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Consultations in local government as a form of social participation in the Polish legal system

Introduction

Participatory administration exemplifies how contemporary administrative theory increasingly emphasizes society's role in the administration and formation of public policies [Bartkowski 2011: 25–44; Kułak 2014: 60; Niżnik-Dobosz 2014:29]. This type of administration is most effective in local governments, where citizens can participate in person or in groups and local issues can be resolved directly. For comprehensive community involvement to occur, public administration must identify the most important issues for residents, determine how they want these issues resolved, work to resolve them, and involve residents in resolving or settling particular matters [Hausner et al. 1999: 41–42; Suwaj 2010: 59–72]. Local government units (abbreviated LGUs) may involve the community in the decision-making process through social consultations. They form opinions but are not legally binding [Pytlewska-Smółka 2016: 84]. Unlike local referendums, they are not intended to resolve public issues but rather to organize the decision-making process so that the decision-maker can learn about the opinions of third parties. Although they are not legally binding, they are of great political significance. They serve as a kind of guideline for bodies that make decisions on specific issues.

The purpose of this article is to analyze the institution of social consultations in local government as a form of social participation in the Polish legal system and to describe their function in administrative decision-making processes on the basis of legal regulations and literature.

The research objective requires consideration of the following issues. What are public consultations? What consultation procedures are used by LGUs and what is their

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subjective, objective and territorial scope? What are the common features of all consultation procedures used at the local government level and what are their types? What is the function of social consultations carried out by LGUs and how should they be conducted?

Such a presentation of the research topic will allow to focus attention on local government consultations, which, according to the author's thesis, are the most important in practice. It is in the local government that the public administration is the closest to the inhabitants and therefore communication procedures can be most effectively applied at this level. The number of cases resolved locally is increasing, and so is the number of cases that can be consulted. In addition, the scope of matters decided locally is usually very specific, which makes it easier for residents to express their views during consultations.

The research objective will determine the structure of the work. The author will discuss in particular the legal framework, the subjective and objective scope of social consultations in LGUs, as well as present the principles and mode of their implementation and draw attention to various forms of social consultations and the practice of conducting them.

To achieve the aim of the study, the author will use the institutional and legal method, based on a comprehensive assessment of the normative status of the examined issue and its interpretation. The analysis will focus mainly on legal acts as well as views and opinions presented in publications in the field of local government and substantive administrative law.

Public consultations at the local government level are of great importance both in legal and social terms. Therefore, an attempt to analyze this matter will complement the ongoing debate with considerations of a theoretical and legal nature and will become a contribution to further considerations and discussions.

The legal framework of social consultation in local government

A separate legal act has not been enacted to regulate the normative model of social consultation in local government. The grounds for public consultations, however, were included in the Republic of Poland's Constitution of April 2, 1997. This institution can be derived indirectly from general constitutional principles such as the principle of national sovereignty, the democratic state of law, the principle of subsidiarity or civil society. The rights to express opinions obtain and disseminate information and provisions guaranteeing the transparency of public life, including the right to obtain information about the activities of public authorities, constitute an additional guarantee in the field of consultation. The aforementioned regulations indicate that the government must be receptive to dialogue and legitimize the expectations and aspirations of citizens to participate directly in the processes of public decision-making, including through consultations [Makowski 2014].

At the local government level, the principle of conducting public consultations is developed, among others, in the provisions of the Act of 8 March 1990 on Municipal Self-Government (hereinafter referred to as: m.s.g.), the Act of 5 June 1998 on Povi

Self-Government (hereinafter referred to as: p.s.g.), the Act of 5 June 1998 on Voivodship Self-Government (hereinafter referred to as: v.s.g.) and in many other acts of substantive administrative law. These individual constitutional acts of local self-government allow for the possibility of conducting consultations with residents on matters of significance to a given LGU and in instances where the law so provides. Nonetheless, their conduct necessitates the establishment of rules and procedures for conducting consultations with residents by the decision-making body of a given unit through the use of resolutions [art. 5 a m.s.g, art. 3 d p.s.g., art. 10 a v.s.g.]. It is also worth noting that, pursuant to Art. 4 Sec. 6 of the European Charter of Local Self-Government, local communities should be consulted as far as possible, at the right time and in an appropriate manner; in the process of drawing up plans and taking decisions on all matters directly affecting them [Moll 2014: 244].

Objective scope of local government consultations

In the local government acts, the legislators provided two types of consultations: obligatory and optional [Augustyniak 2015:140–150; Pawłowski 2015: 203–217]. The first is carried out on the basis of a special provision (“in cases provided for by the law”). The Act on Municipal Self-Government contains four provisions requiring public consultations with residents (the inhabitants of this commune), i.e., Art. 4a sec. 1 m.s.g. – issuing an opinion by the commune council, which is part of the broadly understood territorial changes referred to in art. 4 sec. 1 m.s.g. on the initiative of the Council of Ministers; Art. 4b paragraph. 1 m.s.g. – a motion by the commune council regarding implementing a broadly understood territorial change by the Council of Ministers [art. 4 sec.1]; art. 5 sec. 2 m.s.g. – adoption of a resolution on the establishment of an auxiliary unit; Art. 35 sec. 1 m.s.g. – granting a statute to an auxiliary unit of a commune [Feja-Paszkiwicz 2011: 40–59; Ura 2012: 216–229; Sześciło 2014: 26–32]. The territorial changes of the commune, referred to in article 4 sec. 1 m.s.g., concern the creation, merger, division, and liquidation of communes and the determination of their boundaries; granting a commune or town the status of a town; and establishing its boundaries. Similar provisions in the scope of obligatory social consultations with the inhabitants of the poviát concerning territorial changes are included in the act on poviát self-government (i.e., Article 3a (1) and Article 3b (1) of the Act on Poviát). The obligation to consult at the commune level pursuant to Art. 5a m.s.g. may also result from specific provisions. On the basis of the voivodship self-government, the indicated division of consultations into obligatory and optional, however, is only theoretical. This is because the legislator, unlike in the commune and poviát self-government, did not provide for any case of a statutory obligation to consult the matter with the inhabitants of the voivodeship. In practice, this means that voivodship consultations in the current legal state may only be optional [Dolnicki et al. 2021]. In the case of obligatory consultations with residents, failure to conduct them before adopting a resolution on matters specified in the Act constitutes a significant breach of the provisions governing the procedure of adopting resolutions.

On the other hand, optional consultations take place on other matters important for a given LGU, i.e., on all those that have not been subject to the consultation obligation under the Act and have been recognized by the local government authorities as valid. The legislator does not define which matters should be considered important for a given LGU. The decision to do so rests primarily with the decision-making body of a given unit (i.e., the commune council, poviats council, and voivodship sejmik, respectively) [Madej 2015: 219]. Leaving the legislator the discretionary nature of important matters to the authorities of LGUs, the creation of their catalog will be varied, depending on the needs, the demographic and territorial character of a given LGU, or the importance of a given problem. The importance of the subject of consultation may be determined, among others, by the durability of changes in the functioning of a given LGU over a long period of time caused by the decision taken; the number of funds involved and the impact of the decision on a budget of the LGU; the scope of the impact of the decision on the number of members of the local government community, etc. Therefore, it seems that a matter that may be the subject of consultations may be understood as all circumstances relating to a given LGU and falling within the competence of its organs, which are not settled or are not resolved in the form prescribed by law. Moreover, the matter must be important, which appears to imply strategic activities beyond the scope of normal administration [Ofiarska 2014: 264].

The subjective and territorial scope of social consultations in LGUs

Two entities are always participants in the process of social consultations carried out on the basis of local government acts. The first is the consulting body (decision-maker) authorized to decide how to perform public tasks that were the subject of consultations and to organize public consultations in legal and technical terms. The second participant in self-government consultations is a collective consulted entity, i.e., residents of a given LGU conducting the consultations. They participate actively in the consultation process [Dolnicki et al. 2021]. Substantive administrative law acts can shape the subjective scope of consultations conducted on the basis of provisions in a different (broader) way. The decision-making body of LGUs (commune councils, poviats councils, and voivodship sejmik, respectively) initiates obligatory consultations. In terms of optional consultations, the decision-making body of LGUs may grant such a right to the executive body, residents, and other entities, such as representatives of social organizations and councilors, in the resolution on the rules and procedure for conducting consultations with residents [Moll 2014: 249–250]. Unless the decision-making body decides otherwise in a resolution, the body of a LGU that actually conducts public consultations is the executive body of a given LGU – community commune head (mayor, president) of a commune, poviats board, or voivodship board [Hauser 2011: 67].

The provisions of self-governmental acts do not define the concept of a resident; therefore, in this respect, one should refer to the provisions of the Civil Code. Pursuant to Art. 25 of the Civil Code, the place of residence of a natural person is the place where the person stays with the intention of permanent residence. Art. 28 of the Civil Code states that one can only have one place of residence. Pursuant to Art. 25 of the Civil

Code, two factors determine the place of residence: external (actual stay, i.e., *corpus*) and internal (intention to reside permanently, i.e., *animus manendi*), both occurring and lasting together. Only natural persons who meet the above conditions are the commune/poviat/region residents and the local government community members. This means that people who: are under 18 years of age; have been completely incapacitated; are foreigners; have been deprived of public rights in a final court judgment – have the status of a resident and may participate in public consultations.

As a category of administrative law, check-in does not prejudge the place of residence within the meaning of civil law [Judgments: 1995, SA/Po 518/95; 2005, III SA/Kr 318/05]. Having a legal or actual interest (e.g., related to real estate located on the territory of a given LGU) does not entitle one to participate in consultations either. While the subjective scope of consultations is unrestricted and applies to all residents of a given LGU due to the substantive nature of a resident's status, the territorial scope of consultations may be limited on the basis of a provision of the act or a resolution to a portion of the area of a given LGU (e.g., article 4a (2) m.s.g.) or to specific localities.

Principles and procedures for conducting public consultations in LGUs

The rules and procedures for conducting public consultations are set out in a resolution of the LGU (i.e., the council or *sejmik*, respectively). The resolution on the principles and procedure for conducting consultations with residents is always an act of local law regardless of whether it concerns all consultations with residents carried out in LGUs or covers only consultations on one matter and is subject to publication in the Voivodship Official Journal. The resolution of a given local government unit's decision-making body (council or *sejmik*) should define completely and exhaustively who initiates the consultation, the subject and purpose of the consultation; the date of their conduct; the area to be consulted; the manner and procedure for conducting consultations; the form, date, and place of displaying materials relating to the matter being the subject of consultations; and the time and place for providing explanations [Moll 2014: 257]. The resolution outlining the principles and procedure for holding public consultations on the discussed local government acts can be abstract or specific. The abstract resolution specifies the format and rules for organizing and carrying out all public consultations in a specific LGU. It allows for the adoption of a consistent model for conducting consultations as well as the development of a specific practice in this area. This is a useful solution for large units that prepare a large number of optional consultations. An individual resolution regulates specific consultations conducted in a specific factual state, and a solution that creates an optimal model of consultation in a given situation in LGUs where public consultations are conducted sporadically or atypically. In practice, some decision-making bodies adopt a resolution, the appendix of which is the regulations for conducting public consultations, which is an integral part of the resolution or regulate consultations in the statute of LGUs, in a separate chapter of the statute, or the form of an annex to this statute.

Forms of social consultation in LGUs

The provisions of local government acts do not indicate the forms of conducting consultations with the inhabitants of LGUs, and their definition is left to the discretion of the bodies constituting the LGUs. This means that, depending on the will of the local community, in practice, any activities aimed at involving this community in the process of exercising public authority can be carried out. Consultations most often consist of expressing an opinion or submitting comments on the matter being the subject of the consultation, answering the questions posed and choosing between the proposed options [Madej 2015: 223]. Often, the forms in which consultations may be conducted include written or telephone surveys, street surveys, interviews with interested entities (individual or group), or collecting comments at a consultation point. Consultations consisting of collecting residents' opinions by means of electronic communication, using an internet platform dedicated to consultations, are becoming more and more important. Practice confirms that it is possible to combine several forms of consultation. However, public consultations conducted in this way do not fully fulfill their function, as they are not of a bilateral nature. Indirect forms of citizen participation do not guarantee that decision-makers have contact with speaking citizens. The decision-maker may become familiar with the results of the consultations, but one is not a direct participant in them. Therefore, one is often unaware of what problems are consulted and the result, which translates into a poorer quality of the law being enacted [Marchaj 2016]. Leaving the legislator free to LGUs as to the form of conducting consultations gives the possibility and should encourage the use of more direct forms of citizen participation, providing decision-makers with contact with representatives of the local community, such as meetings of councilors with residents, workshops, or local government public hearings, which have been used so far in the legislative process in the Sejm as a form of admission to the legislative process of citizens and professional lobbyists [Marchaj 2014: 166; Gross 2017: 89–101]. A public hearing consists of allowing anyone interested in a given legal project to express their voice [Dobrowolski & Gorywoda 2004: 3]. This is done as part of a formal procedure to limit corruption and consists of providing the legislator with arguments and opinions from various entities and expressing the parties' conflicting interests [Kuczma 2009: 611]. A local government public hearing, through the involvement of decision-makers and stakeholders at the same time, can be a form of public consultation, providing residents not only with the opportunity to express themselves (i.e., directing opinions to the authorities) but also the right to be heard, thanks to which the residents' message can directly reach decision-makers. Thanks to the local government public hearing, councilors can hear why the prepared project is good or bad according to the representatives of the local community. On the other hand, it is an opportunity to explain to the residents the motivations underlying the adoption of a given resolution. When speaking of the possible forms of consultation, it should be mentioned that, in its current form, the civic budget, despite the legislator's description of it as "a special form of social consultation," is an independent form of decisive direct democracy. The justification for the thesis is provided directly in the provisions of local government acts, which require the civic budget tasks to be included

in the budget resolution by law. In fact, it consults several initiatives voted on by residents or other legitimate entities within a single citizen's budget [Dolnicki et al. 2021].

The practice of community consultations in LGUs

The provisions on public consultations in force in Poland do not fully translate into the efficacy of consultations conducted and the quality of legislation enacted [Smarż 2016: 226–230]. The practice of conducting consultations proves that they often constitute a kind of facade, and the consultations conducted on their basis are apparent [Ferens et al. 2010: 16]. Due to the limited amount of time they have to make decisions and budgetary constraints, public institutions frequently avoid or feign conducting consultations. Consultation is viewed as a necessity rather than a valuable information source. They are frequently carried out in response to social pressure rather than on the initiative of LGUs, which results in a lack of public trust and skepticism that they will influence decisions. In lieu of more engaging and interactive activities, local governments most frequently utilize passive forms resembling a referendum or voting for an option. Even when consultations occur, they are frequently conducted in a purely formal manner. Participants receive no feedback, their results are not elaborated, and it is difficult to determine their actual impact on the decision's final form. In the interim, the consultation process should culminate with a report that details all of its most significant aspects [Zychowicz 2014: 173]. During consultations, the competitiveness of goals is revealed, and it is difficult to satisfy the interests of one group without infringing the interests of another.

It is also difficult to find an unequivocal compromise. Another significant disadvantage is that consultation participants are sometimes unprepared for them [Długosz & Wygnański 2005: 14]. Meanwhile, in order to have effective consultations, both the parties preparing and participating must have the necessary knowledge. Inadequate time for the partners to speak, lack of a clear purpose or inadequate formulation of the purpose of consultations, and illegibility of documents and the manner in which they should be referred to are also weaknesses of consultations. Social consultations are initiated and conducted too late, at a late stage of the decision-making process, which has a negative effect on the possibility of utilizing their results, a fundamental change in assumptions, or the fundamental direction of the solution. Too often, ready-made concepts are consulted without first consulting general directions. Typically, they pertain to the document's near-final draft or investment plans. This is also a result of the fact that comments were not taken into account, as their incorporation would have necessitated extensive alterations to the entire document. These mistakes frustrate citizens and discourage them from acting, instead of stimulating them to be active [Happach & Komorowska, 2014: 74]. Consultations are treated in a perfunctory manner, so their potential as a tool of social participation is not noticed and fully used [Olech & Sobiesiak-Penszko 2013: 21]. In the meantime, in addition to contributing practically to the content of proposed solutions, well-conducted consultations may also yield results with significant sociopolitical significance. Involving social partners allows them to develop a sense of shared responsibility for the administration's problem-solving

efforts. In this way, they impart a sense of agency and control to the populace and popularize mechanisms for influencing the decisions of authorities. They contribute to a better understanding of the needs of citizens, allowing for their satisfaction, and enable precise prioritization and resource allocation.

Conclusions

As a tool for civic engagement, social consultations are becoming an increasingly vital aspect of how local communities function. They are one of the components of maintaining communication between authorities and residents of LGUs, which is one of the prerequisites for modern local government management. Effectively organized – they provide the necessary social legitimacy to the public authority and its decisions, which is essential to the success of the policy at the local level. Citizens' participation in decision-making enables the creation of an optimal solution that takes into account the broadest needs, is distinguished by the precision of method and solution selection, and is cost-effective. For public consultations to be effective, they should occur at a decision-making stage where community perspectives can be considered. Consequently, they must be conducted early enough to permit an in-depth discussion of viable proposed solutions. Consultations held early in the decision-making process may yield innovative solutions that their organizer did not anticipate [Poczykowska 2013: 55]. Consultations should not be a one-time event, but rather a two-stage process, with the first phase occurring as early in the decision-making process as possible, and the second phase occurring when detailed concepts are developed based on the first consultations. The procedure must not discourage participation. Consultations should be held in good faith and in a spirit of dialogue, with both parties listening to each other and showing a willingness to understand different reasons. They require proper coordination. By establishing the conditions for universal participation, everyone who desires to participate in consultations should be able to do so. Consultation should be more direct and allow individuals to be heard, as opposed to merely expressing their opinions. All information within the scope of consultations must be widely accessible, with information on the topic of consultations being accurate and exhaustive. Various communication channels (not only the official board in the office, the Public Information Bulletin, and the online consultation platform, but also leaflets and posters in generally accessible places (e.g., in offices, schools, community centers, clinics, hospitals, at bus stops), advertisements and announcements in the media (press, radio, television, Internet), city lights, billboards, and other adapted consultations) should be utilized [Gawroński 2010: 28]. The result of consultations should be the issuance of an open decision, taking into account the general public's opinions [Ostachowski 2020: 164]. It cannot lead to a situation in which, following consultations, decisions are made that are diametrically opposed to what the residents want. Legally, it is permissible because consultations are an institution whose results are not binding on bodies of self-government, but it could have disastrous social consequences. The optimal effect of consultations should be the achievement of a consensus regarding the proposed solutions, and more pleasantly, they should result in a better understanding of the parties'

intentions, which contributes to the diminution of social opposition to the proposed changes. Properly conducted public consultations strengthen the positive image of the office as an authority that shares decision-making, favoring the development of partnership relations with residents and non-governmental organizations. Citizens who have had the opportunity to voice their opinion on a given issue identify more with the adopted solution. Therefore, one should initially work to change the negative attitude of decision-makers towards this form of public participation. It should be ensured that the duration of public consultations can be extended, and that noncompliance with the obligation to conduct consultations is met with real consequences. Participants in the consultations should be provided with a thorough discussion and explanation of the documents consulted. Good information on the document's objectives and guiding principles will have a positive effect on participation in consultations as well as the quality and precision of opinions expressed during them.

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Abstract

Contemporary administrative doctrine pays more and more attention to the importance of society in the administration and shaping of public policies, as defined by a participatory administration. This type of administration is most effective in local governments, where it is possible to participate in person or groups or to solve local problems directly. A prerequisite for the implementation of the full involvement of local communities is specific actions of public administration consisting, in particular, of identifying the most important problems faced by its residents, getting to know the preferences of residents as to how to solve these problems, and engaging in solving them. One of the forms of community participation in creating decisions for local government units is social consultations. Public consultations carried out in local government acts are opinion-forming and non-binding. They have a legitimizing significance for the specific shape of decisions made by authorities, as well as strengthen the tasks assigned by self-government authorities to citizens. This article aims to analyze the institution of social consultations in local government as one of the forms of social participation in the Polish legal system and to present their role in administrative decision-making processes.

Key words: public consultation, social participation, local government, participatory administration, decision making

