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Changing Legal and Social Role of Professional Self-Governments During Systemic Transformation in Poland[3]

Abstract

The paper tries to conceptualize the social and structural change that self-governments underwent during systemic transformation in Poland. First, the situation of professional self-governments before the systemic transformation is discussed, including their liquidation at the onset of communist rule in Poland as well as the beginnings of their revival at the end of it, which was described as the first wave of development of professional self-governments. Both the reasons for liquidation, as well as revival of professional-self-governments are described. After this we discuss the second wave of this development, covering the first years after the fall of communism up to the adoption of the Polish Constitution of 1997, which regulated the status of professional self-government in the "social constitution". Next we analyse the third wave of development of professional self-governments, which lasted until 2001 and was a portent of the conflict discussed at the end of the article between two ways of understanding what professional self-governments are and what role they should play (one focused on social constitution and other on efficiency). It is argued that from 2001 onwards professional self-governments have been treated more like a tool of effective governance (and very often – as something that hinders this governance) rather than an expression of civic society.

Keywords: professional self-governments, systemic transformation, Polish 1997 Constitution, social constitutionalism, public trust professions

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Zmiana prawnej i społecznej roli samorządów zawodowych podczas transformacji ustrojowej w Polsce

Streszczenie

Artykuł próbuje skonceptualizować społeczną i strukturalną zmianę, którą przeszły samorządy zawodowe w czasie transformacji systemowej. Po pierwsze, omówiona zostaje sytuacja samorządów zawodowych sprzed zmiany systemowej, włączając w to ich likwidację na początku rządów komunistycznych, jak również początek ich odnowy na koniec tych rządów, co zostaje opisane jako pierwsza fala rozwoju samorządności zawodowej. Wyjaśnione zostają zarówno przyczyny likwidacji, jak i powrotu do samorządów zawodowych w okresie komunizmu. Następnie opisana zostaje druga fala rozwoju, obejmująca pierwsze lata po upadku komunizmu aż do przyjęcia Konstytucji z 1997 r., która uregulowała status samorządów zawodowych jako części społecznej konstytucji. Trzecia fala rozwoju samorządów zawodowych, która trwała do 2001 r., przepowiadała konflikt opisany na końcu artykułu między dwoma rodzajami rozumienia, czym są samorządy zawodowe i jaką rolę powinny odgrywać (bardziej skoncentrowanym na społecznej konstytucji i bardziej skoncentrowanym na argumentach efektywnościowych). Argumentuje się, że od 2001 r. samorządy zawodowe są traktowane raczej w perspektywie zapewnienia efektywności rządzenia (a często – jako coś, co w tym rządzeniu przeszkadza), a nie jako wyraz społeczeństwa obywatelskiego.

Słowa kluczowe: samorządy zawodowe, transformacja systemowa, Konstytucja 1997, społeczny konstytucjonalizm, zawody zaufania publicznego

Introduction

The paper tries to conceptualize the legal and social change that professional self-governments underwent during systemic transformation in Poland from the perspective of social constitutionalism and some political consequences of this change as well. The paper is organized as follows.

First, the situation of professional self-governments before the systemic transformation is discussed, including their liquidation at the onset of communist rule in Poland as well as the beginnings of their revival at the end of it, which was described as the first wave of development of professional self-governments. Then the second wave of this development, covering the first years after the fall of communism up to the adoption of the Polish Constitution of 1997, is discussed. After this, the role of this act, which regulated the status of professional self-government in the "social constitution", is addressed. Next, the third wave of development of professional self-governments, which lasted until 2001 and was a portent of the conflict discussed at the end of the article between two ways of understanding what professional self-governments are and what role they should play, is analysed.

Paper argues that in the period 1989–2004 the principal dynamics of change in the field of professional self-governments were: 1) the desire to reestablish self-governments that existed before the nationalization by the socialist government; 2) privatization of the economy that necessitated an instrument of control of how services that had a public significance are provided in the private sphere; 3) new social ontology based on social plurality rather than unity; 4) "binding" legal theory stemming from such ontology perceiving law as a framework prescribing minimal requirements rather than precise commands to be realized.

Paper is based upon literature review and results from in-depth interviews[4] conducted by us with experts and members of governing bodies of professional self-governments.

[4] Overall, we conducted 18 in-depth semi-structured exploratory interviews. This paper presents only a fraction of information gathered during the interviews which were focused on the participation of professional self-governments in the legislative process. Interviews were conducted between March 2017 and April 2019. Since we discussed potentially sensitive topics related to lobbying activity, we decided to present the information on our respondents and their statements in such a way to guarantee their full anonymity.

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The socialist legacy

In order to understand the change that liberal professions underwent during systemic transformation, we must first describe the legacy of state socialism in this domain.

Before the World War II, during Second Polish Republic, professional self-governments were established for legal professions: advocates and notaries, and for medical professions: physicians, dentists, pharmacists, and veterinarians.[5] Legally speaking, self-governments were a form of decentralization of public authority to autonomous corporations equipped with legal personality on the basis of an act of law adopted by the parliament.[6] They had a binary function. On one hand, they constituted a form of economic self-organization in the private sphere to represent the interests of its members. On the other hand, the professions for which self-governments were established performed in fact public functions, and thus some form of self-management was required to assure high level of quality of services and compliance with ethical standards.

Professional self-governments were gradually stripped of competences after 1945 and subsequently abolished – in case of all but one profession (advocates).

All self-governments of medical professions were abolished. This process was strictly related to Soviet-style centralization and nationalization of provision of medical services.[7] Provision of medical services was fully centralized and subordinated to the relevant ministries. Healthcare system was to switched to full financing from the budget to assure access to medical procedures to the whole population.[8] In 1950 the chamber of physicians and chamber of dentists were abolished,[9] with Ministry for Health and party-controlled trade union taking over the surveillance over the profession. In 1951, the chamber of pharmacists was also abolished and pharmacies were nationalized, introducing statist model of pharmacist profession.[10]

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5 Z. Grelowski, *Samorząd specjalny. Gospodarczy – zawodowy – wyznaniowy – według obowiązujących ustaw w Polsce*, Katowice 1947, p. 65.

6 T. Bigo, *Związki publiczno-prawne w świetle ustawodawstwa polskiego*, Warszawa 1927.

7 Act on National Health Facility from 20 July 1950 (Ustawa z dnia 20 lipca 1950 r. o Zakładzie Lecznictwa Pracowniczego) (Journal of Laws of 1950 No. 36, item 334).

8 E. Tragakes, S. Lessof, *Healthcare systems in transition: Russian Federation*, "European Observatory on Health Systems and Policies" 2003, 5(3), p. 21; P. Grata, *Od Drugiej Rzeczypospolitej do Polski Ludowej. Ewolucja systemu ochrony zdrowia w Polsce w latach 1944–1950*, „Polska 1944/45–1989. Studia i Materiały" 2017, 15, pp. 5–23.

9 Act on abolition of chamber of physicians and chamber of stomatologists from 18 July 1950 (Ustawa z dnia 18 lipca 1950 r. o zniesieniu izb lekarskich i lekarsko-dentystycznych) (Journal of Laws of 1950 No. 36, item 326).

10 Act on abolition of chamber of pharmacists from 8 January 1951 (Ustawa o zniesieniu Izb Aptekarskich z dnia 8 stycznia 1951 roku) (Journal of Laws of 1951 No. 1, item 3) and Act on nationalization

The same happened to the chamber of veterinarians that was created in 1945 and abolished in 1954.[11] The process of abolishing the chambers of medical professions was strictly related to a nationalization of infrastructure and transition to a statist model of provision of medical services.

Chamber of notaries was subject to a similar transition leading to abolishment of the chamber. The marginalization of the role of private (and civil) law due to limited role of the private property transfers and civil contracts in general in a socialist economy made independent notaries' self-government practically redundant. The scope of duties of the profession was gradually limited, and the chamber of notaries gradually stripped of competences after 1945. The self-government was finally abolished in 1951–1952, with private notary offices replaced by state notary offices,[12] and notaries formally turned into state officials.[13] Other legal professions, such as patent attorneys (that did not have self-government before the war but enjoyed certain organizational autonomy) were also in fact nationalized and turned into state officials.

The only self-government that formally survived the process of nationalization was the bar. It was however slowly deprived of its autonomy in the years 1945–1950, with almost full subordination to the Minister of Justice who was granted the right to choose members of all organized bodies of the bar, including the supreme bar council, as well as a right to verify all advocates, including unconditional right to remove advocates from the profession, and the right to decide upon skipping the necessity to complete advocate training. The bar theoretically retained the right to consult the draft acts in the legislative process, but given the superficiality of consultations this right was rather theoretical.[14] Still, the mere fact that the bar formally existed facilitated the process of revitalization and reestablishment of autonomous self-government of advocates in the 1980s.

Self-governments, and especially – professional self-governments – were seen as irreconcilable with the fundaments of socialist state.

First, the incompatibility existed on the level of social ontology. The doctrine of "really existing socialism" put a significant emphasis on the unity between society

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of pharmacies from 8 January 1951 (Ustawa o przejęciu aptek na własność państwa z dnia 8 stycznia 1951 roku) (Journal of Laws of 1951 No. 1, item 1).

11 Decree on abolition of chamber of veterinarians from 18 September 1954 (Dekret z dnia 18 września 1954 r. o zniesieniu izb lekarsko-weterynaryjnych).

12 T. Woś, *Proces upaństwowienia notariatu w Polsce w pierwszych latach po II wojnie światowej*, "Studia Iuridica Lublinensia" 2013, 20(2), pp. 101–115.

13 W. Mróz, *Notariat polski w latach 1939–1951 (cz. II)*, "Rejent" 2004, 7(159), pp. 210–211, http://www.rejent.com.pl/app/appStowarzyszenieS/publikacje/2004/7/1187.pdf

14 Z. Czeszejko-Sochacki, *Adwokatura Polskiej Rzeczypospolitej Ludowej*, Warszawa 1974, p. 16.

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and state. The philosophical and political foundation for the really existing socialism was that socialist state eliminated the conflict between the ruled and the rulers, and removed conflicts of interests within the society. Institutionalized politics was intended not as a tool of solving political conflicts or governing the society, but rather managing particular spheres of human life in a depoliticized manner. This is very well expressed in the "societal" provisions of 1952 Stalinist-style Polish Constitution. Article 72 of this constitution provided that Polish People's Republic granted the right to self-organize so that citizens could "actively participate in political, social, economic, and cultural life". The superficial unity of society was accentuated by a relative skepticism towards self-organization (which should not be necessary in a society that eliminates conflicts and divergent interests), as well as by the abstractness of perceived internal societal or political conflicts (given the inherent conflictual nature of society, conflicts were branded as "hostile tendencies" expressed by shadowy and never fully identified "enemies of the people"). Institutionalization of political conflict or disagreement was impossible due to social ontology stressing social unity as a real achievement of the socialist state.

Secondly, self-governments were not compatible with the perceived function of law stemming from such social ontology. Socialist constitutionalism treats legal regulation as one of the tools of steering people's behavior, concurrent to other ordonnances or commands though which supposedly depoliticized process of governance was carried out.[15] Overall, law was a technical tool translating the political/apolitical will and was thus equivalent to the informal orders provided by the formal political power, e.g. political committee.[16] As such, law did not have its autonomy. Since political commands and law were interchangeable, the difference between deontological and consequential dimension was blurred. Prescriptions of what people should do were actually equivalent with the goals that were meant to be achieved. Procedures, if observed, served only as means to increase the effectiveness of governance, not as means of expression or coordination of political conflicts that were believed to be eradicated. The formal law understood as a procedure was redundant in socialist state because informal orders or prescriptions realized the unanimous will in the same manner. Law did not need to be a guarantor or "third" party, because the conflict between social actors was presumably resolved.

Finally, professional self-governments were incompatible with the socialist state due to incompatibility in the economic dimension. Here, several issues must be raised.

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15 T. Stawecki, *Instrumentalne traktowanie prawa – różne perspektywy*, [in:] *Prawo i ład społeczny. Księga Jubileuszowa dedykowana Profesor Annie Turskiej*, Warszawa 2000, p. 39.

16 G. Skąpska, *From 'Civil Society' to 'Europe': A Sociological Study on Constitutionalism After Communism*, Leiden 2011, pp. 85–86; J. Staniszkis, *Ontologia socjalizmu*, Warszawa 1989, p. 9.

First, professional self-governments represent economic interests of its members. This is inconsistent with the socialist state in which economic conflicts were to be abolished. Secondly, professional self-governments are to maintain ethical and professional standards of its members due to privatized structure of economy. Professional self-governments are to establish rules of conduct and standards precisely because members of the profession perform some public functions, but are not necessarily directly hired in the public sector. In that case, professional self-governments assume a public and administrative functions supervising the standards because services on one hand play pivotal role in the public dimension, but on the other – are performed by private providers. This paradox is however abolished by state socialism that simply nationalized the private property and the provision of services (or at least claimed to do so) and eventually maintained the professions but in a statist form. Liberal professionals simply became state officials.

"Expert" internal pluralization of the system – "socialist" resurgence of legal professions – 1980–1989 – the "first wave"

The concept of unity was reproduced through the whole institutional structure of the society which obviously only masked tensions. The end of the 70s and very early 80s was a moment of a substantial crisis of central planning and a unified steering of society. It is well described that late 70s in general brought politically engaged language into political life of Polish People's Republic.[17] The principal dimension of contention was located in workplaces. This is when first independent trade union began to operate, but also the elite of socialist state began to fully realize that purely centralized organization of society is not sustainable.

"Solidarity" as a political actor highlighted that its interest is different from the agenda of the political party as an ideological and self-assumed voice of society. The 1980–1981 "Solidarity" was a social movement using trade union as a platform, but it was very far from classical liberal democracy, opting for a deep yet evolutionary change in state socialism in the direction of syndicalism and cooperativism. The final program of the "first" Solidarity – "Self-governing Republic" – was adopted at the First Convention of Delegates in October 1981. The program assumed that cooperatives and self-governments (professional and territorial) should be central for governance in Poland. The key issue in terms of governance was a combination of a multi-level participation in political and economic dimension of all citizens.

[17] J. Staniszkis, *Samoograniczająca się rewolucja*, Gdańsk 2010, p. 60.

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The long lasting impact of the program was significant: even when Solidarność's elites leaned towards liberal rhetoric and more revolutionary rather evolutionary narrative, the idea of creation of territorial and professional self-governments embedded with strong autonomy endured. Explicitly, "Self-governing Republic" program expressed the necessity to reactivate the professional self-government of physicians (Thesis 15), the need to strengthen the bar, and introduce the self-government/chamber of judges (Thesis 24).

With the emergence of "Solidarity" in years 1980–1981, strongest and best organized professions – advocates, legal advisors, and physicians – campaigned for a creation of self-governments (in case of advocates – strengthening of the bar). Advocates and legal advisors could rely on their limited but existing autonomy. Physicians were at the same time pushing for deep changes in the organization of healthcare system and reactivation of their chamber. This took place both within the scope of reforms drafted by the "Solidarity", as well as reforms planned by the government.

Apart from the plans created by the Solidarity movement and in reaction to those plans, the government scheduled a number of economic and political reforms (so called "first stage of economic reform"). The reform assumed on the economic level:[18] the introduction of the elements of free market policies, including enabling enterprises to operate more independently: for instance, turning public sector companies into quasi-cooperatives by introducing bodies similar to work councils that would govern the enterprises in a more profit-oriented and competitive fashion.[19] On the political level, it assumed the reduction of the role of Council of Ministers (government/executive) and strengthening of the role of Sejm. Government was to be subjected more to the Sejm that would elaborate the propositions and would have a much bigger impact on the economy and society.

The beginning of revitalization of professional self-governments could be dated back to 1981 when advocates and legal advisors national congresses were held. Congresses elaborated legislative propositions (on the Act on Bar and Act on legal advisors) that were subsequently adopted in 1982. Acts provided limited but still a substantial autonomy to the self-governments of lawyers. The bar immediately started using its autonomy. It issued i.a. negative statements regarding human rights standards and engaged in direct political criticism against the abuses of political power.

In 1981, an association of patent attorneys was also created that started to elaborate propositions regarding the future of the profession. The association was pivotal

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18 *Kierunki reformy gospodarczej: projekt: projekty ustaw o przedsiębiorstwach państwowych, o samorządzie załogi przedsiębiorstwa państwowego*, Warszawa 1981.

19 D. Grala, *System docelowy gospodarki PRL w projektach reform gospodarczych z lat 1980–1981*, "Dzieje Najnowsze" 2004, 36(1), pp. 135–150.

for the creation of self-government of patent attorneys after the economic and political transition.

In a state monopolist in drug production (Centrofarm), a trade union affiliated with Solidarity began campaigning for reestablishment of independent chamber of pharmacists.[20]

The discussion about reestablishment of chamber of physicians that encompassed also dentists was advanced in 1980–1981. There was a consensus among Solidarity that chamber of physicians should be reestablished. Concurrently, draft act of law reestablishing chamber of physicians was in legislative proceedings in socialist Sejm. The draft was aborted after the declaration of martial law in Poland at the end of 1981. Proceedings were restarted in 1986. The process of drafting the act bringing back the self-government of physicians was extremely complex, but the act on chamber of physicians (that also covered dentists) was finally adopted in strong cooperation with Solidarity movement in May 1989, just before the first partially free elections in July 1989. With advanced works regarding the reestablishment of chamber of physicians, there have also been discussions about reestablishment of chambers of pharmacists and a creation of self-government of nurses.[21]

Overall, the idea that professional self-governments should play a major role in the society was brought back by the Solidarity movement. This idea was partially "captured" by the socialist government with regard to legal professions as a form of internal pluralization of society within the first stage of economic reform. Advanced plans to reestablish the chamber of physicians were dropped and resumed only at the end of the socialist regime, with a strong cooperation with democratic forces.

From intrasystemic pluralism to the autonomy of civil society – 1989–1997 – the "second wave"

In comparison to 1945, the situation on the eve of political and economic transition was the following. The bar had its own self-governmental structure formally uninterrupted since 1945, with reinforced autonomy in 1982. A new self-government of legal advisors was established around the same moment. Two of the professions that had self-government in 1945 – physicians and dentists – had a common chamber (called the chamber of physicians) reestablished in May 1989.

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20 A. Magowska, *Organizacja zaopatrzenia farmaceutycznego w Wielkopolsce w latach 1945–1998*, "Medycyna Nowożytna" 1999, 6(1), pp. 129–148.

21 A. Tasak, *20 lat historii samorządu*, "Biuletyn Okręgowej Izby Pielęgniarek i Położnych w Łodzi" 2011, 4, p. 5.

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The process of development of new self-governments after the economic and political transition was boosted by four factors.

1) First, the tradition. Professions that had their self-governments abolished by socialist government demanded their reestablishing. That was true with regard to the other professions that had self-governments in 1945 – apothecaries, veterinarians, and notaries.
2) Second, the economic changes, most importantly privatization of provision of many services or privatization of professions that were previously hired as state officials. Privatization created a necessity to establish ethical standards, standards of quality and surveillance, as well as to regulate the access to the profession that were now in a large extent performed outside public sector or at least in theory could also be provided outside public sector (which is the case of medical professions).
3) Third, new approach to social self-organization based on social ontology based on societal constitutionalism. Solidarity that in fact came to power in 1989 was assuming that self-organization of the people is something to be viewed positively rather than suspiciously. Society was viewed as a heterogenous and pluralist composition of different groups that should have the right to self-organize. Within that, self-governments (both territorial and professional) were to constitute the highest form of self-organization, embedded not only with legal personality but also with the rights to perform public duties.
4) Fourth and finally, new approach to legal regulation stemming from social ontology based on societal constitutionalism. With a social ontology stressing the plurality of interests and perspectives coexisting in the same society, law is principally a framework that prescribes minimal procedures of operation, as well as a tool of governance that is utilized by the political system according to those procedures.[22] Societal constitutionalism therefore focuses on procedures and minimal requirements (*how* people should act and what they should *not* do); provisions specifying outcomes or goals are severely limited in that case, as those are determined individually within procedures and without violation of minimal requirements. Self-governments need the ability to self-organize within designated legal sphere that would provide them with autonomy of action: a sphere of discretionarily that is completely distinct from the central power and that does not necessarily have to realize the goals

[22] G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford 2012, pp. 105–108; idem, *Law as an autopoietic system*, Oxford 1993, pp. 68–75.

of the central political power, but can pursue – independently but within the designated sphere – its own goals.

Undoubtedly, the above changes were supported by a relatively broad reception of civil society doctrines, while there were fewer references to doctrines of the New Public Management type. Though both types of doctrines are liberal, the first is rather related to political liberalism, and the second to neo-liberalism in economics. As a result, the institutionalisation of professional self-governments was understood more as creating guarantees of the autonomy of society in relation to the state than as a way to ensure the efficiency of public services. It was more a matter of the whole social system rather than its economic subsystem, and this is how it manifested itself in political debate.

Three "medical" self-governments were created. Self-government of veterinarians was created on a basis of 1990 Act on veterinarians and veterinarians' chamber. The self-government was created because of: deep changes in the agricultural sector that further increased the role of private sector in this branch of the economy; privatization of the veterinary services that in fact privatized the profession; necessity to re-organize the profession that had become relatively disorganized as a result of patchy solutions used during state socialism.[23]

Self-government of pharmacists was reestablished in 1991, after years of campaigning by associations of pharmacists and trade union affiliated with Solidarity in one of the pharmaceutical companies. At first, there have been numerous propositions on how to structure the self-government, but finally a regulation referring to the pre-war regulations was chosen as a blueprint for the 1991 Act. The rationale behind the creation of chamber of pharmacists were: the desire to refer to the pre-socialist tradition; privatization of pharmacies, drug warehouses, and drug companies after 1989; necessity to establish self-government for prestigious reasons to show equality with physicians.

A creation of a self-government of nurses and midwifes was agreed during the Round Table negotiations between the government and opposition in 1989.[24] Chamber was to be established in order to "protect the professional interests of nurses and midwifes". Created in 1991, the chamber is in particularly complex situation. The self-government saw itself primarily as an economic association (quasi-trade union) that represented the economic interests of its members. At the same time,

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23 W. Hildebrand, J. Dorobek, R. Karczmarczyk, *25 lat Dolnośląskiej Izby Lekarsko-Weterynaryjnej*, "Życie Weterynaryjne" 2016, 91(10), pp. 777–778.

24 Round Table, Subteam on Health Policy, *Final Protocol with attachments* (Okrągły Stół, Podzespół do Spraw Zdrowia, *Protokół końcowy wraz z załącznikami*), Warszawa 1989, pp. 21–22.

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it was granted classic self-governmental competences of surveillance over training and control over the access to the profession. The self-government itself closely cooperates with trade union that in fact seems to suit better the role and position of this profession.[25]

Further, self-governments were created for legal professions. The re-establishment of chamber of notaries reflected the complex and gradual nature of the economic transition. Independent chamber was treated as something obvious due to the intended reversal of the relations between the role of the private and the public in the economy, as well as pre-1945 tradition of independent self-government. Notaries were allowed to conduct private practice in 1989, but state notary offices still existed and operated. In 1991, the profession was fully privatized, and a part of "public" obligations of notaries (i.e. management of land registers) was transferred to the courts.[26] The Act was designed after 1933 Decree from Second Polish Republic and partially copied after foreign regulation. The regulation of the notaries reflected a paradoxical nature of the profession itself. Being primarily a profession focused on assuring security of contracts in the private sphere, it remained highly autonomous but embedded with public powers and quasi-official rights and obligations of surveillance over the legal certainty and security of transactions.[27]

Creation of chamber of patent attorneys was precedented with a discussion held by Association of patent attorneys and Patent Office.[28] During state socialism, patent attorneys were in fact officials hired by state enterprises, partially responsible to the employers and partially to the Patent Office. Discussions conducted during the 80s brought patent attorneys closer together to legal professions. The Association was supported by the Patent Office in campaigning for a creation of a fully autonomous profession of patent attorney.[29] The 1993 Act on patent attorneys mimicked the regulations of legal professions in terms of structure of self-government, its obligations, regulations regarding the education and training of attorneys, professional secrecy, and legal responsibility of attorneys. The Association in fact served as a platform for the establishment of self-governmental local structures.[30]

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25 This information was provided to us by our respondent who held managerial positions in chamber of nurses.

26 G. Kołodziejska, *Problemy występujące w funkcjonowaniu wydziałów ksiąg wieczystych w przededniu informatyzacji*, "Rejent" 1998, 6(86), p. 36.

27 R. Sztyk, *Rola notariatu w przeobrażeniach gospodarczych jako gwarancja bezpieczeństwa obrotu cywilnego*, "Rejent" 1994, 4, pp. 69–95.

28 This information was provided to us by our respondent who took part in this process as an expert.

29 M. Słomski, *Historia rzecznictwa patentowego*, Kraków 1997, pp. 58–92.

30 Ibidem, pp. 80–91.

Finally, self-governments were established to financial professions in a fashion similar to those established to legal professions. Act on the analysis and announcement of financial statements and on expert auditors and their self-government from 1991 created self-government for expert auditors, a profession that evolved from internal accountants conducting controls of state enterprises during socialism. The main "lobbing" subject was an association of accountants.[31] The fundamental reason behind the creation of the self-government of expert auditors were as follows: a) privatization of the economy; b) necessity to establish independent organization that would guarantee that financial and accounting statements are created in compliance with the existing regulations, with expert auditors having legal responsibility to act independently from the expectations of the principals; c) necessity of creation of independent organization training future expert auditors.[32]

In 1991, a self-government of brokers, a profession that serviced the emerging capital market, was also created. It was given quite a specific name for a professional self-government – the Association of Securities Brokers.[33] However, it had all the competencies of a professional self-government and every broker had to be a member. In 1994, the self-government was expanded to include advisers on public trading in securities and was given a new name – the Association of Securities Brokers and Advisers on Public Trading in Securities.[34]

Finally, tax advisors had their chamber established in close cooperation with accountant and tax advisors associations in 1996/97.[35] Tax advisors were intended as an "auxiliary" self-government, since all their tasks could have been performed by advocates, legal advisors, and expert auditors. Nonetheless, it somehow paralleled the structure and competences of expert auditors self-government. In fact,

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31 A. Kwasiborski, *Dwadzieścia lat samorządu, kilkadziesiąt lat tradycji*, [in:] K. Sobczak (ed.), *Dwadzieścia lat samorządu biegłych rewidentów*, Warszawa 2012, p. 19.

32 Sejm, Draft act on analysis and annoucenemt of financial reports and on expert auditors and their self-government (Projekt ustawy o badaniu i ogłaszaniu sprawozdań finansowych oraz biegłych rewidentach ich samorządzie), Warszawa 1991; justification to the act pp. 2–3.

33 Act on Public Trading in Securities and Trust Funds from March 22nd 1991 (Ustawa z dnia 22 marca 1991 r. Prawo o publicznym obrocie papierami wartościowymi i funduszach powierniczych) (Journal of Laws of 1991 No. 35, item 155).

34 Act on Amending the Act on Public Trading in Securities, Trust Funds and Amending Other Acts from December 29th 1993 (Ustawa z dnia 29 grudnia 1993 r. o zmianie ustawy – Prawo o publicznym obrocie papierami wartościowymi i funduszach powierniczych oraz o zmianie niektórych innych ustaw) (Journal of Laws of 1994 No. 4, item 17).

35 I. Sobieska, *Doradztwo podatkowe: funkcjonowanie i kierunki rozwoju*, Warszawa 2012, pp. 34–38. This information was also provided to us by respondent who held managerial positions in the chamber of tax advisors.

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the self-government began to operate as late as 2002, when first congress took place and bodies were elected.

Overall, a majority of self-governments created during the "second wave" were related to either the desire to reestablish previously existing chambers in case of professions that had chambers before nationalization by the socialist government, or because of the privatization of the economy.

Apart from establishment of self-governments, there have been other issues in the regulation of self-governments in the 1990s.

First, there have been numerous issues pertaining to the continuity with the old chambers. For instance, chamber of notaries and chamber of physicians attempted to reclaim the property that was in possession before the nationalization of their professions.

Second, many transitional issues were occupying the self-governments. For instance, chamber of notaries was in a state of deep transition that lasted until 1993, with many changes in structure, competences, and a necessity to handle the land registers to courts.[36]

Third, there have been numerous competitional conflicts between self-governments. For instance, legal professions were in a serious and deep conflict regarding the scope of professional competences and rights. Probably most significant was the conflict between legal advisors and advocates[37] with the latter opting for broader competences and rights or even unification with advocates, and advocates defending the status quo. 1997 amendment to Act on bar and Act on legal advisors changed many provisions, adopting them to the post-transition situation and strengthening autonomy of the bar and the chamber of legal advisors, and at the same time reassuring the separation of two corporations. There have also been conflicts between tax advisors and other professions regarding the right to represent clients before the court.[38]

36 A. Oleszko, *Ustrój i zadania samorządu notarialnego*, Warszawa 2016, pp. 70–74.

37 This information was provided to us by two respondents – an expert who took part in several legislative proceedings related to legal professions, as well as a member of chamber of advocates who held managerial positions in self-government.

38 This information was also provided to us by respondent who held managerial positions in the chamber of tax advisors.

Constitutionalisation of professional self-governance and the place of professional self-governments in the social constitution – 1997

Finally, there was the question of drafting of the Constitution. Here, according to our respondents, self-governments acted in a relative coordination, pushing an introduction of the status of self-governments into the new constitution.[39] This was largely possible due to the length of the process of creating the new constitution. Moreover, the constitution drafters' decision to treat the matter relatively broadly and include regulation of the social system, with various types of organisations, was important. Hence, it was decided that it would cover not only issues characteristic of liberal constitutionalism, namely relating to the political system, government and the status of individuals.[40] This was significantly reflected in the Constitution of the Republic of Poland adopted on 2 April 1997.

The social constitution on the grounds of the Polish Constitution was primarily regulated in its first chapter and includes provisions regarding, among other things, political parties (Art. 11), trade unions, socio-occupational organisations of farmers, societies, citizens' movements, other voluntary associations and foundations (Art. 12), territorial self-governing communities (Art. 16), professional self-governments (Art. 17), marriage and the family (Art. 18), family farms (Art. 23), and churches and other religious organisations (Art. 25).[41] Such a broad view confirms the above-described treatment of professional self-governance as part of the social system rather than of the economic one. It is also based on the assumption that the autonomy of social organisations performs the guarantee function in relation to the individual. Their status was guaranteed at the constitutional level so that they would not be absorbed again by the state.

Article 17 of the Polish Constitution, concerning professional self-governments, was finally worded as follows: "1. 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 the purpose of protecting, the public interest. 2. Other forms of self-government shall also be created by means of statute. Such self-govern-

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39 This information was provided to us by two members of two self-governments who held managerial positions in this period.

40 M. Małajny, *Konstytucjonalizm a przedmiotowy zakres konstytucji*, [in:] P. Sarnecki (ed.), *Konstytucjonalizacja zasad i instytucji ustrojowych*, Warszawa 1997, pp. 121–125.

41 See: S. Gebethner, *Rzeczpospolita w świetle postanowień rozdziału pierwszego Konstytucji z 1997 roku*, [in:] E. Zwierzchowski (ed.), *Podstawowe pojęcia pierwszego rozdziału Konstytucji RP*, Katowice 2000, pp. 13–38.

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ments shall not infringe the freedom to practice a profession nor limit the freedom to undertake economic activity."[42]

Introducing this provision and using such wording was in many respects groundbreaking. It was the culmination in the development of professional self-government during political transformation in Poland. It can also be interpreted as an portent of the emergence of structural conflicts that determined public discourse about professional self-governments in subsequent years. It is worth paying attention to at least the following points.

The concept of "profession in which the public repose confidence" or "a public trust profession",[43] unknown to earlier legislation, was introduced. Thus, the traditional concept of liberal profession was not used, but a new legal category was created. It was not defined in any way. The lack of a definition of the concept of "a public trust profession" resulted in many proposals developed by legal doctrine. However, from the course of the constitutional discussions preceding the adoption of the Constitution of the Republic of Poland, it follows that its authors considered lawyers and doctors as typical professions belonging to this category.

At the same time, whether it is possible to create a self-government for a given profession by means of the act with competences described in Art. 17, Sec. 1 is dependent on whether this profession belongs to this category. More importantly, only self-governments of such professions may infringe the freedom to practice a profession and limit the freedom to undertake economic activity. Hence, theoretically, the creation of professional self-governments was subjected to legal restrictions, and the creation of such self-government for a group that does not meet the criteria of being a public trust profession would be contrary to the Constitution of the Republic of Poland and could result in a decision of the Constitutional Tribunal repealing such provisions. However, it should be emphasised that such a case has never arisen, and the legislator – due to the imprecise nature of the concept in question – retained great freedom in deciding whether or not a professional self-government could be created.

Therefore, the slowdown in creation of such self-governments which may be observed in the following years was due not to legal reasons, but rather to social, economic and political causes.

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42 The translation of Polish Constitution from 1997 on Sejm webpage: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 14.01.2020).

43 The term "public trust professions" seems to be better translation than "profession in which the public repose confidence" which occurs in official translation cited above. Hence, it will be used hereinafter.

Furthermore, it should be noted that the solution contained in Art. 17 of the Polish Constitution consists of entrusting professional self-governments with two tasks – representing persons performing "a public trust professions" and concerning themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, the public interest.[44] It is often pointed out that in this way a structural conflict was created consisting of the simultaneous obligation to pursue both professional and public interest. As a result, this has a negative impact on fulfilling the second task. On one hand, the Polish Constitution recognises that the professional groups in question have their own interests, and authorises them to represent these in social and political life. On the other, it explicitly requires them to be guided by public interests when it comes to the main subject of their activity.

This has consequences on another level. Among many organisations included in the Constitution of the Republic of Poland within the social constitution, professional self-governments were given a very high status. It seems that more importance was given only to local self-governments. This status is not only manifested in the fact that they were given competence to concern themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, the public interest, and it was assumed that they could infringe the freedom to practice a profession and limit the freedom to undertake economic activity, but, by giving them such shape, they were included in the structures of public authority and it was recognised that, as well as the government (state authorities), self-governments can exercise power. Therefore, like government, professional self-governments were given the opportunity to define the public interest.

Thus, professional self-governments were doubly encouraged to go beyond the purely social sphere, and their ambitions to influence public policies were justified. This happened, first, by giving them the powers to define and represent the interests of a given profession. Second, it included them in the broadly understood sphere of public authority and granted the right (and obligation at the same time) to define and represent the public interest. Naturally, this impact is by definition limited to public policies implemented in those social subsystems in which professions with professional self-governments are active.

However, such limited scope of interest in public policies by professional self--governments does not mean this interest is weak. On the contrary, it enables each self-governments to justify its interpretation of the public interest in the context of a specific policy by it having specialised and expert knowledge of a given social subsystem. Consequently, although organs of professional self-governments and

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44 H. Izdebski, *Zawody prawnicze jako zawody zaufania publicznego*, [in:] H. Izdebski, P. Skuczyński (eds.), *Etyka zawodów prawniczych. Etyka prawnicza*, Warszawa 2006, p. 44.

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organs of the state are *de iure* equal when it comes to interpreting the public interest, the former may claim that, for structural reasons, they have greater cognitive abilities to recognise how a given public policy should be implemented.

On the other hand, the Polish Constitution does not seem to notice either the potential of professional self-governments to influence public policies or the related problems. This statement is based on the fact that the participation of these self-governments in the creation of law consists in the possibility of participating in public consultations with the same rights as in the case of simple associations, operating under private law, and not being corporations of public law. Meanwhile, at least some of the other forms of organisation of society that are provided for in the social constitution have specific kinds of communication with the government. These are, for example, trade unions and employers' organisations (social dialogue from Art. 20 of the Polish Constitution), and churches and religious associations (agreements concluded on the basis of Art. 25 Sec. 5 of the Constitution).

The lack of any special channel of communication between a self-government and state organs within the law-making procedures not only causes practical difficulties, it also intensifies the structural conflict significantly. It leads to a situation in which professional self-governments, factually (although, naturally, not *de iure*) are "pushed" out of the structure of public authorities, back to the private sphere. On one hand, professional self-governments participating in law-making are treated as part of the public authority structure that provides important knowledge about the functioning of a given sphere of social life; on the other, as stakeholders (professional groups), they are outside this structure.

Further development of professional self-governance and its inhibition – 1997–2001 – "the third wave"

The constitutionalisation of professional self-governments coincided with the continuation of their creation, but there was a visible change in the reasons for equipping subsequent professions with such an organisational form, as well as a slowdown in the process itself. Of course, these changes took place as part of a process, and it is difficult to indicate one moment in which they occurred.

The change in the reasons for creating individual self-governments consisted primarily in the fact that more and more decisions about this matter started to be made on the basis of efficiency rather than social considerations. Therefore, professional self-governments were seen decreasingly as a means to guarantee pluralism and autonomy of society, and increasingly as a legal form to guarantee the highest quality of public services with the lowest possible expenditure. If in a particular

case this criterion is not met, then alternative solutions should be considered, such as those relying on full marketisation of a given profession or on forms of regulation other than those relating to professional self-government.

This can be observed on the example of a decision, which can be interpreted as the symbolic beginning of the discussed period in the history of professional self-governments in Poland, to deprive the professions of brokers and advisers on public trading in securities of this organisational form. In 1997, in parallel with the adoption of the Constitution, and with particular reference to Article 17, the Association of Securities Brokers and Advisers on Trading in Public Securities was transformed by way of legislation into an association operating as a private law entity.[45]

At the same time, it was decided to create another self-government, namely of court bailiffs.[46] This, it seems, was motivated primarily by the need to increase the effectiveness of debt enforcement. As bailiffs perform a task that falls directly within the remit of the state, and their actions are magisterial, not servicing, the need to provide social autonomy was negligible. At the same time, the introduction of the self-government was an portent of revolutionary changes in the enforcement system that have taken place since 2001. They consisted of changing the status of court bailiffs, who ceased to be employees of the courts and started running offices on their own account. This enabled the emergence of quasi-market mechanisms, which, by assumption, were to increase the effectiveness of debt enforcement. However, their activities are still exercising state power in nature. As a result, for many years it was unclear whether this profession could be included as a public trust profession as defined in Art. 17 of the Constitution.[47] Thus, undoubtedly, considerations of efficiency played a great role here, and the adopted solution is closer to the New Public Management concept than to guaranteeing social pluralism.

The year 2000 saw the creation of three self-governments covering construction professions: architects, civil engineers and urban planners.[48] Their origin is associated with the preparations for Poland's accession to the European Union and the harmonisation of the national legal order with European law. It was decided that

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45 Act on Public Trading in Securities and Trust Funds from August 21st 1997 (Ustawa z dnia 21 sierpnia 1997 r. – Prawo o publicznym obrocie papierami wartościowymi) (Journal of Laws of 1997 No. 118, item 754).

46 Act on Court Bailiffs and Execution from August 29th 1997 (Ustawa z 29 sierpnia 1997 r. o komornikach sądowych i egzekucji) (Journal of Laws of 1997 No. 133, item 882).

47 On history of the changes of the court bailiffs profession and its consequences see: P. Skuczyński. *Etyka komorników sądowych*, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), *System prawa administracyjnego*, Vol. 13, *Etyka urzędnicza i etyka służby publicznej*, Warszawa 2016, pp. 502–513.

48 Act on Professional Associations/Self-Governments of Architects, Civil Engineers and Urban Planers from December 15th 2000 (Ustawa z 15 grudnia 2000 r. o samorządach zawodowych architektów, inżynierów budownictwa oraz urbanistów) (Journal of Laws of z 2001 No. 5, item 42).

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the resulting requirement to regulate construction professions so that they would be subject to supervision would be implemented in the form of a professional self-government. This obligation, however, did not mean the necessity to create a self-government. Rather, it was recognised that this would be the fastest and most effective form of implementation. In principle, the decision in this regard was not related to the fulfilment of efforts of professional groups concerned, but rather a "top-down" decision.[49]

In 2001, a self-government of laboratory diagnosticians, who can be included in the medical professions, was established. The creation of this self-government was largely the result of many years of efforts by members of this professional group, undertaken since the early 1990s.[50] In a sense, it continued the previous wave of professional self-government development in Poland.

The self-government of laboratory diagnosticians was the last professional self-government which was effectively created as part of the discussed wave, and thus the process of creating this type of organisation in Poland as part of the system transformation was completed. The next self-government, for physiotherapists, (also included in medical professions) was not created until 2015.[51]

In 2001, regulations were adopted to create another self-government – this time for the psychology profession,[52] although, with the exception of one regional chamber, this self-government has not yet been constituted. The Organising Committee established in accordance with the regulations was unable to convene appropriate founding meetings of the self-government due to negligible interest among psychologists themselves.

Attempts at rationalisation, the beginnings of the deregulation movement, and the escalation of conflict – 2001 onwards

With the creation of the last professional self-government, a shift in public discourse around this issue became noticeable, a portent of which was not only the

49 This information was provided by an expert who participated in convergence process.

50 More information, see the official website of the National Chamber of Laboratory Diagnosticians: https://kidl.org.pl/page/view?id=129 (access: 14.01.2020).

51 Act on Profession of Physiotherapy from September 25th 2015 (Ustawa z dnia 25 września 2015 r. o zawodzie fizjoterapeuty) (Journal of Laws of 2015, item 1994).

52 Act on Psychologist Profession and Professional Self-Governments of Psychologists from June 8th 2001 (Ustawa z dnia 8 czerwca 2001 r. o zawodzie psychologa i samorządzie zawodowym psychologów) (Journal of Laws of No. 73, item 763).

aforementioned emergence of an approach consisting of seeking effective regulation of social subsystems and professions operating within them. This new approach became an increasingly clear alternative to the paradigm based on the autonomisation of society in relation to the state and on the guarantees of pluralism. This also portended an attempt to introduce a coherent government policy towards professional self-governments and regulation of professions in general. It seems there was an attempt to rationalise the existing legislation and at the same time reconcile both approaches.

Such a coherent policy was manifested in, among other things, introducing the concept of regulated professions to the Polish legal order, which took place in 2001 and was associated with the harmonisation of Polish and European Union law.[53] It indicates the possibility of preparing and implementing a regulatory policy regarding professions that would reconcile social and performance considerations, and would be based on cooperation with interested professional groups. Among the regulated professions, those with self-governments in the meaning of Art. 17 Sec. 1 of the Polish Constitution can undoubtedly be treated as qualified regulated professions.[54]

Such rationalising actions include the commencement of work on general provisions on self-governments of public trust professions in 2002, on the initiative of the Minister of Economy. As part of this work, a bill on professional self-governments was prepared, and this became one of the annexes to the draft of the National Development Plan for 2007–2013, initially adopted by the Council of Ministers in 2005. What may be indicative of the atmosphere around the need to undertake such rationalisation efforts is a statement by the Minister of Economy disclosed the efforts of a parliamentarian to include florists as public trust profession, and create a professional self-government for them.[55]

However, rationalisation plans were not implemented due to the election calendar. Instead, around the years 2003–2004, the conflict over the group of legal professions with self-governments began to intensify. It concerned issues relating to

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53 Act on Rules of Recognition of Acquired in Member States of the European Union Qualifications for Performing Regulated Professions from April 26th 2001 (Ustawa z dnia 26 kwietnia 2001 r. o zasadach uznawania nabytych w państwach członkowskich Unii Europejskiej kwalifikacji do wykonywania zawodów regulowanych) (Journal of Laws of No. 87, item 954).

54 H. Izdebski, op. cit., p. 45.

55 Senat Rzeczypospolitej Polskiej, *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 8 kwietnia 2002 r.*, Warszawa 2002, p. 109.

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individuals' potential access to a profession to which recruitment was carried out self-governments themselves.

It was argued that this situation was a clear example of self-governments operating in a way typical of interest groups, and not in the public interest. This conflict lasted several years, and ended in 2007 with the adoption of solutions assuming recruitment for legal professions through state exams with guaranteed participation of representatives of self-governments, which would also retain control of training for a profession.[56]

However, the significance of this conflict goes beyond the legal profession or the concrete issue of recruitment.[57] In public discourse, an approach has formed in which professional self-governments are the same as all other interest groups who from the social and economic sphere and seek to influence the processes of law--making. As such, they are unable to define the public interest. Thus, they are unable to apply performance criteria, and ultimately are always guided by the particular interests of their professional group. Their efforts must therefore be balanced by the state, in particular the government as the central organ responsible for public policy. This organ has not only cognitive skills to define the public interest, but also appropriate political legitimacy, as it is managed by the winner of democratic elections.

Possible claims of professional self-governments referring to the previously formed paradigm, confirmed by the solutions of the Constitution, were usually confronted with this new paradigm and related social ontology. This new approach rejects the view that professional self-governments, being the institutionalisation of autonomous social subsystems and guarantors of pluralism, have any legitimacy to co-create public policies. Neither is their inclusion in the sphere of public authorities as a basis for articulating public interest in public policies accepted. It is alleged that, like many other authorities, professional self-governments were entrusted with administrative tasks, and thus essentially with the implementation of law. Neither this task nor that of representing a professional group, which rather belongs to the sphere of articulating collective private interests, allows for public interest to be defined in a way that is valid for the creation of public policies.

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56 Act on Amending Act on Advocates Profession, Act on Legal Advisers an Act on Notaries from February 20th 2009 (Ustawa z dnia 20 lutego 2009 roku o zmianie ustawy – Prawo o adwokaturze, ustawy o radcach prawnych oraz ustawy – Prawo o notariacie) (Journal of Laws of 2009 No. 37, item 286). More about the history and consequences of the conflict, see: K. Gadowska, *Otwarcie zawodów adwokata i radcy prawnego w Polsce po 1989 roku*, "Prakseologia" 2018, 160, pp. 143–189; M. Masior, *Analiza wpływu zmiany reguł dostępu do zawodu adwokata i radcy prawnego na jakość usług prawnych*, [in:] J. Szumniak-Samolej (ed.), *Współczesne wyzwania w zakresie funkcjonowania przedsiębiorstw: perspektywa badawcza młodych naukowców*, Warszawa 2017, pp. 39–71.

57 H. Izdebski, L. Morawski, *Dwugłos: Demokracja a przywileje korporacyjne*, "Państwo i Prawo" 2007, 6, pp. 49–69.

It seems that these two paradigms remain in conflict today. In principle, self-governments try to legitimise their influence on public policies by pluralistic social ontology and their inclusion in public authority. However, successive governments consistently deny them this influence by referring to the greater legitimacy of their own authority, and to the status of self-governments as interest groups.

Confirmation of this can be seen, for example, in the policy of deregulating professions carried out in 2012–2015. This covered numerous professions, including those with professional self-governments. One of them, associating urban planners, was even disbanded as a result.[58] The overall goal of this policy was to increase competitiveness of the economy by removing many barriers to access to services and professions. Interestingly, as has already been mentioned, this was accompanied by the creation of a self-government of physiotherapists. Therefore, performance criteria must have mainly been used. Although for many reasons this policy can be viewed as activities that took place already after the political transformation, the conditions for its implementation were shaped precisely by the two discussed approaches to professional self-government.

Summary

The paper intended to depict the change in the role professional self-governments played after the transition in Poland. Professional self-governments were practically abolished after Second World War because they were incompatible with the doctrine of really existing socialism. The resurgence of professional self-governments started still during the socialist regime in the 80s, where it was highly limited way of internal pluralization of the system. The second wave that started with the political transformation, was inspired by the ideas of modern civic society and substantiated by historical, political, and economic reasons. This process was confirmed primarily in the 1997 Constitution that created guarantees for a substantial role of professional self-governments in the governance and social structure of the society. The third „wave" of professional self-governments lasted until 2001 and marked a change in the way regulation of professional self-governments was conceptualized. From this date on, professional self-governments have been treated more like a tool of effective governance rather than an expression of civic society. This led to both

[58] Act on Easier Access to Performing Certain Regulated Professions from May 9th 2014 (Ustawa z dnia 9 maja 2014 r. o ułatwieniu dostępu do wykonywania niektórych zawodów regulowanych) (Journal of Laws of 2014, item 768).

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a creation of some new self-governments, as well as to the attempts of limiting power of already existing professional self-governments after 2001.

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