

LEGAL CONSEQUENCES OF INTRODUCTION OF ELEMENTS OF PUBLIC LAW INTO COOPERATIVE LAW – POLISH PERCEPTION

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Abstract: The article considers the role of administrative law and the impact of state authorities on the shape of cooperative law in Poland. The establishment of legal norms introduces elements of public law into cooperative law. This article assesses these legal norms, including the regulation of credit unions and housing cooperatives. In addition, it considers a newly shaped model of membership in housing cooperatives in Polish law. This model assumes that membership can be created, *ex lege*, in isolation from the will of the member, if they acquire the right to occupy premises in a housing cooperative. This type of membership is an example of the Polish legislator using housing cooperatives to implement the public obligation to meet the housing needs of society.

Key words: cooperative law, public regulation, supervision, credit unions, housing cooperatives, Poland

I. Introduction

The cooperative movement and cooperative law have long traditions in Poland. The first Polish cooperative society was founded in 1816 and the first Polish Act on Cooperatives was introduced in 1920.¹ Since then, Poland had seen many structural kinds of cooperatives. Not all of these are related to the cooperative model based on the Rochdale Principles.² During the communist regime (1945 – 1989),

¹ See: J. Shaffer, *Historical Dictionary of the Cooperative Movement*, Lanham, Maryland – Toronto – Plymouth, UK, 1999, p. 337 – 338.

² See: A. Kurimoto, J. Draperi, J. Bancel, S. Novkovic, M. Wilson, L. Shaw, E. L. Cheney, D. Cracogna, in: *Guidance Notes to the Co – operative Principles*, Brussels, 2015; J. Birchall, in: *Co – operative Governance Fit to Build Resilience in the Face of Complexity*, Brussels, 2015, p. 25 – 35; P. Zakrzewski, *Zasady Międzynarodowego Związku Spółdzielczego [Principles of the International Cooperative Alliance]*, *Kwartalnik Prawa Prywatnego*, 2005, no. 1, p. 277; H. Cioch, *Zasady roczdelskie i ich realizacja w praktyce [Rochdale Principles and it's Practice Implementation]*, PAN Oddział w Lublinie. Teka Komisji Prawniczej, vol 2, Lublin, 2009, p. 29.

cooperatives were used as tools for the relegation of resources and were controlled by the communist government. Since the fall of communism, a rebirth of independent cooperatives has occurred. The establishment of the Polish credit union movement is the best example of this rebirth.³ However cooperatives are still governed under the Act that was introduced during the communist regime (1982) and government interference with the autonomy of cooperatives can still legally take place.⁴

Under current law, government interference is most visible in the regulation of credit unions and housing cooperatives. These are both cooperative entities that the state perceives as executing public tasks. One legal source of this interference is the introduction of elements of public law into the cooperative law applicable to credit unions and housing cooperatives. In these cooperatives, formation and activity is regulated not only by private law regulations but also regulated by administrative norms. This is a manifestation of a wider phenomenon, recognized by Polish legal doctrine, where elements of public law are introduced into private law. In this situation, classic private law relationships are increasingly being regulated by administrative methods that are appropriate for public law.⁵ This leads to a distortion of the nature of cooperatives, which in Poland have always been perceived as being the subject of private law relations.⁶ In such relations, cooperatives remain autonomous with respect to other legal entities, and none of these entities may impose a specific order on them.⁷ Such a situation expresses in a legal sense the principle of autonomy and independence of cooperatives. Where cooperatives are regulated by administrative norms, they become entities obliged to take or suspend certain activities. If such orders or prohibitions relate to the subject of the cooperative's activities and the possibility of associating in them, we are dealing with a violation of the autonomy of the cooperative. The purpose of this article is to discuss this occurrence in Polish law.

II. Credit unions regulation

The credit union movement in Poland was reborn in 1992. The original Polish credit union movement began in southern Poland in the 19th century. It was founded by Franciszek Stefczyk on the pattern of Friedrich Wilhelm Raiffeisen's financial cooperatives⁸. The first Act on credit unions was introduced in 1995. Currently, Polish credit unions operate under the 2009 Credit Unions Act (CUA). Article 2 of this Act explicitly states that a credit union is a cooperative and thus the general rules of cooperatives shall be applied to credit unions. These rules are expressed in the 1982 Polish Cooperative Act (PCA). Article 1 states that the cooperative is a voluntary association of an unlimited number of people with a variable composition of members and a variable share fund, which in the interest of its

³ See: A. Jedliński, *Krajowa spółdzielcza kasa oszczędnościowo – kredytowa – zagadnienia konstrukcji prawnej* [National Association of Cooperative Savings and Credit Unions – Legal Construction Issues], Sopot, 2001, p. 20 – 28.

⁴ On Polish cooperative law see: A. Piechowski, in: *International Handbook of Cooperative Law*, edit. D. Cracogna, A. Fici, H. Henrÿ, Berlin – Heidelberg, 2013, p. 609 – 634.

⁵ See: M. Safjan, in: *System Prawa Prywatnego, Prawo cywilne – część ogólna* [Private Law System, Civil Law – General Part], vol. 1, edit. M. Safjan, Warsaw, 2012, p. 49 – 52.

⁶ See: S. Grzybowski, *Prawo spółdzielcze w systemie porządku prawnego* [Cooperative Law in the System of Law], Warsaw, 1976, *passim*; K. Pietrzykowski, *Powstanie i ustanie stosunku członkostwa w spółdzielni* [Establishment and Termination of Membership in the Cooperative], Warsaw, 1990, *passim*; A. Jedliński, *Członkostwo w spółdzielczej kasie oszczędnościowo – kredytowej* [Membership in the Credit Union], Warsaw, 2002, *passim*.

⁷ See: S. Grzybowski, *Prawo spółdzielcze*..., p. 13 i n.

⁸ J. Ossowski, *Jałmużna i kredyt* [Alms and Credit], Sopot, 2005, *passim*.

members carries out joint economic activities.⁹ This definition of a cooperative does not address the issue of cooperative autonomy. The CUA established the supervision of credit unions by the Financial Supervision Authority (FSA). The Polish legislator was guided by the scope of credit union activities as financial market entities. This has led to credit unions being subject to supervision that is more appropriate for other types of financial institutions, such as commercial and cooperative banks.

It should be noted that the supervision of credit unions is based on an international standard set by the World Council of Credit Unions (WOCCU).¹⁰ It is understandable that external supervision of credit unions is required, particularly in relation to financial issues concerning the safety of members' deposits i.e. the capital to assets ratio, solvency ratio, liquidity ratio etc. However, the scope of the supervisor's powers in Poland raise some justifiable doubts. Under the FSA's supervision, credit unions in Poland require permission for formation and mergers (Articles 7 and 74a of CUA). Also, democratically elected members of the management board cannot perform their functions without firstly obtaining permission from the FSA. Administrative permission requirements apply to credit unions simultaneously with their obligations to register the formation or merger of a credit union by a civil court. This results in a situation where cooperatives that are credit unions are required to obtain the consent of two different state authorities (civil court and FSA).¹¹ Both of these authorities examine whether the formation or merger of a credit union meets the requirements set by substantive laws. Polish legal doctrine emphasizes that such a solution is not compatible with the rule of non-discrimination in social or economic life, as expressed by the Constitution of the Republic of Poland (Polish Constitution).¹²

The formation and merger of cooperatives that are credit unions takes place as a consequence of legal actions. As a result of the implementation of FSA supervision, the effectiveness of these activities depends on the consent of the central public administration authority, issued in the form of an administrative decision. Such a situation seems to violate the principles of voluntary association in a cooperative and autonomy of cooperatives. In addition, from a practical point of view, it reduces the

⁹ In the Polish doctrine of cooperative law, it was pointed out that the definition of a cooperative contained in Article 1 of PCA deviates from the definition of a cooperative approved by the ICA. H. Cioch proposed the introduction of the following definition of the cooperative in Polish law: *"The cooperative is voluntary and a self-governing association with a variable composition and a variable participation fund of an unlimited number of members who have been associated in order to cooperate in business to meet their economic, cultural and social aspirations and needs. The cooperative also conducts social activities for its members, their families and the local social environment"*. See: H. Cioch, *Prawo spółdzielcze [Cooperative Law]*, Warsaw, 2011, p. 33. Example to follow by the Polish legislator with changing the definition of cooperatives in Polish law may be the Principles of European Cooperative Law developed as a model of cooperative legislation and expressing the characteristics of cooperatives adopted in the International Cooperative Principles. Section 1.2. (2) of these Principles states that *"As autonomous organizations, cooperatives are free to govern themselves by their statutes within the limits of cooperative law"*. See: A. Fici, in: *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge – Antwerp – Portland, 2017, p. 34 – 37.

¹⁰ See: *Model Law for Credit Unions*, Washington, DC – Madison, Wisconsin, 2015, p. 50 – 58. On supervision of credit unions see also: R. Coelho, J. A. Mazzillo, J. Svoronos, T. Yu, *Regulation and supervision of financial cooperatives* [www.bis.org, access 23.04.2019].

¹¹ K. Pietrzykowski, *Charakterystyka nowych regulacji prawnych dotyczących spółdzielczych kas oszczędnościowo – kredytowych [Characteristics of New Legal Regulations Regarding Credit Unions]*, in: *Prawne i ekonomiczne determinanty rozwoju spółdzielczych kas oszczędnościowo – kredytowych w Polsce [Legal and Economic Determinants of Development of Credit Unions in Poland]*, edit. J. Ossowski, Sopot, 2010, p. 34. See also: D. Bierecki, *Członkostwo w spółdzielczej kasie oszczędnościowo – kredytowej [Membership in the Credit Union]*, Sopot, 2013, p. 51.

¹² A. Bałaban, *Nowe regulacje dotyczące kas spółdzielczych w świetle konstytucyjnej zasady państwa prawnego [New Regulations Regarding Credit Unions in the Light of the Constitutional Principle of the Rule of Law]*, in: *Prawne i ekonomiczne...*, p. 47.

attractiveness of cooperatives and consequently reduces their formation. It should be noted that the Polish legislator does not encourage the creation of cooperatives. Such a situation occurs not only in the context of the regulation of credit unions. An example of this was a regulation that enabled the transformation of a labor cooperative into a commercial law company. This regulation was repealed in 2019 as a consequence of the judgement issued by the Constitutional Tribunal¹³ at 16th of June 2015 (K 25/12).¹⁴ The judgement stated that the mentioned regulation does not comply with the constitutional rule of law, the constitutional freedom of association and the constitutional rule of property protection. However, it should be noted that in Polish law there has never been a corresponding regulation providing for the opposite effect, i.e. to enable the transformation of a commercial law company into a cooperative.

It is inconsistent with the second International Cooperative Principle i.e. democratic member control, to make the selection of a member of the credit union management board dependent on the consent of the FSA. This permission is required by Polish law for members of management boards of commercial banks and is intended to ensure the safety of customers' funds accumulated in banks. This kind of permission is also required for members of management board of cooperative banks, which can provide financial services for consumers other than their members. Credit unions in Poland on the other hand are entitled to provide financial services only to their members (Article 3 of CUA). All funds collected on deposit in credit unions belong exclusively to their members. A paradoxical situation arises, where the election of management board members by persons whose funds they will manage may be rendered ineffective by a decision of the FSA. The preservation of the quality of credit union services should not violate the credit union's autonomy.

Simultaneously with establishing the supervision of credit unions by the FSA, the CUA reduced the role of the National Association of Cooperative Savings and Credit Unions (NACSCU) in the credit union market. The CUA also established FSA supervision of the NACSCU. The NACSCU is a second tier cooperative association of credit unions in Poland. In the current legal state, NACSCU's role has been reduced from the supervision of cooperatives - enabling substantive correction of their activities, to limited control, consisting only of the examination and assessment of cooperative activities, but without the possibility of ordering their correction. Credit unions have no influence on the FSA, which is an administrative body. Until the CUA came into force, credit unions as members of the NACSCU, controlled this second level cooperative association according to general principles applicable to all cooperatives.

The FSA's supervision of credit unions should be carried out in a manner that is proportionate to the complexity and the scale of risk of the activity of the credit union (Article 60 of CUA). In addition, the supervision of credit unions and NACSCU should take into account the principles of supervision and corrective measures that take into account the scale of the credit union's activity, to ensure the application of milder measures where appropriate (Article 60a of CUA). The adequacy of supervision over cooperatives was analyzed by the Constitutional Tribunal. The regulations concerning limitations on the scale of supervision to correspond to the scope of the cooperative's activities (Articles 60 and 60a of CUA) were introduced as a result of the judgment issued by the Constitutional Tribunal, at 31st of July

¹³ In Poland the Constitutional Tribunal is the court competent to issue a judgment causing the loss of power by the provision of the act in the event of its non-compliance with the Constitution (Article 190 of Polish Constitution).

¹⁴ OTK-A 2015/6/82.

2015 (K 41/12).¹⁵ In this judgment, the Tribunal decided that CUA regulations failed to limit supervision measures adequately to correspond to the cooperative's activities and were inconsistent with provisions of the Polish Constitution ensuring freedom of association and allowing freedom of economic activity to be limited only by way of statute and only where it was important to the public interest.¹⁶

III. Housing cooperatives regulation

Housing cooperatives meet a significant part of the housing needs of society in Poland. One Pole in three lives in premises in a housing cooperative building.¹⁷ In these circumstances the Polish legislator has subjected housing cooperatives to control by the Minister responsible for construction, spatial planning and housing (Article 93a of the Polish Housing Cooperatives Act – HCA). The Minister has the right to request any information, data and documents regarding the organization and operation of a housing cooperative that is necessary to assess compliance with the law. In the case of a suspected violation of the law by a housing cooperative, the minister may apply to the appropriate cooperative association to which the housing cooperative is affiliated, or to the National Cooperative Council,¹⁸ with a request to examine the legality, thrift and reliability of its entire operation (illustration – Article 91 of PCA). Article 93a of PCA was the subject of a Constitutional Tribunal study in its compliance with the constitutional catalog of competencies of the Council of Ministers. In the judgment of 15 July 2009 (K 64/07¹⁹), the Constitutional Tribunal did not find any inconsistency between Articles 93a of PCA and 146 of the Polish Constitution which sets the scope of competence of the Council of Ministers. However, a separate opinion was submitted in this judgment which stated that Article 93a of PCA constitutes an intolerable interference with the legislator, which is incompatible with the principle of a democratic state of law, contrary to the constitutionally protected status of a cooperative as a juridical person. The Polish Constitution does not give the Council of Ministers, or individual ministers, power to exercise administrative supervision of the activities of a cooperative. Due to the scope of supervisory powers under Article 93a of PCA exceeding the competence of a state administrative body in relation to a private legal person (in this case, a cooperative), the challenged provision (Article 93a PCA) is inconsistent with Article 2 of the Polish Constitution which establishes the principle of the rule of law in the Polish legal system.

The regulation of housing cooperatives had been the subject of many judgments of the Constitutional Tribunal. In terms of membership in a housing cooperative, the Constitutional Tribunal

¹⁵ OTK-A 2015/7/102.

¹⁶ See: P. Pelc, *Nadzór Komisji Nadzoru Finansowego nad spółdzielczymi kasami oszczędnościowo – kredytowymi i Kasą Krajową oraz instrumenty nadzorcze Komisji w stosunku do kas i Kasy Krajowej* [Supervision of the Financial Supervision Authority over Credit Unions and the National Association of Cooperative Savings and Credit Unions and Instruments of the Financial Supervision Authority Regarding Credit Unions and National Association of Cooperative Savings and Credit Union], in: *Prawo spółdzielcze. Zagadnienia materialnoprawne i procesowe* [Cooperative Law. Substantive and Procedural Issues], edit. A. Herbet, J. Misztal – Konecka, P. Zakrzewski, Lublin, 2017, p. 233 – 261.

¹⁷ A. Dragan, in: *Ruch spółdzielczy w Europie i instrumenty wsparcia* [Cooperative Movement in Europe and Support Instruments], Warsaw, 2016, p. 14.

¹⁸ The National Cooperative Council is a legal person established directly by PCA whose statutory duty is to act in the interest of the cooperative movement in Poland and on the international forum (Article 259 of PCA).

¹⁹ OTK – A, 2009/7/110.

judgment issued on 5th of February 2015 (K 60/13),²⁰ has significant consequences. The Constitutional Tribunal ruled that the provisions of the HCA, to the extent that they allow membership in a housing cooperative to be held by persons who do not have the right to premises is inconsistent with the provisions of the Polish Constitution ensuring protection of property rights. According to this judgment, members of the housing cooperative who were not entitled to premises in the buildings of a cooperative, who held member rights, were impacting on the ownership rights of those members who were entitled to premises. The Constitution Tribunal ruled that no other person should be entitled to influence the housing cooperative activities of those that were entitled to premises. Because every cooperative member has corporate rights in a cooperative (i.e. voting rights and active and passive electoral rights to the cooperative associations) only members with rights to premises should be allowed to associate in a housing cooperative.²¹ As a consequence of this judgment the Polish legislator was bound by Constitution to amend the HCA. The 2017 amendment of the HCA connected the right to membership with an entitlement to premises in the housing cooperative. Under current law membership in a housing cooperative arises, *ex lege*, as a consequence of acquiring a right to premises in a housing cooperative (Article 3 of HCA). Some of those rights are non-pecuniary rights to premises (dwellings, flats, habitations) so closely bonded with membership in a housing cooperative that they cannot exist without it. In those cases, acquisition of membership is required before acquiring the right to premises and cooperative statute restrictions on membership requirements shall apply. However, there are also other rights to premises in a housing cooperative which have a pecuniary character and can exist without membership in a housing cooperative. These rights burden housing cooperative premises as *iura in re aliena*. In case of acquiring such rights, membership in a housing cooperative arises *ex lege* and cooperative statute restrictions on membership requirements shall not apply. However, sale of this right results in the loss of membership in the housing cooperative.

The current model of membership in a housing cooperative may raise doubts as to compliance with the principle of voluntary membership.²² It seems, however, that the establishment of an *ex lege* effect in the form of membership acquisition does not affect the issue of voluntary membership or coercion of membership in the cooperative, since there is no expression of will by the cooperative member regarding their membership in the housing cooperative. Binding membership in a housing cooperative with the right to the premises means that the autonomous will to acquire membership is expressed by the acquisition of the right to premises. In other words, the legal requirement to become a member of a housing cooperative becomes the right to the premises. However, this argument does not apply to persons who are entitled with a right formed as *iura in re aliena* on housing cooperatives premises, who *ex lege* have become members of housing cooperatives as a result of the changes to the HCA by the 2017 amendment. This latter situation seems to violate the principle of voluntary membership in a cooperative.

The 2017 HCA amendment introduced one more significant change, namely the abolition of the obligation to contribute to a housing cooperative. Housing cooperatives became non-share cooperatives.

²⁰ OTK-A 2015/2/11.

²¹ Criticism of this position was voiced by P. Zakrzewski, *Spółdzielnie mieszkaniowe po zmianach z 2017 r. [Housing Cooperatives after the 2017 amendment]*, Kwartalnik Prawa Prywatnego, 2018, no 1, p. 181 – 182.

²² See: P. Hoffman, in: *Spółdzielnie mieszkaniowe. Komentarz do nowelizacji [Housing Cooperatives. Comment on the Amendment]*, Warsaw, 2018, p. 48, 54.

The financing of their functioning is now based solely on fees paid by members for the maintenance of cooperative buildings and for costs related to social, educational and cultural activities conducted by the cooperative. These fees however should not be considered as cooperative capital.²³

It can be argued that bonding membership rights with the right to premises is a manifestation of the introduction of elements of public law into cooperative law. Satisfying the housing needs of citizens is one of the public tasks of the state (Article 75 of Polish Constitution). Housing cooperatives can be considered to be entities that meet these needs. The legal definition of a housing cooperative in Polish law states that purpose of a housing cooperative is to meet the housing needs of their members (Article 1 of HCA). It can be argued that the formula for the acquisition of *ex lege* membership in a housing cooperative linked to the exclusion of any obligation to contribute to the cooperative, serves to enable the public task of meeting housing needs. This situation introduces an element of public law into cooperative law.

IV. Conclusion

This study of Polish regulations of credit unions and housing cooperatives leads to the conclusion that the Polish legislator has treated credit unions similarly to commercial and cooperative banks, bearing in mind the public functions of the financial market. Housing cooperatives on the other hand were primarily treated by the Polish legislator as entities that ensured the performance of the obligation of the state to satisfy the housing needs of society and subsequently as voluntary (quasi-public) organizations. In both examples we can see the increased implementation of elements of public law in the regulation of credit unions and housing cooperatives. The consequences of this phenomenon raise some doubt about the cooperative nature of each type of organization in the light of the International Cooperative Principles. It should be also noted that where administrative law standards limit the possibility of association, as in the case of credit unions, it increases the state's burden to meet the needs of society, when these needs can arguably be well met by private organizations with open membership, such as cooperatives.²⁴

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²³ See: P. Zakrzewski, *Spółdzielnie mieszkaniowe...*, p. 225.

²⁴ See: A. Bałaban, *Orzecznictwo Trybunału Konstytucyjnego w zakresie spółdzielczości finansowej* [The Jurisprudence of the Constitutional Tribunal in the Field of Financial Cooperatives], in: *Kierunki zmian prawa spółdzielczego w Polsce* [Directions of Changes in Cooperative Law in Poland], Warsaw, 2014, s. 149.

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