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SELF-GOVERNMENT OF LEGAL ADVISERS AS A FORM OF DECENTRALIZATION OF PUBLIC AUTHORITY IN POLAND

I. The legal concept and types of self-governments

Issues concerning the concept, legal nature, and place of self-government in the system of public law in the Polish doctrine of administrative law were taken already since the interwar period. The doctrine, however, focuses on the essence and systemic role of local government. Much less attention has been paid in the subject of special kind of self-governments, including the professional self-government, whose significance in the current legal system increases. Self-government is not a homogeneous phenomenon, in the literature self-government institutions are divided into local (general) and special (non-territorial) self-government. The concept of "special self-government" was introduced at Polish administrative law by *Kazimierz Władysław Kumaniecki* in the interwar period. According to this author, the term "special government" points to the fundamental difference between territorial and non-territorial self-government, whereby a special government refers only to a certain category of cases or persons, and therefore is not a universal activity in contrast to local government[1]. Special self-government distinguishes from the local government the way of acquiring membership. To the territorial unit's persons belong by virtue of the law, while membership in the special self-government is associated with performing a particular profession or carrying out a specific activity. Another difference is the extent of public affairs provided by the state to local governments. Territorial units are responsible for various manifestations of human life, and special self-governments perform only tasks in the field of occupational (professional) matter or economic activity.

In the contemporary doctrine of administrative law[2] the following types of special self-government are distinguished into: professional, that links people in the same profession, economic self-government linking business people with common interests, religious self-government that links people of the same religious faith, national self-government linking national minorities. The distinction between religious and national self-government is not difficult. Complications arise, however, when we try to distinguish professional self-

[1] Kumaniecki, Kazimierz Władysław: *Administracja społeczna* In: Kumaniecki, Kazimierz Władysław – Wasiutyński, Bolesław – Panejko, Jerzy: Polskie prawo administracyjne w zarysie. Księgarnia Powszechna, Kraków, 1929. 428-430.

[2] Zimmermann, Jan: *Prawo administracyjne*, Wolters Kluwer, Warszawa, 2008. 110–111.; Filipek, Józef: *Prawo administracyjne. Instytucje ogólne*, Zakamycze, Kraków, 2003. 237.; Granat, Mirosław: *Zasada decentralizacji władzy publicznej i samorządu terytorialnego*. In: Skrzydło, Wiesław (ed): Polskie prawo konstytucyjne. Oficyna Wydawnicza Verba, Lublin, 2004. 146.

government from economic self-government.[3] At present the most exemplary difficulty in uniquely classifying an organization to a specific type of self-government is the agricultural self-government. In the doctrine of administrative law, it essentially falls to the economic[4] self-government, but according to *Jan Zimmermann*, the chambers of agricultural self-government combine the features of economic and professional self-government.[5] Interestingly, the literature also raised doubts about the affiliation of pharmacist's self-government to the professional self-government[6]. The reason for the difficulty of assigning a particular activity to the category of professional or economic activity is that "o*ccupational interests often coincide with or fall within economic interests*"[7]. The criterion which distinguishes the different types of self-governments shall be "t*he activity that underlies the existence of a given self-government organization*"[8].

II. The concept of free profession and profession of public trust

II.1. The concept of free professions (freelancers)

Separation of professional self-governments from other special self-governments requires the presentation of the concept of *free professions*. Professional autonomies perform a significant part of the statutory tasks assigned to them in the field of public administration and therefore they are considered as public entities. In Polish law the term *freelance* does not have a statutory definition or a uniform meaning. There is also no single legal regulation of the competition. In the present legal situation, it is difficult to determine whether a given occupation is or not a free occupation (e.g. artist, craftsman) by material criteria. Therefore, the formal criterion whether the regulations distinguish occupations as a free profession is the most helpful. The list of free professions is variable and depends on the legal traditions of the state, the strength, and requirements of the professional group and on the needs of society.[9] Laws that use the term *freelance* most often refer what kind of professions, within the meaning of this legal act, are understood as free occupations or legal acts leave the meaning of concept of *freelance* to determine by doctrine of law. With this

[3] Leoński, Zbigniew: *Problematyka samorządu gospodarczego i zawodowego w nowych regulacjach prawnych*. Administracja, 1990/7. 34 – 35.

[4] Banasiński, Cezary: *Samorząd gospodarczy i samorząd zawodowy*. In: Wierzbowski, Marek – Wyrzykowski, Mirosław (eds): Prawo gospodarcze. Zagadnienia administracyjnoprawne. LexisNexis, Warszawa, 2003. 184.; Grzelak, Mirosław – Kmieciak, Robert: *Ustrój i zadania samorządu gospodarczego*. In: Wykrętowicz, Stanisław (ed): Samorząd w Polsce, Istota, formy, zadania. Wydawnictwo Wyższej Szkoły Bankowej w Poznaniu, Poznań, 2008. 302.

[5] Zimmermann 2008, 111.

[6] Wojtczak, Krystyna: *Pojęcie wolnego zawodu w świetle prawa*. Studia Prawnicze, 1997/3-4, 138.; Wojtczak, Krystyna: *Zawód i jego prawna reglamentacja. Studium z zakresu materialnego prawa administracyjnego*. Ars Boni et Aequi, Poznań, 1999. 106.; Jacyszyn, Jerzy: *Wykonywanie wolnych zawodów w Polsce*. LexisNexis, Warszawa, 2004. 289.

[7] Starościak, Józef: *Samorząd adwokatury*, Wrocław-Wilno, 1939. 19.

[8] Starościak 1939, 19–20.

[9] Leoński, Zbigniew: *Wolne zawody*. In: Smoktunowicz, Eugeniusz (ed): Wielka Encyklopedia Prawa. Wydaw. Prawo i Praktyka Gospodarcza, Białystok-Warszawa 2000. 1157.

kind of situation, one must deal on Law on craftsmanship[10], which stated that the services provided by the free professions are not included in the craftsmanship. Unfortunately, this law does not specify which professions are free and because of it their performance is not a part of craftsmanship. In turn, the *Code of Commercial Companies*[11] provides for a special type of partnership, established only for jointly pursuing a freelance profession, the so-called partner company. According to Article 87 of this Code, partners in such a company may only be natural persons, entitled to perform free professions, which are listed in the Code or in a separate act. The following categories of professions, according to Code, are considered freelance: attorney, apothecary, architect, construction engineer, chartered accountant, insurance broker, tax adviser, securities broker, investment advisor, accountant, doctor, dentist, veterinary surgeon, notary, nurse, midwife, legal adviser, patent attorney, property valuer and sworn translator. This list is extensive and includes professions that are not traditionally considered as a free in the legal doctrine, e.g. insurance broker, accountant, property valuer or sworn translator.

II.2. The concept of profession of public trust. Constitutional base of professional self-governments.

It is extremely important to determine which profession can be determine as a *free* or as a *profession of public trust*, because according to the Constitution of the Republic of Poland[12] professional self-government is an organization of profession of public trust. A normative definition contained in Article 17 (1) of by means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with, and for protecting, the public interest. Unfortunately, the term *profession of public trust* is not defined in the Constitution nor in the ordinary law. During the constitutional debate, it was explained that this term refers to traditionally understood legal and medical professions. During the work on the Constitution, however, none criteria were created to distinguish the different types of professions. Interestingly, on the grounds of ordinary law some professions were explicitly referred as "profession of public trust" such as: notary or patent attorney. In the doctrine of administrative law some views denied the need to define the concept of the profession of public trust. Professor *Michał Kulesza* believed that "*attempts to build a substantive definition of the profession of public trust lead nowhere*"[13]. This author did not refer to the category of public trust in the profession itself and its characteristics, but to the state or degree of organization of the profession. This category should point to the deontological level presented by this environment and to the fact that the group is

[10] Act of 15th of September 2000 on craftsmanship, Unified text Journal of Laws of 2016, item no 1285.

[11] Act of 15th of September 2002 the Code of Commercial Companies, Unified text Journal of Laws of 2017, item no 1577.

[12] Act of 2nd of April 1997 the Constitution of the Republic of Poland, Journal of Laws of 1997/78, item no 483.

[13] Kulesza, Michał: *Pojęcie zawodu zaufania publicznego*. In: Legat, Sławomir – Lipińska, Małgorzata (ed.): Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu. Materiały z konferencji zorganizowanej przez Komisję Polityki Społecznej i Zdrowia Senatu RP przy współudziale Ministerstwa Pracy i Polityki Społecznej pod patronatem Marszałka Senatu RP Longina Pastusiaka. Senat RP. Warszawa, 2002. 25.

coherent, organized in a social and traditional sense. Only such organizations are able to, in accordance with Article 17 (1) of the Constitution, on its own behalf, perform part of the function of public authority *within the limits of the public interest and its protection*. Referring to the constitutional conception of the profession of public trust, *Kulesza* argued that these are freelance professions (but not all) traditionally performed on an economic basis (or at least in the past it was true), and their deontological character is exceptional.[14]

It is worth noting that an attempt to define the notion of the profession of public trust was included in the draft of Act on the professional self-governments' custody over the exercising of profession of public trust and on the supervision of the activities of professional self-governments and on the amendment of certain acts. In this draft law it was stated that the profession of public trust is a profession performed by persons entrusted with tasks of a special character from the public tasks point of view, the concern for the realization of the public interest or the guarantee of human's freedoms and rights.[15] The professions of public trust are not only those professions in respect of which the statute provides so. Adoption of such a view would reduce the normative content of the Constitution to the level of the act and would also deprive constitutional norms of binding force, addressed first to the legislator.[16] Statutory provisions do not have to use *expressis verbis* the term *profession of public trust*, but they must contain features relevant to these professions, as in the case of advocates, undoubtedly included in the category of public trust in Poland, as in other countries, e.g. US law, which emphasize the public character of the profession of advocate in ensuring public access to justice and legal assistance. Therefore, one should agree with the view that the inclusion in the indicated category is determined by the fact of confirmation in the act of the general characteristics attributed to the professions of public trust in the doctrine[17].

In practice, the definition of clear criteria for granting a particular profession the status of a public trust profession presents many difficulties. Some professions, e.g. basic legal professions – advocate, legal adviser, notary public, have gained the status of public trust professions during their long-term pragmatics and traditionally they are treated as public jobs, but in the case of other professions, these attributes are just shaping and perpetuating. The lack of a normative definition of the concept of the profession of public trust relates to the necessity to consider the attributes of the discussed professions. According to views of doctrine of law, the features of the public trust professions shall include:

- entrusting representatives of this profession with information on the private life of people using their services,
- recognition of these information as a professional secret (resulting in the obligation to protect it),
- the inclusion of persons performing the profession of public trust by immunity from criminal liability for failing to disclose information,

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[14] Kulesza 2002, 26.

[15] Project no IV, dated on 1st of March 2003, Article 2, Radca Prawny (Legal Adviser) 2003/3. 7.

[16] Karcz-Kaczmarek, Maria: *Wykonywanie funkcji administracji publicznej przez samorząd radców prawnych*. Fundacja Radców Prawnych Okręgowej Izby Radców Prawnych w Warszawie, Warszawa, 2017. 18.

[17] Sarnecki, Paweł: *Glosa do wyroku Sądu Najwyższego z dnia 29 maja 2001*. Palestra, 2002/5-6. 185–188.

- the use of the services of these professions is most often associated with the occurrence of a real or even potential danger for goods of special importance for the individual (eg. life, health, freedom, dignity, good name),
- failure to comply with the rules of the clerical hierarchy,
- occurrence of formalized professional deontology[18].

According to *Paweł Sarnecki*, the *profession of public trust* is a profession consisting in servicing personal human needs, and its performance involves obtaining information regarding personal, confidential matters. This element objectivizes and distinguishes these professions from the professions of social trust, i.e. pilots, drivers, engineers, whom we entrust to our health and even life, but we do not entrust personal matters. Confidence, which is a special relationship that distinguishes this kind of competition, can be described as *official trust* since the people performing this profession perform specific public tasks entrusted to them by the state. The state and citizens are interested in who carries out this profession. This interest is manifested, among others, in the statutory specification of requirements for candidates for these professions. The society is also expected to meet the requirement of "*having very high professional skills, usually graduating from higher studies and conducting further training (application, specialization*)"[19]. Therefore, people performing public trust professions become entities that connect civil society with the state.

The profession of public trust is a special category of regulated profession. The concept of a regulated profession has been recirculated from EU law to Polish law. The Act of 22nd of December 2015 on the rules for the recognition of professional qualifications acquired in the Member States of the European Union[20] defines in the provision of Article 5 point 4 indicated concept as a set of professional activities, the performance of which depends on having defined in the regulatory provisions formal qualifications necessary to perform these professional activities and, if required, to meet other conditions specified in these regulations. A regulated profession is, therefore, a profession which is or remains to be performed in the host country, based on laws, regulations, or administrative provisions, dependent on direct or indirect certification of a particular education or training. All EU countries can independently determine the list of professions belonging to regulated professions. Most often these are professions in which their improper or incorrect performance may pose a threat to the life and health of others or may result in material or moral damage. As each Member State itself determines which professions are regulated, the same profession may be a regulated profession in one Member State, while in other Member States it will not be in that category. Most countries in the EU consider regulated professions related to medicine, pharmacy, construction, law, transport, education, and finance. "Performing a regulated profession" may take place on its own account, under a contract of employment or in another form permitted by law. Therefore, the possibilities to pursue a regulated profession have been broadly defined, allowing in principle every legal basis for taking up

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[18] Karcz-Kaczmarek 2017, 18 – 20. See also the literature given there.

[19] Sarnecki, Paweł: *Pojęcie zawodu zaufania publicznego* (*art. 17 ust. 1 Konstytucji*) *na przykładzie adwokatury*. In: Garlicki, Leszek (ed.): Konstytucja, wybory, parlament. Liber, Warszawa, 2000. 154 – 157.

[20] Act of 22nd of December 2015 on the rules for the recognition of professional qualifications acquired in the Member States of the European Union, Unified text Journal of Laws of 2016, item no. 65.

a regulated profession.[21] Thus, the professions for which the appropriate self-government is created may have complex legal character. First, these professions belong to regulated professions because their taking up and performance depends on the fulfilment of appropriate qualification requirements and conditions specified in legal regulations. Secondly, they can be legally recognized as a profession of public trust, as is the case for the notary profession. The legislator, however, does not have complete freedom in considering the professions concerned as a profession of public trust. The restriction of this freedom is the content of a constitutional norm indicating the functions that local self-governments of public trust professions should fulfil: representation of the profession and the care of proper performance of the profession, within the limits of public interest and for its protection. Separate functions characteristic for trade unions, such as the protection of social interests of the group, should be separated from public functions performed by professional self-governments. Unfortunately, some self-governments are more like quasi-trade unions than professional self-governments.

Due to the above, only some professions can be included in the category of public trust professions due to regulatory tasks entrusted by the state to the professional self-government. The purpose of professional self-governments professions of public trust is, in accordance with the Constitution of the Republic of Poland, protection of the public interest. The consequence of this statement is the recognition of the tasks of these self-governments, or at least some of them, as a category of public tasks, and not a category of independent powers and recognition of these self-governments. It should be remembered that the associations of public trust professions carry out the public tasks entrusted to them on their own behalf and on their own responsibility, which is why it is necessary to equip individual professions with the utmost responsibility and the quality of public trust. The professional self-governments operate independently only in the field of matters belonging to the so-called organizational governance domain, but it should be noted that the so-called domain of organizational power, is not completely beyond the reach of state regulation. Public authorities are entering this area by introducing, among others, compulsory payment of membership fees and their administrative execution. The statutory framework also shapes the organizational structure of such governments. As it was indicated earlier, the rank of professional self-governments is underlined in the Constitution of the Republic of Poland, according to which these associations exercise custody over the proper performance of public trust professions within the limits of the public interest and for its protection. The provisions of the Constitution regarding the possibility of creating professional self-governments in professions of public trust [Article 17 (1)] and the decentralization of public authorities [Article 15 (1)] create a kind of whole range of legal regulations. In this way, that the existence and transfer of tasks of public administration to professional communities should not be understood solely as a manifestation of the will of the legislator, but as a constitutional order regarding the formation of the political system of the Republic. Decentralization of public administration should be understood as the statutory transfer of public-law liability for the implementation of specific public tasks to independent entities, authorities or administrative institutions that do not belong to the centralized government administration[22]. Therefore, it is crucial

[21] Karcz-Kaczmarek 2017, 19 – 20.

[22] Izdebski, Hubert – Kulesza, Michał: *Administracja publiczna. Zagadnienia ogólne*, Liber, Warszawa 1998, 123.

to determine whether the given association performs the tasks of public administration independently – on its own behalf and under its own responsibility – in forms appropriate for public administration, acting on the basis of the law, while remaining under the supervision of the state. Professional self-governments – constituting a form of decentralization of public authority – perform public tasks entrusted to them by law with the use of imperious forms of action. Due to this, the legal and systemic role of this type of associations cannot be bypassed or marginalized in a democratic state ruled by law. The transfer of functions and tasks of public administration to professional self-governments justify not only systemic considerations, but also praxeological considerations. Professional self-governments, as professional and specialized entities are naturally predestined to perform public tasks related to a given profession. It seems that this circumstance should contribute to increasing – with the simultaneous existence of an effective system of state control and supervision – the participation of professional self-governments in performing public administration tasks. The democratic system naturally refers to corporatism as an element necessary to build a civil society. Both the territorial and the special self-government is inherently connected with civil society and is an expression of social participation. The ability to self-organize citizens shows the strength of the whole society, and this in turn is important for the state, because "*the state cannot be strong by the very power of officials; the state can only be strong by the strength of societ*y"[23]. Regarding this, certain types of professions undertake activities aimed at organizing themselves on the basis of self-government, which proves the attractiveness of the idea of professional corporatism. An example is functioning since the 31st of May, 2016[24] Physiotherapist's self-government. This corporation associates together people, who perform an independent medical profession of physiotherapists. The creation of new professional self-governments should be deeply preceded by a thorough assessment of the need for its existence. The indicated activities can not only be result from the bottom-up efforts of specific professional environments. Self-government associations should be created "*when the performance of a given profession*:

- *firstly, has significant public importance*;
- *secondly, when the whole society is involved in the proper exercise of this profession*;
- *thirdly, when exercising a particular profession requires the cultivation of certain ethical and professional traits*,
- *fourthly, when, for the stabilization of a given profession, it is advisable to provide people with this profession performing certain independence*"[25].

Transferring public administration tasks to professional self-governments shall concern professions with a well-established history, tradition, and stable internal organization. When transferring public tasks, it is important to engage the community in various forms of public life beforehand, as it allows to prepare for the subsequent performance, on the principle of decentralization of power, of public administration tasks. An example of premature decentralization of public tasks for the newly established self-government was the functioning of the brokers' self-government created by the provisions of the Act of 22nd

[23] Osiatyński, Wiesław: *Rzeczpospolita obywateli*, Rosner & Wspólnicy, Warszawa, 2004. 97.

[24] Act of 25th of September 2015 on Physiotherapist's Profession, Journal of Law of 2015, item no. 1994.

[25] Sarnecki, Paweł: *Opinia o projekcie ustawy „Prawo o adwokaturze"*. Palestra, 1991/1–2. 51.

of March, 1991 Act on public trading in securities and trust funds[26], and abolished in 1997 by new Law on Public Trading in Securities[27]. The Autonomies of Securities Brokers and Advisors in the Public Trading of Securities was then transformed into an association with privet-law nature. In this light, the aspirations of certain professions to organize them on the basis of professional self-government and admission to perform public administration functions should be assessed as premature. From the point of view of protecting public interests, the decentralization of power should not be too hasty and should not be the result of only strong pressure from specific professional environments.

In summary, the professional self-government of public trust professions can be considered as subcategory of self-government in the legal sense, closely related to the concept and formation of the profession. The members of these professional self-governments are people performing the same occupation and people preparing to perform it (apprentices). Such a solution from the practical point of view is beneficial for these people, because during the application they deepen their theoretical and practical knowledge about the profession, but also learn about the self-government structures and the rights and obligations of self-government members. The literature[28] indicates that the professional self-government is a compulsory organizational form of association of citizens based on a professional community, created to represent the interests of people performing professions requiring special social trust towards state institutions, conducting professional development and social protection of their members. The professional self-government is an organizationally separated community with the features of self-government in the legal sense, membership in which it is associated with the performance of a specific, common profession. It seems that these observations concern professional self-governments from paragraph 1 Article 17 of the Constitution of the Republic of Poland. Self-governments of public trust professions should – unlike other types of self-governments and civil law associations – be guided not only and not primarily by the interests of the affiliates themselves, but above all aim to protect the public interest. Used in the provision of Article 17 (1) of the Polish Constitution, reimbursement of the profession of public trust, refers to the criteria of high qualifications and skills of representatives of individual professions of public trust, shaped by the tradition of principles of performing a given profession, including ethical principles and the ability to properly perform public tasks entrusted to the profession.

III. The history of professional self-government chambers in Poland

During interwar period in Poland there were five self-governments of freelancers. These were the following chambers: advocate's, notary's, medical, dentist's and pharmacy's. Considering the significant development of special governments in the Second Polish Republic, it can be stated that administrative system was characterized on the one hand by an outstanding development of professional self-government organizations shaped in such a way as to safeguard the influence of central authorities on their activities. On the other hand,

[26] Act of 22nd of March 1991 on public trading in securities and trust funds, Journal of Laws of 1991, No 35, item no 155.

[27] Journal of Laws of 1997, No 118, item no 754.

[28] Zimmermann 2008, 110.

by the process of successive limiting the position of local self-government, in particular during the so-called Colonel's rule (1929 – 1935). Prominent representatives of inter-war science pointed out that the special (economic and professional) self-government could be an antidote to the deepening political and economic crisis of the state[29]. Polish concepts of economic self-government were to a large extent a reference to legal solutions functioning at that time in other European countries, primarily in Portugal and Italy. Unfortunately, hopes in this type of legal institutions have not come true. It was caused on the one hand by the aspirations of the public authorities to centralize the state, and on the other hand by the weakness of the professional organizations. This is clearly confirmed by the words that "*acceptance into the system of political state life of a corporate idea, where it is only a tool in the hands of the administration, not a new approach to man with the demand for cooperation for a general good on other principles than before, maybe a corporate idea, the idea of social rebuilding on different principles only harm. Let us hope that our authoritative factors from this false path will step down*"[30]. Liquidated in connection with the outbreak of World War II, professional self-government organizations reactivated their activities after the end of the war, basing, as a rule, on inter-war legislation. In the new system conditions, the existing shape of self-government in the legal sense has changed significantly. Since the local government was a form of decentralization of public authority, there was no place for it in Poland and other countries of Central and Eastern Europe. *Stanisław Kaźmierczyk* said, that after 1945 in socialist state there was no appropriate formulas for the self-government. In socialist countries the self-government deliberations were not popular, because there was no climate for such scientific researches. The political situation of Poland, which did not encourage the development of self-government, caused that the functioning professional self-governments were liquidated until the beginning of the 1950s. The only exception was the advocate association which formally existed as a self-government, but in practice it was strongly subordinated to the state authorities and did not fulfil its tasks independently.

Trends aimed at the decentralization of the state intensified in the early 1980s. Their result was the restoration of the self-governmental shape of advocacy structures and the creation by the Act of 6 July, 1982[31] the professional self-government of legal advisers (solicitors). In Poland the idea of professional self-government of legal advisers was strong and overcame the bureaucracy of that time. From the point of view of the political status of legal advisers, a statutory statement that a legal adviser was not bound by an order regarding the content of a legal opinion. In the opinion of the professional environment, "*just getting your own independent social organization nationwide was an incredible achievement, a value in itself*"[32]. Set up at this time professional council of legal advisers was originally equipped with very modest public competences. First, it did not perform the function of admission to practice as a legal adviser. Despite the existence of self-government, this

[29] Kumaniecki, Kazimierz Władysław: *Na drodze ku stanowości*, Czasopismo Prawnicze i Ekonomiczne 1920; Jaworski, Władysław Leopold: *Projekt Konstytucji*, Wydawca: Frommer, Leon, Kraków. 1928. 76 – 77.

[30] Kałwa Piotr: *Korporacjonizm i formy polityczne*. Konstytucja polska. In: Stopniak, Piotr et. al. (eds.): Korporacjonizm. Towarzystwo Wiedzy Chrześcijańskiej, Lublin, 1939. 298.

[31] The original text Journal of Laws of 1982/19, item no. 145.

[32] Bereza, Arkadiusz, (ed): *Zawód radcy prawnego. Historia zawodu i zasad jego wykonywania*. Ośrodek Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych, Warszawa, 2010. 37.

function was still carried out by the state administration. The decision to refuse to enter the list of legal advisers or the decision to strike off the list was subject to appeal to the Chairman of the State Commercial Arbitration. Self-government bodies were also not competent in the cases of legal adviser application. According to the original wording of the provision of Article 38 (1) of Act on Legal Advisers, legal application was organized and conducted by district arbitration commissions, which were a state bodies. The Act on Legal Advisers provided only the obligation to cooperate with the organs of the State Commercial Arbitration with the bodies of the self-government of legal advisers in matters related to the organization and running of the legal adviser application. Competences in the field of granting the right to practice, organize and conduct legal adviser training and conducting legal adviser exams were obtained by the councillor's legal advisory in 1989 pursuant to the provisions of the Act of 24th of May, 1989 on the recognition of business cases by courts. Obtaining these rights, had from processional chamber point of view, a fundamental meaning and made from discussed self-government a corporation with full self-government authority. Legal solutions introduced by the May 1989 Act had a significant importance not only to the professional community concerned, but also to the entire society. The political and social transformation initiated in Poland in 1989 has had a major impact on the activation of professional environment. An expression of this movement was the amended wording of Article 5 of the Constitution of the Polish People's Republic from 1952. Amendment from 1989[33] provides that the Republic of Poland guarantees the participation of local self-government in the exercise of public power and the freedom of other forms of self-government. The principle of decentralization of public administration has become a systemic principle, according to which the management of public affairs was to take place with a significant participation of territorial self-government and obligatory associations of citizens performing a specific profession (self-government) or operating in a specific branch of the national economy (economic self-government). The functioning of self-government communities in all forms was considered to be an improvement of administration. Because of so-called The Little Constitution[34] of 1992 maintained in force the 1989 amended provision of Article 5 of the previous Constitution of the Polish People's Republic.

IV. Public tasks performed by self-government of legal advisers

IV.1. General information about the scope of tasks

The analysis of legal regulations concerning the functioning of professional self-governments in Poland indicates that the public-law competences of professional associations are significantly different. In opinion of *Jan Boć* the state decides to create or modify the current regulation of professional self-government, decides to relinquish to the communities a specific part of their regulatory function, which these entities perform as part of the state's

[33] Act of 29th December 1989 on amendment to the Constitution of the Polish People's Republic, Journal of Laws of 1989/75, item no. 444.

[34] Act of 17th October 1992 on mutual relations between the legislative and executive power of the Republic of Poland and on local self-government, Journal of Laws of 1992/84, item no. 426.

public power[35]. The scope of public administration functions performed by individual professional government is variable over time. The functioning and the political position of self-governments is closely related to the political and legal system of the state, as well as the actual position of a given profession in the state. The performance of various functions of public administration by professional autonomies does not absolve the state from responsibility for the correctness and effectiveness of taking up these functions. Certain tasks are undertaken, in a way, "in place of the state", which does not change their public character. This statement emphasizes the important role of state supervision over professional self-governments. At the same time, due to the requirements of a democratic state ruled by law and the need to protect the independence of these self-governments, the legislator should clearly define the imperious powers of professional bodies and the powers of government administration bodies exercising supervision over these self-governments. The doctrine[36] of administrative law includes to the functions (tasks) of public administration carried out by professional autonomies, functions such as: regulating access to the profession, exercising supervision over the profession and exercising disciplinary judiciary. The tasks of public administration carried out by professional self-government include also: representing the interests of the professions concerned with state authorities, shaping the rules of professional ethics and deontology, as well as professional development and the definition of education programs in each profession.

There is no doubt that self-government of legal advisers certainly meets the contemporary constitutional requirements set for professional self-governments of public trust professions. This self-government associates representatives one of the most recognizable professions of public trust. In accordance with the provisions of Article 4 on the Act on Legal Advisers[37], *exercising the profession of a legal adviser consists in providing legal assistance*. The provision of "*legal assistance*" should be treated broadly, it is not only to provide advice, *sensu stricto*, but to perform on behalf of the commissioner one all legal acts occurring in the legal turnover. In accordance with Article 41 of Act on Legal Advisers the catalogue of tasks of the legal adviser self-government is opened and contains only a sample tasks. This catalogue includes in particular: 1) participation in providing conditions to perform statutory tasks of legal advisers; 2) representing legal advisers and apprentices and protecting their professional interests; 3) cooperation in shaping and applying the law; 4) preparation of apprentices for the proper performance of the profession of legal adviser and professional development of legal advisers; 5) supervision over the proper performance of the profession by legal advisers and apprentices; 6) conducting research in the scope of functioning of legal assistance; 7) cooperation with local government units in ensuring the provision of free legal assistance referred to Act of 5th August 2015 on free legal aid and legal education.[38] Taking into account the statutory provisions and the doctrine, the functions of public administration conducted by the legal adviser self-government can be distinguished

[35] Boć, Jan: *Administracja publiczna*, Kolonia Limited, Wrocławm, 2003. 64.

[36] Kmieciak, Robert: *Asymetria w rozwoju samorządu zawodowego i gospodarczego w Polsce*. In: Wykrętowicz, Stanisław (ed): Spór o samorząd gospodarczy w Polsce, Wydawnictwo Wyższej Szkoły Bankowej w Poznaniu, Poznań, 2005.; Izdebski, Hubert: *Sprawowanie pieczy nad należytym wykonywaniem zawodu przez samorządy zawodowe*. In: Legat, Sławomir – Lipińska, Małgorzata (eds): Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu. Senat RP, Warszawa, 2002.

[37] Act of 6th July 1982 on Legal Advisers; Unified text Journal of Laws of 2017, item no. 1870.

[38] Journal of Laws of 2015, item no. 1255.

into: 1) regulating access to the profession, including conducting apprentices application; 2) supervising the proper exercise of the profession; 3) exercising disciplinary sanctions; 4) shaping rules of professional ethics. The whole public-law functions and tasks carried out by the self-government of legal advisers are referred in this study as a custody over the proper performance of a given profession. The analysis of the functioning of the self-government of legal advisers is justified by numerous statutory changes concerning internal organization and functioning of these self- government, as well as amendments regarding the rules of exercising corporation's disciplinary jurisdiction. It is important to stress that self-government of legal advisers trying to satisfy the needs and expectations of its owns members, also strives to meet high social expectations towards this professional group. This professional autonomy in its activities considers the changing social conditions and legal conditions.

IV.2. Adopting of professional ethical codes

The result of this kind of activities is, among others, adoption of the new *Code of Ethics of Legal Advisers* on 22nd of November, 2014. Referring to professional ethics codes, it should be noted, that the legislator has delegated the competence to determine the rules of professional ethics and deontology for national organizational units of individual professional self-governments. The competence of these authorities is justified by the fact that these rules apply to all members of a given community (professional chamber) to the same extent. As a rule, ethical codes are passed by the National Conventions, thanks to which the largest number of delegates, who express the will of other members of the professional community, can participate in the work on their adoption. It should be clearly emphasized that professional self-governments are the most appropriate, and indeed predestined entities to determine the principles of professional ethics and deontology. The experience, practice, and professionalism of this type of organizations is a guarantee that the codes passed by them will respond to the real doubts and ethical needs of a given professional group. Such an effect cannot be achieved by the norms imposed by state authorities from above. On the contrary, any external interference can be met with rejection and reluctance to submit to its requirements. Some interpretative doubts may arise due to the heterogeneous formulations used in the authorization to set standards of professional ethics. The indicated *Code of Ethics of Legal Advisers* came into force on 1st of July, 2015. The existing regulations apply to events taking place before the effective date of this resolution. The indicated legal act begins with the preamble exposing the systemic meaning of the profession of legal adviser. According to the introduction: *a legal adviser performing independently and freely the independent profession serves the interests of the judiciary as well as those, whose rights and freedoms have been entrusted to him for protection*. The profession of legal adviser is an important element of the system of guarantees and respect for law in Poland. It is a profession of public trust that respects ethical ideals and responsibilities shaped during its performance. Defining the rules of conduct in professional and self-governmental life contributes to the dignified and honest practice of the profession of legal adviser. The *Code of Ethics of Legal Advisers* from 2014 consists of 66 Articles divided into seven sections: Section I General provisions; Section II Basic principles of practicing the profession and ethical values and duties of the legal adviser; Section III Practice; Section IV Customer

relations; Section V Relationship to courts and offices; Section VI Relations between legal advisers; and Section VII Relations of legal adviser with self-government. The *Code of Ethics of Legal Advisers* exposes the fundamental principles of practicing the profession of legal adviser, including independence and the rank of professional secrecy. It prohibits paid brokering. According to Article 34 (1), a legal adviser (solicitor) cannot accept remuneration or other benefit for referring a client to another entity providing legal assistance or services connected with it. Newness is that Article 36 (3) of the *Code of Ethics of Legal Advisers* establishes a prohibition on determining remuneration dependent solely on the success (so-called *success fee*). These self-government provision says that legal adviser may not conclude an agreement with the client, under which the client undertakes to pay a fee for running the case only if successful results are obtained, unless otherwise provided by law. However, an agreement is acceptable, which provides for an additional fee for the successful outcome of the case, concluded before the final settlement of the case. To sum up this part, it is worth to notice that adopted by the National Congress, the *Code of Ethics of Legal Advisers* refers not only to traditional, basic issues related to the profession, but also to new phenomena appearing in legal transactions. Thanks to this, the *Code of Ethics of Legal Advisers* from 2014 can be a real and important self-government's tool for lawyers.

Due to the need for unification of modern Europe and the growing importance of cross-border activities, issues of professional ethics ceased to be not only national. The professional status of legal advisers in the European Union, as a rule, is identified with the status of the advocate profession, therefore there are no separate regulations relating exclusively to the ethics of legal advisers. As a substitute for the European legal code of deontology, it should be recognized already in 1977 *Perugia Declaration*. Work on these Declarations was initiated by the *Consultative Committee of Bars and Law Societies of the European Community* (CCBE). This act contained general norms concerning professional ethics, professional secrecy, respecting the principles of foreign bars and law societies, but it did not constitute a complete set of rules that could regulate cross-border practices. The next step on the road to creating a European Code of Ethics for Lawyers was the adoption by the CCBE on October 28th, 1998 in Strasbourg *Common Code of Conduct for Lawyers in the European Community*. The updated version of *the Code* was subsequently adopted at the CCBE plenary session in Lyon on November 28th of the same year. Subsequent changes were introduced at the Dublin session on December 6th, 2002 and in Brussels on November 24th, 2006. The provisions of the Code apply, in principle, to all lawyers within the meaning of Directive 77/249/EEC[39] and Directive 98/5/EC,[40] and lawyers from organizations that are members of CCBE observers in the case of undertaking cross-border activities within the European Union and the European Economic Area. The relevant national authorities of the relevant professional self-government may only sanction possible violations of the Code. The mentioned Code was adopted for use by Polish legal advisers during their

[39] Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ L 78, 26.3.1977. 17–18.

[40] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. OJ L 77, 14.3.1998. 36–43.

cross-border activities pursuant to Resolution No. 8/2010 of the 9th National Congress of Legal Advisors of November 6th, 2010.[41]

V. Supervision over the self-government of legal advisers

In contrast to legal acts regulating legal existence and functioning of local self-government, laws regarding professional self-governments do not generally contain separate chapters on the supervision over these associations. The exceptions are regulations contained in the *Act on notary law* of 1991[42] and in the *Act on court bailiffs and executions* of 1997.[43] The legislator included in these mentioned above acts separate provisions on supervision due to the specific role played by notaries as a person of public trust and bailiffs who are in fact public officials. The specific legal status of representatives of the indicated professions forces them to be subject of more intense state supervision and control than representatives of other professions.

Pursuant to the provisions of Article 5 (3) of *Act on Legal Advisers* and Article 3 (2) of Law on the Bar (advocate) supervision over the activity of the legal adviser self-government and barrister is performed by the Minister of Justice in the scope and forms specified by law. This wording underlines the legal nature of the supervisory authority and the fundamental consequence that supervisory measures can only be applied when the legislator provides for it and in the forms, it makes specification. It is worth noting that the current shape of the paragraph 3 Article 5 of Act on Legal Advisers underlining the formal guarantees of self-government independence, was introduced by the Act of May 22nd, 1997, which amended the provision. The earlier provision provided only that the superior supervision over the chamber of legal advisers is exercised by the Minister of Justice. The currently applicable laconic regulation of the issue of supervision over the legal adviser's self-government (*the Minister of Justice supervises the activity of self-government in the scope and forms defined by law*), allows to refer to doctrinal arrangements in the subject of supervision. In addition, in the provision of Article 5 (3) of *Act on Legal Advisers* the concepts of supervision were used in a clear and precise way, referring them to relations of a systemic character. Such a statutory formulation allows to distinguish the supervision exercised over the whole self-government (the supervision with systemic nature) from the supervision over the individual performance of the profession of a legal adviser, which have material-legal character.

In conclusion, it should be stated that formally supervised entities, the passive side of supervision, are professional self-governments, including the self-government of legal advisers, as decentralized entities of public authority. From a practical point of view, the collegial resolution bodies of all organizational levels of self-governments are primarily subject to state supervision. Such a solution guarantees supervision over the activities of bodies that make decisions in the most important matters for a given professional association. In addition, subjecting the activity of these authorities to state supervision is justified by the fact that some of the self-government decisions are not only intra-corporate in nature, but

[41] Unified text of the Code of Ethics of Legal Advisers. http://bibliotekakirp.pl/items/show/545 (05.12.2017.)

[42] Unified text Journal of Laws of 2016, item no. 1796.

[43] Unified text Journal of Laws of 2017, item no. 1277.

are the implementation of public administration tasks. The self-government implements several tasks commissioned by the state e.g. settlement in the subject of the right to pursue a profession, setting ethical standards or setting disciplinary rules.

VI. Statutory changes and proposition of new legal regulations

It should be stressed that one of the important public tasks of professional self-governments is to provide disciplinary jurisdiction. As part of the supervision over the proper performance of the profession, the self-government courts can decide about suspension, limitation and even about the deprivation of the right to practice of given profession. From 2014 the penalty of depriving the right to practice the legal adviser is no longer of a long-term nature. Nowadays the penalty of depriving the right to practice entails deleting from the list of legal advisors without the right to apply for re-enrolment in the list of legal advisers for a period of 10 years from the day the termination of the right to practice as a legal advisor becomes final.

At present, in the Polish Parliament, the debate on the reform of the judiciary is being held. The proposed changes, in a certain extent, will also apply to the functioning of professional self-governments. This applies, among others, appointment in the Supreme Court a separate *Disciplinary Chamber*. The Disciplinary Chamber should consist of two departments. The first Department should include, in particular, the affairs of the judges of the Supreme Court and the cases of judges and prosecutors regarding disciplinary offenses extending the features of deliberate offenses prosecuted by public prosecution. Whereas the Second Department should consider disciplinary judgments considered by the Supreme Court in connection with disciplinary proceedings conducted on the basis of the *Act on the Bar*, the *Act on Legal Advisors and the Law on Notary*. One of the basic difference between the current and the proposed legal status would consist in directing cassation from corporate disciplinary decisions directly to a specially designated disciplinary chamber. Currently, cassation against disciplinary decisions are considered by the Supreme Court based on the general provisions of the *Code of Criminal Procedure* in the *Criminal Chamber of Supreme Court*. The *National Council of Legal Advisers* has submitted a negative attitude towards the proposed statutory changes[44]. The Act of 20th July, 2017 on the Supreme Court[45], after consideration by the Parliament, was directed to the President, who used his veto right and asked for its re-examination. Finally, after a deliberation in the Sejm's committee of Justice and Human Rights 8th December, 2017 Sejm adopted new version of Law on Supreme Court. The above-mentioned Act was referred to the Senate, i.e. the

[44] Stanowisko Ośrodka Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych dotyczące poselskiego projektu ustawy o Sądzie Najwyższym (Position of Center Research Studies and Legislation the National Legal Advisers Counselors about parliamentary draft of Law on Supreme Court Print No.1727). http://orka.sejm.gov.pl/Druki8ka.nsf/0/03824EE6F88C03C0C12581620035DA76/%24File/1727-004.pdf (05.12.2017.)

[45] The Act of 20th July 2017 on the Supreme Court. http://orka.sejm.gov.pl/opinie8.nsf/nazwa/1727_u/$file/1727_u.pdf (10.10.2017)

upper house of Polish Parliament and 11th of December, 2017 these Law was handed over to the President for signature.[46]

Finally, on December 20, 2017 President of Poland signed the indicated legal act and new Law on Supreme Court was announced in the Official Journal of Laws.[47]

VII. General conclusion

Considering the Polish constitutional statements contained in Article 17, it can be concluded that the concept of professional self-government is inextricably linked to the organization of public trust professions. The provision clearly states that, by way of law, professional self-governments can be formed, representing persons performing public trust professions. The term contained in Article 17 (1) the Constitution of Poland seems to be a normative definition of professional self-government. According to this provision, there are two clear premises for recognizing a given professional organization as a self-governing community. The first premise is the purpose of the functioning of the self-government, that is keeping custody over the proper performance of professions within the public interest and for its protection. The second premise is that the implementation of this objective concerns only the professions of public trust. Both objectives that are to be implemented by professional autonomies (self-governments) are complementary to each other and justify the transfer of part of important public authority and tasks to professional self-governments.

Analyzing the role of the self-government of legal advisers in performing the functions and tasks of public administration, one can cite *Kazimierz Władysław Kumaniecki*, who said

> *" (...) one should remember the Toqueville's words that without the self-government institutions the nation can give the government a liberty, but it cannot have the spirit of freedom. The point is, however, that the local government should be duly developed and built on the one hand, and on the other hand should not be considered a factor that should be raised against government bodies, because in a state of a nation, its own, based on democratic principles, the local government should, in a certain sense in the very organization of state authority, become one of its essential elements, a balancing, binding, ruling authority with those governed in the name of preservation and development of a state organization as a social organization with general, universal and compulsory objectives."*[48]

This opinion seems to be fully current, although it was expressed almost a hundred years ago.[49]

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46 Sejm przyjął ustawy o SN i KRS. https://wiadomosci.wp.pl/sejm-przyjal-ustawy-o-sn-i-krs-6196158218745985a (12.12.2017.) Text of Law of 8th of December 2017 on Supreme Court. http://orka.sejm.gov.pl/opinie8.nsf/nazwa/2003_u/$file/2003_u.pdf (12.12.2017)

47 Journal of Laws of 2018, item no.50.

48 Kumaniecki, Kazimierz Władysław: *Ustrój państwowych władz administracyjnych na ziemiach polskich z dodatkiem – zawierający postępowanie administracyjne*. Wydawca: Frommer, Leon, Kraków, 1921. 138.

49 Karcz-Kaczmarek 2017, 9.

Finally, it should be emphasized that there is no doubt that the profession of legal adviser and its self-government meets the constitutional criteria established in Article 17 for professional self-governments and can certainly be included into category of professional self-governments of public trust professions. What more, nowadays in Poland, in the legal consciousness of society, the importance of the profession of legal adviser is systematically growing. It is influenced by, among others, recently introduced provisions of Act of 5th August, 2015,[50] which obliging the self-government of legal advisers to participate in the provision of free legal assistance and to carry out tasks in the field of legal education of the society. In the current legal status, the participation of legal advisers in the justice system is also growing. This is evidenced by the latest legislative changes from Act of 27th September, 2013 amending the *Code of Criminal Procedure* and some other acts,[51] enabling legal advisers to act as counsel in criminal proceedings and in proceedings in cases concerning fiscal offenses. The activity of the self-government of legal advisers also applies to participation in the system of observing the rights of patients by indicating candidates for provincial commissions for deciding on medical events.[52]

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[50] Journal of Laws of 2015, item no. 1255.

[51] Journal of Laws of 2013, item no 1247.

[52] Act of 6th November 2008 on Patients' Rights and the Patient's Rights Ombudsman, Unified text Journal of Laws of 2017, item no. 1318.

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