el. 2022.

[36] Z. Leoński, *Nadzór nad samorządem terytorialnym w świetle ustawy z 8 III 1990 r.*, "Państwo i Prawo" 1990, no. 1–2, p. 59.

[37] Judgment of the Voivodeship Court of 5 May 2007, I SA/Gd 24/07, LEX no. 297017.

[38] Journal of Laws 2011, no. 134, item 779.

ties, i.e. local bodies of central public administration and bodies of local government units.[39] The arrangement of territorial divisions is not absolute. The legislator allows for changes in the territorial divisions of the state at all levels. The competence in this area belongs to the Council of Ministers, which by way of a regulation can decide on the establishment, merger, division and abolition of municipalities and setting their boundaries in accordance with the content of Article 4 (1) (1) and Article 4 (3) AMSG. Nonetheless, some changes in territorial divisions of the state may result in the expiry of councillors' mandates or the dissolution of municipal councils, as the changes may involve the movement of individual or part of constituencies between local government units of the same type. According to Article 390 of the Electoral Code, changes in territorial divisions of the country made during the term of office of councils result in the following consequences: 1) if an area forming part of a constituency, a whole constituency or more constituencies for the election of a given council in order to incorporate this area in the new unit being created, the mandate of a councillor permanently residing or elected in this area expires by operation of law; 2) if an area forming part of a constituency, or a whole constituency for the election of a given council is excluded from the unit and it is incorporated in a neighbouring unit, a councillor permanently residing and elected in this constituency becomes a councillor elected in this unit in the extended unit; the mandate of a councillor who does not meet these conditions expires by operation of law; 3) if a unit is incorporated into another unit or two or more units merge into a new unit, the councils of these units are dissolved by operation of law. As a result of shifts of constituencies or parts thereof between units, there is a change in the numerical composition of the councils affected by these shifts. In the event of a change in the composition of the legislative body of the municipality, the municipality council acts in the changed composition until the end of the term of office, as provided for in Article 390 § 4 of the Electoral Code. However, if as a result of these changes the composition of the council has decreased below three-fifths of the statutory number of councillors, such municipal council is dissolved by operation of law in accordance with Article 390 § 5 of the Electoral Code. Information on the dissolution of the council by operation of law shall be made public by the election commissioner and published in the provincial official journal in the form of a notice, as provided for in Article 390 § 6 of the Electoral Code.

This very situation is referred to by the legislature by stipulating that in the event of dissolution of the municipal council by operation of law, the President of the Council of Ministers, at the request of the locally competent provincial governor submitted through the minister responsible for public administration, designates a person to perform the responsibilities and exercise powers of the municipal council until a new council is elected. The legislature has assumed that a drop in the number of members of the municipal council below three-fifths of the statutory

[39] B. Banaszak, *Prawo konstytucyjne*, Warszawa 2017, p. 606.

number of councillors in a given municipality results in the body losing the attribute of representativeness from the democratic point of view. Therefore, the legislature considered the continued functioning of the council with such a reduced number of members to be unacceptable from the point of view of the local community, which is why the effect in the form of dissolution by operation of law was provided for.

The legislature uses the term "person" who, by operation of law, will perform the responsibilities and powers of the municipal council until a new council is elected. This "person" will be entitled to execute all the responsibilities and powers of the municipal council as a legislative and controlling body of the municipality, as the legislature does not introduce any restrictions in this regard. Furthermore, the legislature has not set any requirements to be met by the "person", so it should be assumed that the provincial governor with the relevant territorial jurisdiction has the discretion in indicating this "person". It is obvious that this "person" should have full public rights, and it seems advisable for them to be connected to the municipality by residing in its territory, which would involve knowledge of the characteristics and problems of members of the local community; it is worth considering that the person be experienced in local government or parliamentary matters. Although the candidate for the "person" who will perform the responsibilities and exercise powers of the dissolved municipal council by operation of law until a new council is elected is designated by the relevant provincial governor, the ultimate responsibility for the actions of such a "person" rests with the President of the Council of Ministers, to whom the law has granted exclusive competence in appointing this "person".

DISSOLUTION OF THE MUNICIPAL COUNCIL IN LIGHT OF THE PROVISIONS OF THE LOCAL REFERENDUM ACT

The next two situations in which the municipal council is dissolved, and then the President of the Council of Ministers designates a person to perform the functions of the dissolved body are related to the institution of local referendum.

According to Article 67 (2) of the Local Referendum Act, the announcement by the provincial governor in the regional official gazette of the results of the referendum, held upon the request of municipality inhabitants to decide about dismissal of the municipal authorities before the end of the term of office, signifies the termination of the activities of these authorities. As stipulated in Article 11a AMSG, the municipal bodies include the municipal council and the mayor (village mayor, town mayor, city president). As both the municipal council and the mayor are directly elected, the referendum on dismissal before the end of the term of office may concern these bodies jointly or separately. In the latter case, the termination of activities before the expiry of the term of office refers only to the body concerned by the referendum. Therefore, if the motion of the inhabitants of the municipality

concerns the dismissal of the municipal council, the referendum on the dismissal of the municipal council results in the termination of the activities of the legislative body only, this does not affect the activities of the executive body, i.e. the mayor (village mayor, town mayor, city president). The situation thus arisen results, of course, in the President of the Council of Ministers promptly appointing a person to perform the functions of the municipal council until a new council is elected.

On the other hand, as stipulated in Article 67 (3) of the Local Referendum Act, in the event that in a valid referendum for the dismissal of the mayor, conducted at the request of the municipal council for a reason other than the failure to grant a discharge, more than half of the valid votes were cast against the dismissal of the mayor, the activities of the municipal council are terminated by operation of law. In such a situation, the President of the Council of Ministers is obliged to immediately appoint a person to perform the functions of the municipal council until a new municipal council is elected, and orders an early election. Pursuant to Article 28b AMSG, the municipal council may, after 9 months from the date of the election of the head of the mayor and no later than 9 months prior to the end of the term of office, adopt a resolution to hold a referendum on the dismissal of the mayor for a reason other than the failure to discharge the mayor or the failure to grant the mayor a vote of confidence, only upon the request of at least one-fourth of the statutory composition of the council. The request in written form and the reasons for the dismissal are subject to the opinion of the audit committee. A resolution to hold a referendum on the dismissal of the mayor is adopted by the municipal council by a majority of at least three-fifths of the votes of the statutory composition of the council, in a roll-call vote, at a session convened not earlier than after 14 days from the date of submission of the request.

The systemic interpretation suggests that the effect in the form of terminating the activities of this body by operation of law will occur at the moment the provincial governor communicates the record of the referendum result in the regional official gazette. The announcement of the results of a decisive referendum concerning the dismissal of the mayor generates significant legal consequences. If most voters in such a vote expressed their support for the dismissal, the publication of the referendum results leads to the end of mayor's term as the executive body in the municipality. However, if more than half of the valid votes were cast against the dismissal of the mayor, the activities of the municipal council are ceased by operation of law. Such an immediate termination of the term of the legislative body in the municipality entails the issue of substitution until new elections are held.

In such a situation, we have a classic arbitration referendum here, in which the inhabitants of the municipality resolve a conflict between the municipal council and the mayor, simultaneously expressing a sort of vote of no confidence in the body which loses this vote. This is so because if the referendum has a binding effect, then where the majority of valid votes are cast against the dismissal of the mayor (or city president), it means the end of the municipal council's existence. It is unimaginable

for both such conflicted bodies to continue working, especially as such a conflict could lead to a deadlock and, consequently, decision paralysis within the municipality. The winning body must be given the opportunity to engage with a new entity that acts as a partner rather than an opponent. Voters thus decide which body's activities they accept, which can be considered a plebiscite in which either the municipal council or the executive body may win support. The person appointed by the President of the Council of Ministers will only replace (likewise in the case of the arbitration referendum) the body that has been dismissed. Any other view is absolutely unacceptable here, as the person concerned cannot perform actions on behalf of the existing municipal body.[40]

CONCLUSIONS FOR THE LAW AS IT STANDS (*DE LEGE LATA*)

Thus, in all the situations presented, there is an identical solution provided for by the legislature, namely, the President of the Council of Ministers designates a "person" who, by operation of law, will perform the responsibilities and exercise powers of the municipal council until a new council is elected. It is noticeable that the legislature uses the phrase "shall designate a person", which means to indicate a person to whom a function, position or task will be entrusted. Definitely more often we can find in the law the entrustment of a position, office or the far more common and legally established act of appointment "to an office", "to a position".

Another issue worth noting is that the legislature did not regulate many important issues related to the special nature of the so-called "designated person". It should be noted that it uses the term "person" without further specification, which may raise doubts as to whether the legislature only means a natural person or whether it allows the designation of a juridical person to play this particular role. I think that only a natural person can be appointed, and therefore it cannot be accepted to appoint a juridical person. The municipal council being dissolved consists of councillors who are representatives of inhabitants, members of the municipal local community to which only natural persons can belong, while membership of any juridical persons is absolutely ruled out. Therefore, the appointment by the President of the Council of Ministers of a legal person to perform by virtue of law the responsibilities and powers of the municipal council until a new council is elected would be an unacceptable action by all means. Also, the term "person designated to perform the functions of the municipal council" used by the legislator is not particularly apt either. In view of the role assigned to this person, it is puzzling why the legislature did not use the term that is most suitable for the situation at hand, i.e. "commissioner" or further, "cen-

[40] P.J. Uziębło, *Ustawa o referendum lokalnym. Komentarz*, LEX/el. 2017.

tral-government commissioner",[41] as is the case, e.g., in the provision of Article 96 (2) AMSG where under this provision municipal authorities may be suspended and commissioner's administration with a central-government commissioner may be introduced. In the literature, one may encounter the term "single-person provisional body"[42] or "a certain kind of commissioner".[43] It is barely comprehensible what guided the legislature to use such a special term as "person designated to perform functions".

The legal nature of the act of "designating" a person to perform the function of the municipal council remains a subject of discussion. According to some scholars in the field,[44] with whose views I also identify, the act of designation does not set another type of measure to supervise activities of local government, while K.M. Ziemski classifies it as a supervisory decision, which may also be justified by the provisions of Article 98 (1) AMSG.[45]

It should be noted that in the case of the provisions of Article 4f and Article 96 (1) AMSG the person to perform the function of the municipal council is indeed appointed by the President of the Council of Ministers, but he only carries out the act of appointing this person while the proposal to do so is submitted by the relevant provincial governor (where Article 4f AMSG applies) and by the minister responsible for administration (in the case of Article 96 (1) AMSG). In both situations, the provincial governor and the minister responsible for administration assume, in a way, the responsibility for the suitability of the candidate to be appointed by the President of the Council of Ministers. These bodies are responsible for carefully reviewing potential candidates and proposing the "best possible candidate" to the President of the Council of Ministers. A different solution was provided by the legislature in Article 67 (2) and (3) of the Local Referendum Act, as the actions of the President of the Council of Ministers are not preceded by a proposal from any other body. The President of the Council of Ministers makes the designation of the person entirely independently, and his decision is completely discretionary.

A further point to be noted is the absence of any guidelines on the qualifications of this "designated person", as the legislature failed to specify any requirements the "person" must meet, so it should be assumed that there is a freedom to designate that "person".[46] It seems obvious that it should be a person with proper knowledge

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[41] A. Matan, *Komentarz do art. 96*, [in:] *Ustawa o samorządzie gminnym. Komentarz*, ed. B. Dolnicki, Warszawa 2018, p. 930.

[42] K. Podgórski, *op. cit.*, p. 35.

[43] Z. Leoński, *op. cit.*, p. 59.

[44] P. Chmielnicki, *Komentarz do art. 96*, [in:] *Komentarz do ustawy o samorządzie gminnym*, ed. P. Chmielnicki, Warszawa 2007, p. 687.

[45] K.M. Ziemski, *Indywidualny akt administracyjny jako forma prawna działania administracji*, Poznań 2005, pp. 190–191.

[46] K. Wojciechowska, *Komentarz do art. 96*, [in:] *Ustawa o samorządzie gminnym. Komentarz*, eds. S. Gajewski, A. Jakubowski, Legalis 2018.

and experience in matters of local government, but this is not required whatsoever by legal provisions. The regulations do not specify requirements concerning the person acting as a municipal body until a new one is elected. It can be anyone, but it should, of course, be a person with proper knowledge and experience related to local government. The identification of such a person requires the cooperation and consensus of the applicant and the authority which is competent to empower such a person.[47] Attention should be paid to the enormous responsibility that is associated with the single-handed acting as a municipal body by the designated person. It must be a person who, albeit for a limited period of time, not only will ensure legal compliance, but will also act in the interest of the community of a given municipality, from whom this person did not receive a mandate to exercise authority. Therefore, both this person and the President of the Council of Ministers appointing him or her should be guided by an objective understanding of the interest of the inhabitants of a given municipality. It is reasonable to expect a person acting in lieu of a dissolved body to be appointed from among the residents of the municipality concerned, if only because of their awareness of local or regional issues and their importance for residents,[48] or may have been, e.g., associated with the municipality in the past (as a councillor, a village mayor, town mayor, city president) in which the dissolution of the legislative body occurs. There are no guidelines to be followed by the President of the Council of Ministers when appointing this person; the only question is the issue of trust that the President of the Council of Ministers must have in such a person, also trusting the provincial governor or minister responsible for public administration, who will submit this request. Designating such a person therefore requires the cooperation and consensus between the applicant and the President of the Council of Ministers, who is the only authority to empower such a person.

A person appointed by the President of the Council of Ministers becomes an employee of the central-government administration,[49] which also means that such a person will only be dependent on and reporting to the President of the Council of Ministers. It is adopted in the established scholarly opinion that the person appointed by the President of the Council of Ministers, while fulfilling their role, will carry out all tasks and exercise the powers previously vested in the dissolved municipal council,[50] with all legal consequences. However, such an interpretation is disproved by

[47] M. Jaroszyński, *Komentarz do art. 96*, [in:] *Ustawa o samorządzie gminnym. Komentarz z odniesieniami do ustaw o samorządzie powiatowym i samorządzie województwa*, eds. R. Hauser, Z. Niewiadomski, Legalis 2011.

[48] J. Wyporska-Frankiewicz, *Rządowa kontrola działalności i nadzór nad działalnością samorządu terytorialnego*, [in:] *Kontrola wykonywania zadań i nadzór nad jednostkami samorządu terytorialnego*, ed. J. Wyporska-Frankiewicz, Warszawa 2020, p. 138.

[49] Judgment of the Supreme Court of 9 June 2016, III PK 116/15, LEX no. 2057629; W. Kisiel, *Ustrój samorządu terytorialnego w Polsce*, Warszawa 2003, p. 276.

[50] Z. Leoński, *op. cit.*, p. 59.

the fact that the person performing the function of the body is not an entity chosen in elections and performs their function only until the proper body is elected. Therefore, they should limit themselves only to activities related to the current operation of the municipality.[51] The appointed person assumes their duties upon appointment and performs them, as a rule, until the election of a new municipal council.[52] It should be noted that since the President of the Council of Ministers designates such a person, he also has the right to dismiss and appoint another person at any time.

When analysing situations in which, due to the dissolution of a municipal council, it is necessary for the President of the Council of Ministers to appoint a person to perform the functions of the dissolved body until a new municipal council is elected, it is noticeable that the legislature has nowhere linked the appointment of the person with any time limit, thus the action of the President of the Council of Ministers in this matter is not determined by any time limit, the President of the Council of Ministers is not bound in his action by any deadline. The legislature, due to the uniqueness of the situations in which the dissolution of the municipal council takes place, has not resolved in any of the provisions to use even the word 'promptly', let alone to set a binding time limit for the President of the Council of Ministers to perform the act of designating a person. This may result in that the President of the Council of Ministers may be tempted, e.g., to obstruct, or delay the appointment of a person to perform the functions of the dissolved municipal council, which would be an action contradicting the requirement to ensure smooth operation in the municipality even in such an exceptional situation as the dissolution of a municipal council.

CONCLUSIONS FOR THE LAW AS IT SHOULD STAND (*DE LEGE FERENDA*)

The analysis of the situations presented above gives rise to the following conclusions. Firstly, the legislature should introduce a time limit within which the President of the Council of Ministers is to perform the act of indicating "a person designated to perform the function of municipal council". The currently applicable solutions are devoid of the attribute of being conditional on a time limit, which may result in the President of the Council of Ministers wanting to take advantage of the situation to play political games, create organizational and legal chaos in the municipality, especially when we are dealing with a political divergence between the central-government administration and local-government administration. In my opinion, introducing a solution based on the formula "promptly" will not solve the problem, either. In

[51] M. Łyszczarz, *Komentarz do art. 96*, [in:] *Ustawa o samorządzie gminnym. Komentarz*, ed. G. Dragon, Legalis 2017.

[52] Judgment of the Voivodeship Court of 5 May 2007, I SA/Gd 24/07, LEX no. 297017.

view of the above, I propose the introduction of a 14-day time limit within which the President of the Council of Ministers would indicate the "designated person". It is enough time to find a potential candidate for this function, and acceptable by the community of the municipality, so as there are no rumours of a political game or intention to stir chaos in the municipality. I also believe that the introduction of a time limit for the performance of the act in question would open up the possibility of filing an action for failure of the administrative authority to proceed, under the provision of Article 3 § 2 (9) of the Act of 30 August 2002 – Law on Proceedings before Administrative Courts.[53]

Secondly, the format of "a person designated to perform the functions of municipal council" should definitely be abandoned. We are in fact dealing with a central-government commissioner and this nomenclature should be introduced into the legislation in question. This is, in my opinion, a clear and precise message of who we are actually dealing with. Moreover, it would put an end to unnecessary deliberations regarding the legal status of the "designated person". In addition, it would be worthwhile to move away from the verb 'designates' and use 'appoints' instead, a formula commonly used in the law and practice of the functioning of public authorities.

Thirdly, the "designated person" or potentially an appointed central-government commissioner to perform the function of a dissolved municipal council should be someone residing in the territory of the given municipality, directly connected to it, thus having knowledge of the specificities and issues of the local community; it should also be someone with local government experience, such as a former councillor or former village mayor, town mayor, or city president. This would eliminate the potential danger of "randomness" concerning this person and would also express a certain trust in the local community and its representatives. The current legislation in force, wherein the legislature has not introduced any requirements for a potential candidate, not only promotes randomness but also gives far-reaching discretion in the selection of this "person" and subsequently their designation by the President of the Council of Ministers to perform the function of municipal council.

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[53] Consolidated text, Journal of Laws 2023, item 1634, as amended.

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ABSTRAKT

Okoliczności, w których dochodzi do rozwiązania rady gminy jako organu stanowiąco-kontrolnego w gminie, należą do sytuacji wyjątkowych. Można je odnaleźć w przepisach ustawy z dnia 8 marca 1990 r. o samorządzie gminnym, jak również w przepisach ustawy z dnia 15 września 2000 r. o referendum lokalnym. Zaistnienie przesłanek pozwalających na rozwiązanie rady gminy prowadzi do konieczności wyznaczenia przez Prezesa Rady Ministrów osoby, która będzie pełniła funkcję rozwiązanego organu gminy. Obowiązujące przepisy ustawowe są nieprecyzyjne, a zawarte w nich rozwiązania dalekie są od idei racjonalnego ustawodawcy. Ich wykładnia prowadzi do wskazania, w jakim zakresie możliwe jest ich doprecyzowanie, doszczegółowienie regulacji prawnej, co miałoby przyczynić się do skuteczniejszego ich stosowania w praktyce.

Słowa kluczowe: gmina; rada gminy; rozwiązanie rady gminy; osoba wyznaczona; Prezes Rady Ministrów