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## ETHICAL RESPONSIBILITY OF LOCAL GOVERNMENT OFFICIALS

Citizens of a democratic state expect the representatives of the public administration to be competent, educated and professionally prepared experts. The current and the future changes result in the necessity of constantly monitoring the national and local administrative personnel, its functioning and the rules governing its actions. The introduction of modern techniques and methods of work organization and new computing technologies, as well as the improvement of the legal system, the new quality of relations between the public and the private sector, the active role of mass media and the low political culture – it all results in the fact that, according to the Polish public opinion, we can observe a deep moral crisis in the public sphere. At the same time, the people have understood that democracy results in a limited trust towards politicians. The role of politicians, who had been exercising the role of grand builders of the system until 1993, is also changing in Poland because nowadays they have to be, first of all, responsible towards their voters. Despite that, public life in our country, especially in between the political and administrative sphere, is still a maze of complicated, often famed with bad reputation behaviors. Fifteen years was not enough to create clear rules and principles of proper conduct. And although the politicians, while understanding the importance of their voters, do realize that the efficiency of their actions depends on the ability of gaining public support, respect and credibility, they still do not always know that, in fact, only ethical behavior will earn them respect and new voters.

It is much easier for mass media, local press and investigating journalists to discover, identify and describe incompetence and dishonesty occurring in a town or village (since unsatisfied needs of local communities are more evident for their inhabitants) than when it happens in offices or agencies of the central government administration. Therefore, every such case described

in media results in an impression that the local government has fallen to the epidemic of incompetence and dishonesty. Some even say that the local government is a place where councilors and civil servants commit fraud and handle their own interests by using their “five minutes at power”. As a result, the local government is under pressure to prove that, on the one hand, the decentralization of the public authority in favor of the local government entities is reasonable and, on the other hand, the local government functionaries (councilors and civil servants) are not a group of incompetent people who are spoiled by power.

According to E. Łętowska, “in Poland, during the revolutionary changes of the system, it is clear that the necessary features of the stabilized systems’ strength like clear game rules, the knowledge of public roles and the awareness of what behavior of the authorities is good or bad, are not a subject of the common awareness of the society”.<sup>1</sup> Many can just intuitively feel what should the roles of politicians and civil servants be (from the central and local government). This is affected by, settled in administrative law, theory of an administrative organ, which gathers into one anonymous administration apparatus the positions of politicians and civil servants without analyzing the different quality of their legal position, their complicated relations, as well as the different systems of responsibility they are subject to. Therefore, it is high time for the society, civil servants and politicians to finally find an answer to a question what should their roles in the public system be, who they really are in the public administration and whom do they actually serve. Because the understanding of their roles will help them to perform their functions reasonably and not only in accordance with the law but also in accordance with public expectations.

To understand those roles one has to accept the thesis that, although everybody at power is obliged to act reliably, the local government politicians are under different duties compared to the local government civil servants, since there are different public expectations towards each of those groups. While politicians are responsible for the achievement of political strategies before the local government council, their voters and their political parties, the local government civil servants are obliged to act professionally and according to the principle of political neutrality for which they are disciplinary responsible. The law plays a big part in maintaining those differences.

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<sup>1</sup> E. Łętowska, *Dobro wspólne, władza, korupcja*, a speech held at the conference organised by Centrum Konstytucjonalizmu i Kultury Prawnej ISP and Fundacja Stefana Batorego.

Therefore, it is important not only to identify the roles and functions of politicians and civil servants when managing the local government affairs, but also to clearly separate different categories of politicians and their influence on the ethical governance of the public sphere.

### **Ethical responsibility of local government politicians and civil servants**

The local government politicians and civil servants should be responsible for violating statutory obligations and rules of ethical behavior. Applying such responsibility is a consequence of the principle that imposing an obligation on a person is resulting in his responsibility which is understood as negative aftermaths of breaching this obligation. Disputes arising from applying such responsibility are settled by courts.

The local government civil servants and politicians have access to information and a right to decide about public matters because of their special status and, therefore, they are subject to the special regime of responsibility. However, the responsibility for unethical behavior of local government politicians and civil servants is limited because not every breach of ethics is punishable under penal law. The unethical behaviors which are qualified as crimes include, for example, bribery and the misuse of powers. Bribery takes place when a local government official is deciding to act partially for personal benefits, while misuse of powers takes place when an official is buying the votes. According to section 108e of the German Criminal Code: "Whoever undertakes to buy or sell a vote for an election or ballot in the European Parliament or in a parliament of the Federation, the Lands, municipalities or municipal associations, shall be punished with imprisonment for not more than five years or a fine".<sup>2</sup>

Local government civil servants are subject to criminal responsibility for corruption when they are receiving certain personal benefits (financial and other) in exchange for, for example, the disclosure of official information or for taking a specific decision. If it is proven that they have transgressed their official obligations in exchange for certain benefits, they bear criminal responsibility. In penal cases concerning official crimes in the United States, unlike in Europe, civil servants do not have the benefit of the presumption

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<sup>2</sup> *Wybrane przepisy dotyczące etyki parlamentarnej członków Bundestagu, działalności grup interesu i korupcji*, (in:) *Etyka parlamentarna*, Biuro Studiów i Ekspertyz Kancelarii Sejmu 1997, p. 216. English version of the German Criminal Code: <http://www.iuscomp.org/gla/statutes/StGB.htm#108e>.

of innocence and they themselves are obliged to prove that they had not committed the crime. There has been many cases when civil servants, while defending their illegal behavior in the name of “a widely and differently understood public interest”, were eventually often proven that they had acted according to their financial or other benefits.<sup>3</sup>

It can be summarized that civil servants are responsible for violating the standards of ethical behavior only when their actions constitute a crime. And, although often partial behaviors are unambiguously and without doubt forbidden, unethical actions which are not considered as crimes will not result in the civil servant’s criminal responsibility since the law is not working properly when it comes to political party’s interests. However, if a certain behavior does not constitute a crime, it does not mean that it is not transgressing the law and that it is not socially blameworthy. According to E. Łętowska, penal law does not constitute a sufficient measure to effectively counteract violations of ethics and of proper performance of public functions. “After all, according to the basic penal rule, before one can talk about a crime, the boundaries of a penal act need to be specified. An act constitutes a crime only when it is forbidden by the law and, additionally, it has to be forbidden clearly and without doubt. There is no crime if the law itself is not clear and, therefore, the public opinion feels far more negative about certain behaviors than they are punishable. If we rightfully feel appalled with the ‘freemarketing’ of power, than it is not only about punishing the ones which are guilty of law-breaking. The law is not a perfect instrument but it cannot work differently. It will not ‘punish’ everybody who is ‘only’ or ‘already’ immoral”.<sup>4</sup>

A breach of rules of ethical behavior by public functionaries constitutes a typical negative behavior, which is not exhausted by penal law sanctions. Therefore, it is necessary to look for responsibility for unethical behavior of politicians and civil servants in moral or social responsibility, as well as in administrative responsibility for transgressing statutory obligations. Civil servants and politicians act illegally when they violate their statutory obligations and they should be responsible for such actions. However, only local government civil servants, and not local government politicians, can bear administrative responsibility.

Although civil servants’ administrative responsibility is based on different legal grounds and, in principle, has a repressive nature, it is always

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<sup>3</sup> M. Clarke, *Corruption: Causes, Consequences and Control*, New York 1989, p. 415.

<sup>4</sup> E. Łętowska, *Władza bywa sprzedajna, a prawo jest z natury ulomne*, “Rzeczpospolita” 1996, no. 275.

tied to a statutorily restricted system of administrative sanctions available according to the position one is holding, since, for example, it is difficult to punish a civil servant by degrading him to a lower position if he already holds the lowest position in the group.

The differences in applying responsibility towards local government civil servant and politicians are depicted in the table below.

**Table No. 1**  
**Types of responsibility of local government politicians and civil servants**

<b>Responsibility of politicians</b>	<b>Responsibility of civil servants</b>
<b>Penal</b> (before a court of general jurisdiction)	<b>Penal</b> (before a court of general jurisdiction)
<b>Civil</b> (according to tort law)	<b>Civil</b> (according to tort law)
–	<b>Administrative</b> – disciplinary (before a disciplinary commission)
<b>Political</b> (before the organs of the political party)	–
–	<b>Professional</b> (before the organs of a professional association)
<b>Social</b> (towards the council and voters)	<b>Social</b> (towards public opinion)
<b>Moral</b> (towards one’s own conscience)	<b>Moral</b> (towards one’s own conscience)

Applying responsibility constitutes a motivation to take actions and, therefore, different types of responsibility of local government politicians and civil servants result in their different motivations. When politicians are performing their public functions they often take actions according to their “political party motivation”, which does not always have to be consistent with the public interest since political responsibility is generally motivating them to implement political programs (which are, however, constantly verified by the opposition parties if they do not act in the public interest). On the other hand, the politicians’ responsibility towards their voters is motivating them to favor certain groups of voters, which is often based on the political criteria. The fulfillment of the political party’s interest is best motivated by the politicians’ responsibility before the organs of the political party of which they are members. We can lately observe a tendency in the United States to demand greater political subordination of local govern-

ment politicians, although it is mainly Europe which is known for stronger political discipline. The ties between politicians and their political parties are exceptionally strong in the proportionate election system but the politicians' loyalty towards their parties is not always ethical. The specificity of this situation is that it is the political party itself which should care the most for the objective image of its representatives since this is how a party is building its authority and the moral right to execute power.

It is the responsibility towards voters and one's own conscience which fulfills the role of guaranteeing proper behavior of the local government councilors which is in line with the public interest (often understood as the interest of the local community). Politicians bear responsibility for a breach of the public interest values and other constitutional standards mostly during their next local government elections. It is, however, impossible to normalize or judge moral responsibility towards one's own conscience.

The system of civil servants' responsibility is divergent from the system of politicians' responsibility and thus civil servants' motivations are also different. The application of administrative responsibility is the most important here. However, civil servants do not only bear administrative responsibility but they also bear professional responsibility before special commissions of professional responsibility which are created by professional associations to which they belong (e.g. architects, geodesists, accountants, doctors, etc.).

Applying administrative responsibility towards civil servants for their unethical behavior is a difficult and delicate matter. There is a danger that, as a result of "political party motivations", their political superiors will take decisions punishing civil servants not only by applying disciplinary sanctions but also, for example, by refusing to promote a civil servant or by refusing to grant him a reward solely on the basis of his political preferences. The political superiors' party motivations can also be expressed in the content of their official orders which are directed to their subordinate civil servants. Such politicians' party motivations can then be transformed into official motivations of local government civil servants. Such situations can occur in many countries, although their frequency depends on the nature of interior relations in the office.

It is becoming increasingly emphasized of late that responsibility towards the public opinion is playing a significant role in the motivations of civil servants and politicians. This responsibility is molded by the mechanism of self-conscience similar to the principle Washington Post, which means that while taking their official actions, civil servants should take into account the possibility that their actions may be commented by journalists

on the first page of a widely read newspaper, and thus the principle becomes increasingly important for performing the function of a “guardian” of the public interest by civil servants. In such cases, not only the principles of application of administrative law but also the fear of the public opinion’s criticism show directions to civil servants when taking their actions.

It is difficult not to agree with a thesis that the higher the position is, the greater the level of responsibility rests on public functionaries. The theory behind it is that when one gets promoted to a higher position in the local government system, the extent and weight of his administrative tasks enlarges as well as the number of recipients of his actions and their social effects increase subsequently. Therefore, the level of responsibility of local government politicians and civil servants should also expand. According to this theory, the level of responsibility of local government politicians who take decisions concerning such matters as using force to subdue a manifestation or allocating additional public funds to certain categories of people, is greater than the level of responsibility of civil servants who, for example, register cars or decide whether to cut down a tree. Consequently, the people who hold the highest positions in the administrative hierarchy ought to behave according to greater ethical requirements than civil servants of the middle or lowest level.

To be able to judge responsible behavior of local government politicians and civil servants in Poland, their motivations need to be analyzed by sociological questionnaires. For example, it is possible to assess the level of civil servants’ ethical motivations by examining if, while taking administrative actions, especially those actions which do not belong to the category of decisions, they concentrate on legal provisions, constitutional values, ethical values, prohibitions and penalties, cooperation and collaboration in the same office, keeping individual position in the structure of the organization, loyalty towards superiors and fear of the public opinion’s criticism.<sup>5</sup> To assess the level of ethical motivations of politicians, it is enough to ask them a question whether, when taking an administrative decision, they are guided by: the public interest, the interest of the local community, legal provisions, constitutional values, ethical values, fear of applying responsibility, interest of the local government office, political party’s program, loyalty towards their political superiors and voters’ opinion. Of course, questions asked to the local government civil servants should be phrased differently than questions meant for the local government politicians. Therefore, to achieve the

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<sup>5</sup> B. Kudrycka, *Dylematy urzędników administracji publicznej*, Temida2, Białystok 1995, p. 260.

correct assessment of the level of ethical motivations, civil servants need to be asked about politicians' motivations and politicians, likewise, should be asked about civil servants' motivations. The same questions should be directed to the receivers of administrative actions, that is an adequate group of representatives of local commune's inhabitants.

### **Political loyalty and professionalism of actions in the local government**

The application of ethical responsibility in the local government administration greatly depends on internal relations in a particular local government entity and, most of all, it depends on relations between superiors and subordinates based on the principal-agent theory.

Theoretical and organizational aspects of a model of relations: principal-agent in which it is difficult to take into consideration the variety of organizational structures and psychological conditions of behaviors of the principal and agent, are necessarily carried out in the institutional void. Therefore, it is necessary to analyze the content and the boundaries of such relations occurring in a concrete local government office.

In principle, legal norms in democratic states refer to relations between political superiors and civil servants in four different situations:

1. A subordinate civil servant should pass all needed information and official data to his political superiors in the name of the best comprehended professionalism,
2. A subordinate should, according to the art of a professionally carried out occupation, help his political superiors, by means of advising, to make the best optimal political choices,
3. A subordinate should loyally carry out official orders unless they lead to committing a crime,
4. A subordinate should point out to his superior that the order is illegal or contrary to the public interest, it is causing considerable damage, or is posing risk to human life or health, or is in other ways unethical. In such cases a subordinate should use a special hierarchical concept of procedure.

A legal obligation of civil servants to loyally carry out official orders is differently limited in various legal systems. A legally regulated hierarchical concept of procedure is generally accepted in cases when an order is illegal or erroneous, poses danger to public security or human health, or for other reasons (e.g. political) is unethical – than the servant can draw the superior's

attention to all defects and errors before he carries out the order. It allows the superior to verify his position and correct his order if it was based on wrong data or private political interests. If, however, the political superior does not change his original position and passes it to the servant in writing, the subordinate is obliged to carry out that order, but then it will be the superior who is held directly responsible for its performance. Such a generally regulated hierarchical concept of procedure allows to settle the conflict between the superior and the subordinate in a conciliatory manner if, of course, both parties have the necessary good will to do that. If, however, a political superior insists on keeping his original position (which happens quite often) and he repeats his order not in writing but as a “verbal order” (threatening to use disciplinary consequences), the future relations between both parties will depend on the behavior of the civil servant.

In the political context, the model of superior-subordinate relations presents itself differently. We can imagine that in the different systems of democratic administration, civil servants will behave differently when facing unethical official orders. If they can rely on the legal protection for defending the public interest, they will be more determined to look for new measures in order to oppose unethical orders. However, if there is no such legal protection for defending the public interest, civil servants will very likely silently comply with unethical orders risking having bad conscience or/and the criticism of the public opinion.

In the system of democratic administration, where the role of civil servants as the guardians of the public interest is progressively strengthened, there is a need of finding legal possibilities of counteracting unethical orders, which would induce the political superiors to voluntarily verify their orders' content. As a result of making the administration more and more political (including the local government administration), it does happen that the official orders of political superiors are issued in the interest of the political party which is currently holding power in the particular local government. Such orders may serve to manipulate the public opinion, withhold certain information, finance the political party using public resources, run a camouflaged election campaign or use the public resources to improve one's position in the eyes of the society, etc. They do not necessarily have to be against the legal norms or based on erroneous technical or normative basis or strategic calculations. Legal provisions often contain not concrete legal phrases which result in their diverse interpretation allowing different, constantly changing and often created anew behaviors which are strongly motivated by the protection of one's own interests. It is impossible to foresee, by means of legal provisions, how the ambiguous phrases and loopholes will

be used in the future. They may be used to secure the private ambitions of political parties, social groups and individuals.

Does a civil servant have a possibility to counteract an official order which, in principle, is lawful but is promoting the political party's interest, especially when the hierarchical concept of procedure appeared to be ineffective? In such cases a civil servant has three options:

1. To carry out the order and forget about his compunction being happy that no disciplinary consequences were taken and the relations with the political superior are still proper. In this option, however, it is impossible to prevent possible bad conscience and the criticism of the public opinion.
2. To pass the burden of responsibility for carrying out the order on other civil servant in order to prevent bad conscience while avoiding being directly involved in its performance. This can be achieved either formally by officially passing the task on another civil servant or, informally, by using at the moment one's overdue vacation, sick leave or other possibilities which make it impossible to carry out the order. In this option, although the civil servant does not lose his good opinion of himself and maintains proper relations with his superior, such egoistic behavior might ruin his relations with co-workers.
3. To publicly disclose the content of the official order pointing out its political or other unethical nature or make it known to a specially created body while risking disciplinary or even penal consequences. In the United States, a public discloser of information concerning superior's unethical behavior is known as "whistleblowing" and it is resulting from the need to provide legal protection to a civil servant against official consequences used out of vengeance by superiors. The institution of "whistleblowing" is currently at the stage of being researched and prepared in the European countries and the public discloser of official information is still being contemptuously treated as a "leak" and, if it concerns state secret, it is treated as a crime.

Therefore, the fulfillment by a civil servant of an official order after using the hierarchical concept of procedure is still the most common way of behavior. Why should civil servants care about their possible bad conscience and the uncertain value of the public interest at the cost of losing their position? Erich Fromm has already pointed out that "people are often afraid of making choices and, in exchange for security, they give up their freedom".<sup>6</sup>

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<sup>6</sup> E. Fromm, *Escape from Freedom*, New York 1965, p. 87.

### **The scope of civil servants' freedom not to subordinate to official orders of political superiors**

The research prove that civil servants are more determined to use their freedom not to subordinate to the orders of superiors in such industrialized countries where the decentralization of governance of public matters is great, as well as the mobility of civil servants is high and the unemployment is low, where the value of the profession is small and the private sector offers more attractive jobs. On the other hand, civil servants are more susceptible to unquestioningly carry out orders and remain politically loyal towards the people at power (including the people at power in the local government) in small local government entities where the unemployment is high and working in the office is highly valued.<sup>7</sup>

Some theoreticians claim that this is also connected to the professionalism of actions.<sup>8</sup> In such systems where civil servants are well professionally prepared, especially in law, they can better understand the complicated aspects of the political game and, therefore, it is more likely that they will be able to properly verify the motivations, circumstances and conditions of official orders. Knowing the legal provisions and the rules of interpreting the law they can faultlessly identify other than legal aspects of decisions having a political nature and they can more easily judge whether they are taken in the public interest and in accordance with the law and constitutional values or whether they serve private interest of a political party. And the more valued professionals they are, the more often they will be ready not to subordinate to decisions which are political. According to H.-U. Derlien it is economists, and not lawyers, who more demonstrate the engagement and political loyalty towards their superiors.<sup>9</sup>

The research carried out in Germany in the late 1980s prove that when a civil servant considered an official order to be based on incorrect reasons, in 82 cases out of a 100 he had tried to persuade the superior to change his order, and only if this did not work, he carried out the order. On the other hand, 1/3 (27%) of German civil servants claimed that they would rather quit their job than carry out an order which they could not accept from

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<sup>7</sup> H. S. Chan, D. H. Rosenbloom, *Legal Control of Public Administration: a Principal-Agent Perspective*, "International Review of Administrative Sciences" 1994, Vol. 60, p. 564.

<sup>8</sup> *Ibidem*, p. 573.

<sup>9</sup> *Ibidem*, p. 401.

a professional point of view (15%), or would ask for a change of their task or ask for a shift of their scope of obligations (12%).<sup>10</sup>

The situation that almost 1/3 of German civil servants would not carry out an order which they could not accept from a professional point of view results also from the fact that those civil servants pay bigger attention to their role as professional advisors, initiators of new programs and executors of outlined political goals than to the orders of politicians or the pressure of the organized groups of interest.<sup>11</sup>

It seems that carrying out a similar study in the Polish local government administration would definitely help to understand and determine whether Polish civil servants highly value their role as professionals competent in governing certain fields of administrative branches and whether they understand their political loyalty as a loyalty towards the law and constitutional values and not towards one's own political convictions or towards instructions based on political criteria of their superiors.

If professionalism in the administration is understood as a behavior consistent with the best comprehended art of performing a profession in the name of which civil servants are able to oppose unprofessional actions resulting from official orders, and if political loyalty is understood as unconditional subordination to all the instructions of superiors (of course if it does not lead to committing a crime) than, in my opinion, it is possible to measure the scope of civil servants' freedom which, after all, differs in various local government entities and even in different sectors of governing. Of course, we are talking here about the civil servants' practical usage of the legally attributed to them scope of freedom. By comparing the research results from different local government entities it would be possible to determine the scope of civil servants' level of political dependence in a given local government office compared to a different entity and to understand the reasons of the identified level of political dependence.

It could be achieved by, for example, using the sociological method of examining 1000 civil servants engaged in performing the same administrative tasks but working in different sectors of the local government administration. They ought to be asked about different ways of behavior towards unethical orders of superiors. Results plotted on a chart should present the number of civil servants who complied with an unethical order and the num-

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<sup>10</sup> H.-U. Derlien, *Historical Legacy and Recent Developments in the German Higher Civil Service*, "International Review of Administrative Sciences" 1991, Vol. 57, p. 396.

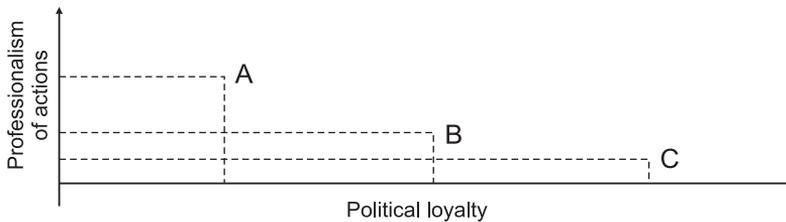
<sup>11</sup> *Ibidem*, p. 401.

ber of those who chose not to carry it out. The point in which the numbers presented by coordinate axis meet would represent the level of exercising the freedom by civil servants of a certain sector of the local government administration.

The level of exercising freedom not to subordinate to unethical orders can be illustrated according to the chart below:

**Chart No. 2**

**A proposed illustration of the level of exercising the freedom not to subordinate to unethical orders by the local government civil servants.**



The example presented above shows that in the local government A the level of exercising the civil servants' freedom is very high because about 50% of questioned people would not comply with an unethical order. On the other hand, in the local governments B and C the level of exercising this freedom is lower because the level of political loyalty is higher in relation to the professionalism of actions. Of course, in reality, this is not a simple directly proportional relation.

The chart is presented in a simplified manner but the problem is much more complicated since it is also determined by political, psychological, organizational, economic and social factors. It is possible, however, to carry out a well prepared research which results could be used to implement new strategies in order to intensify the level of the administration's compliance with the local authorities' politics as well as with legal and constitutional values. It seems needed, especially in such sectors in which political loyalty towards the politics of the local government authorities is predominant over professional actions which serve the protection of the law and constitutional values. Of course this problem will not occur in such local governments where the interest of the local community, and not the individual interest of the political party, determines the local government authorities' actions. It seems, however, that the interest of the local community is more often used by politicians only as a dogmatic slogan and is rarely determining in practice the functioning of the local government office. Especially, that the

conflict of interests is a permanent phenomenon in democratic countries which is just more or less common or known.<sup>12</sup>

The latest reforms of the New Public Management in democratic countries show that the transformation of the hierarchic authoritarian relations in public administration into relations which are based on dialogue and developing common positions, is resulting in a change of political superiors' conduct as well as the behavior of their subordinate civil servants. The political superiors change their conduct because, while acting on the basis of such principles as dialogue and negotiation, they become more open to reform their stance when facing a convincing professional argumentation. On the other hand, the subordinate civil servants change their behavior because they are more open to a conciliatory, less aggressive behavior when their superiors are more open to negotiating their stance. This is especially important because every conflict between a civil servant and his political superior can be more easily mitigated by the receptiveness to open negotiations and, if needed, to the verification of the position than by the escalation of demands. If political superiors value more professional comments of their local government civil servants and are more open to different forms of dialogue and negotiation, it will definitely diminish the number of such dilemmas like, for example, political loyalty versus professionalism of actions.

It is however important to stress out ones more that local government civil servants will not have to choose between professionalism and political loyalty towards the local authorities' politics if professional and political values mutually serve the similarly understood local community's interest which is in line with the law and constitutional values. However, if the values of the political party at power transform from values serving the local community into values serving only the members of this particular party then civil servants, supported and protected by courts, should protect the public interest even if it means risking open conflict with the political superior. Nevertheless, as long as politicians give orders which are in line with the local community's interest, the law and constitutional values, the local government civil servants should carry them out energetically. Neither personal views, nor political views, nor actions of third parties can limit their loyalty towards the actions of the local authorities.

How can one assess whether actions and orders of local government politicians are still taken in the public interest or already in the interest of

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<sup>12</sup> M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 1986, p. 87.

the political party at power? Can local government civil servants, who are supposed to protect the public interest, properly verify the actions of their political superiors if it is already difficult to correctly assess the actions of the local government authorities, since the assessment criteria and long-term effects of actions are difficult to verify? So how can local government civil servants properly verify actions of their political superiors? In my opinion, the answer to this question stems from three conditions:

1. Civil servants are professionals and specialists in a certain field of administering while politicians do not always have this quality. Lately we can observe a clear growth of the number of former high local government civil servants now holding political positions (e.g. a former high local government civil servant is running for a position of mayor or president, or is running for the local government council). It is supposed to secure the professional understanding and convincing justification of cases also by politicians.
2. Civil servants often have access to all sorts of documents, data and information which form the basis for making different political choices. It is easier to convince the local society that a decision was taken on the basis of limited information. However, it is more difficult to convince civil servants because they do know the amount and content of this information. Therefore, it is not surprising that some local governments are searching for methods of limiting civil servants' access to important political information.
3. The experience gained during many years of working in the local government administration under the management of different politicians (who shift whenever there is a change of local authorities) allows civil servants to comparatively judge the politicians' actions and verify their motivations.

The doubts of civil servants towards politicians' motivations are justified when, on the basis of various information, data, opinions, evaluations, alternative variants of decisions and practical experience, politicians are making choices which, according to civil servants, are not professionally legitimate and substantially justified. The politicians are also not eager to negotiate a common position in good faith. The professional doubts of civil servants are even bigger when they use the hierarchical concept of procedure to point out the wrong interpretation of legal provisions, data or information and politicians evade the confirmation of their orders in writing. And although the problem of verbal orders has a long history, the frequency of its occurrence is not at all diminishing in the offices of the local government authorities.

The theory of treating civil servants as a group assigned to protect the public interest has its flaws. Civil servants do not have a monopoly on deciding whether something is in the public interest. Their education, professionalism, experience and long-term practice definitely allows them to identify their proper role in the political game. The legal background must significantly help them as well since it is much easier for civil servants-lawyers than other civil servants to decide whether the law and constitutional values are still or no longer observed by politicians. Such civil servants know the mechanism of interpreting the law and they are able to use the case-law which allows them to answer the question whether the politicians' actions are consistent with the law and constitutional values.

However, even civil servants, who are professionally very well prepared, can falsely interpret the public interest and, according to David Rosenbloom, it can result from four causes:<sup>13</sup>

- Civil servants can be influenced, even unconsciously, by values typical for social, national, professional or religious groups to which they belong,
- The results of sectoral specialization of administration lead to the fact that politicians and their loyal civil servants might care mostly for short-term goals of their actions. For example, they may decide to close community schools or libraries in the name of economic values,
- The permanent specialization of the work in the office or routine while performing official duties can cause a situation when civil servants become not sensitive enough to be able to properly identify the social needs,
- Consumerism and belonging to different corporations can cause a situation when civil servants assimilate the public interest with the interest of corporation groups to which they belong (e.g. hunters, ecologists, breeders of dogs or canaries).

Because social background, specialization and professionalism, routine and corporation links can shape the understanding of the public interest, civil servants should be especially cautious towards their own motivations. The public interest was wrongly understood when, for example, certain community authorities had allocated in its budget a precise amount of money to save an administrative entity which was located a great distance away from this community (Wyrok NSA z 1997-10-14, ISA/Ka 1159/97). In this case the local government politicians and civil servants not only wrongly

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<sup>13</sup> D. H. Rosenbloom, *Public Administration. Understanding Management, Politics, and Law in the Public Sector*, Random House, New York 1986, p. 382-385.

understood the interest of their local community but also infringed the law. That is why it is important for the achievement of the proper results of the research study, to identify the local government decisions which were not taken in the interest of the local community nor to satisfy the collective needs of the community in the last, for example, 5 years. Such a study can complement the assessment of the level of responsible actions of the local government in Poland.

### **Leaks or whistleblowers**

In which cases can a civil servant exercise his freedom and not subordinate to politically controversial orders which are influenced by private interests of political parties? What actions can he take in such a situation? What sanctions is he facing for his insubordination? In principle, the rule common to European countries states that civil servants are obliged to understand the public interest in the way it is understood by their superiors. It is also difficult to justify the thesis concerning the priority of referring by civil servants to the protection of the public interest when they have doubts as to the motives of their superiors' orders since it is mostly the law and politics of the local authorities which define the values and priorities of the public interest. It results mostly from the fact that in Anglo-Saxon countries the role of the administration in enacting legal rules and norms is more discretionary and therefore creational, while in the continental Europe legal provisions enacted by parliaments are more binding and they limit the discretion of the administration more strongly. However, in modern European theories of administrative responsibility it is more and more stressed out that a certain degree of such responsibility towards the variously defined public interest does exist and it can be very desired in the name of rational administrating.<sup>14</sup> Civil servants, however, cannot always prove the political superiors' political party's interest.

In principle, there are two situations when a civil servant can avoid the performance of an official order referring to the public good: when carrying out the order would result in the commitment of a crime or when it is against constitutional values and thus against the legal system. On the other hand, Robert Paper who analyzed in detail the situation of British civil servants, distinguishes three situations:

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<sup>14</sup> Ph. Jos, *Administration Responsibility Revisited; Moral Consensus and Moral Autonomy*, "Administration & Society" 1990, 22 (2), p. 354.

- when carrying out an order is against the law,
- when an order is issued on the basis of an unconstitutional legislation,
- when an official order is politically controversial.<sup>15</sup>

It seems that avoiding orders which are politically controversial is always connected to the risk of being subject to administrative responsibility since it is more difficult in such cases to legally protect a civil servant against the accusation of insubordination than it is in the first two cases. It is easier to defend civil servants who do not subordinate to orders, which lead to corruption or other crimes, than civil servants who get involved in political controversies (especially that they are legally obliged to remain politically neutral in their place of work). However, in the real world of administration and politics, situations which result in the infringement of law or the constitution are often connected with political controversies. It is even possible that cases which are politically sensitive result in corruption, abuse of power, defalcation of public funds, disclosure of state secret, etc.

Civil servants who have doubts as to the nature of their superiors' political instructions can disclose them publicly. However, such behavior is accepted only in the American law and is known as "whistleblowers". According to the United States Whistleblowers Act from 1989 "whistleblowing" takes place when a present or a former civil servant discloses information proving infringements of law, errors in governance, fraud of public funds, abuse of power or threat to human health or public security. In other words, it means that civil servants have a right to comment their superiors' behavior and this right stems from the freedom of speech and the freedom of information provided in the fourth and fourteenth amendments to the United States Constitution.<sup>16</sup>

In Europe, civil servants do not have a right to publicly comment their superiors' behavior since it would be against the constitutional principle of loyalty towards the government, which is identified as a principle of temperance, restraint and reserve in expressing views on official matters. Because of the legal duty of political neutrality which is obliging civil servants not to publicly undermine the reputation of local authorities, and because of the duty to protect the state and official secrets, civil servants who disclose such information often expose themselves to administrative and/or penal responsibility. It does not mean, however, that civil servants in Europe do

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<sup>15</sup> R. Paper, *The British Civil Service*, Prentice Hall, Harvester Wheatsheaf 1995, p. 79.

<sup>16</sup> *Whistleblowing and the Federal Employee*, Government Printing Office, Washington 1981.

not take the risk of criticizing the government's actions or disseminating the government information.

It can be summed up that civil servants of industrialized democratic countries take the risk of disclosing information concerning unethical actions of their superiors either by "whistleblowing" (USA) or, anonymously, by "leaking" information or documents to the press. Because of the danger of being held penally or administratively responsible for disclosing such information, the disclosure takes the form of anonymous leaks unlike in the American system of "whistleblowing". However, no matter the method of disclosing the information, it is obvious that the same responsibility is not applied in every "leak" case. Civil servants can be variously motivated to take such actions and they can also be differently judged. Three basic types of responsibility have been applied to them so far:

- Disciplinary responsibility. Administrative sanctions are regulated by the civil service legislation and other special acts (starting with a reprimand and a reduction of the position, and finishing with a deposition). Such sanctions are declared either by disciplinary commissions (France, Germany) or depend on the decision of the Permanent Secretary (England).

- Penal responsibility for a breach of state secret. The application of such responsibility depends on the extent of official documents classified as state secret. The rule is that every national legislation determines types of documents classified, e.g. documents concerning country's defenses, the protection of internal and external security etc. In the United Kingdom, on the other hand, the documents classified as state secret are those which are not accessible to the public. Therefore, there is a list of documents which are allowed to be made public. The disclosure of documents which are not on the list can result in the disclosure of state or official secret and in the application of penal sanctions. According to the British Officials Secrets Act a present or a former civil servant who discloses confidential documents is liable to imprisonment for a term not exceeding two years.<sup>17</sup>

- Penal responsibility for corruption. This type of responsibility is applied when a civil servant accepts a bribe (financial or other) in exchange for the disclosure of official information. Such civil servants are considered as criminals and they bear penal responsibility. In the United States, unlike in Europe, civil servants are not presumed innocent before a court and they themselves bear the burden of proving that they did not commit the crime of corruption.

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<sup>17</sup> J. A. Taylor, H. Williams, *Public Administration and the Information Policy*, Public Administration, RIPA, 1991, Vol. 69, p. 287.

Courts rarely take the side of a civil servant who is disclosing information. In the European culture “leaks” are not highly valued. It results not only from the preventive effects of various types of legal responsibility applied to civil servants for the disclosure of official information, but also because of the traditional understanding of ethical rules of performing a profession.

Political scandals, the disclosure of unethical or illegal actions of public functionaries and the crises of trust between civil servants and politicians forces the academics to search for such forms of proceedings which would solve conflicts in the most rational and least painful manner. In principle, however, civil servants are not allowed to treat their understanding of public interest as a higher, overriding value towards orders and instructions of their political superiors. Therefore, they are advised to use the hierarchical concept of procedure when such dilemmas appear. They can also consult their problems with a person responsible for solving such conflicts or a person responsible for personal matters in the office. If, however, this does not help, they can either subordinate to the order or forget about the case. They can also leave their office but it still does not release them from the obligation of keeping state secret.

Using the hierarchical concept of procedure or consulting with people responsible for personal matters does not always help a civil servant to solve such dilemmas. It happens that political superiors are not susceptible to change their orders or instructions and the people consulted avoid responsibility or are unavailable. Unfortunately, political and ethical dilemmas constantly appear in democratic systems, especially during elections. Therefore, it seems that the American institution of “whistleblowing” can constitute an interesting inspiration for finding solutions which would secure the responsible administrating by the local government in Poland.

Lately, some European countries are trying to introduce the institution of “whistleblowing” as a binding regulation and its basis are said to be found in Article 10 of the European Convention on Human Rights (the freedom of expression).<sup>18</sup> An interesting interpretation of the freedom of expression was presented by the European Court of Human Rights in case William Goodwin in 1994: W. Goodwin was an owner of a newspaper which

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<sup>18</sup> E.g. M. B., *Whistleblowing on Fraud in the Netherlands*, Final Report Submitted to the European Commission, 1994; M. Bovens, *Are Private Virtues Public Vices? An Inquiry into Integrity of the Managerial State*, article prepared for the VIII conference organized by Stowarzyszenie Administracji Publicznej, March 1995; L.W.I.C. Huberts, *Public corruption and fraud in the Netherlands: research and results*, Crime, Law & Social Change 1994/1995, Vol. 22, Nr 4, p. 311.

published certain information about Tetra Ltd, a company using the public funds, acquired by means of a leak from an informant from this company. Tetra Ltd accused the newspaper of breaching official secret and initiated legal proceedings. The British High Court obliged W. Goodwin to reveal his source's identity. Because he did not want to disclose this information he was fined £5,000. The European Court of Human Rights held that the British order was a violation of W. Goodwin's right to freedom of expression under Article 10 of the European Convention on Human Rights. It stated that if journalists were forced to disclose their source's identity, it would deter the sources from assisting the press in informing the public on matters of public interest. "As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected." Therefore, as pointed above, the European Court of Human Rights aimed at providing better protection to journalists and their sources. Of course, this problem has a lot of supporters as well as opponents.

In the United States, such public institutions as GAO, FBI, CIA, DIA, NASA and all those which are aimed at protecting the state and the security of its citizens are excluded from the right of public disclosure of information concerning unethical actions of superiors. Civil servants employed in all other offices can criticize and disclose superiors' unethical instructions and orders in mass-media while remembering that if they do not manage to prove their reasons, penal and administrative sanctions will be applied to them for disclosing false information. American civil servants disclosing information about unethical actions of their superiors will not be legally protected if their evidence are not recognized by the Office of the Consul General and the special committee of professional ethics. Generally, people disclosing erroneous or unethical actions of their superiors are considered as "problem-makers".

Lately, theoreticians are more and more proving that the institution of "whistleblowing" is desired also in Europe.<sup>19</sup> According to David Lewis, civil servants prefer the system of "whistleblowing" because of problems in communication inside the public office. In such an office where civil servants are encouraged to state their ethical, professional and political doubts by means of special channels allowing them to report their dilemmas and errors of their superiors, "whistleblowing" is no longer needed. If, however, there is no mechanism of reporting official doubts, civil servants might be eager

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<sup>19</sup> Ibidem.

to publicly disclose their doubts and information.<sup>20</sup> Often civil servants are aware of the risk and of the administrative and penal consequences of the public disclosure of documents and information and they decide to use this method only if internal channels of reporting appeared to be inefficient or not trustworthy.

Therefore, in my opinion, it is important to document the local government cases which “leaked” to the press, the legal measures which were applied to people responsible for unethical behavior and the legal position of the sources of such information. Such a study would allow to assess how the institution of “leaks” is being used in the public life of the local government in Poland and if it should be modified and how. It might help to find the answer to a question, in which degree the public control initiated by “leaks” has influence on responsible actions of local government politicians and civil servants and whether the channels of passing information inside the local government structure should be legally institutionalized.

## **Conclusion**

The described herein legal institutions present only the beginning of securing the desired behavior of local government politicians and civil servants in Poland. They create only a general structure for implementing responsible behavior of the local government. We need to remember, however, that every local government in a democratic state, although it should expect its civil servants to be loyal, cannot allow partial actions which breach the standards of ethical behavior, because eventually it will be the members of the local authorities who are held responsible before their voters for such actions.

It is thus necessary to promote a search for such regulations which would limit the engagement of the state’s capital in undertakings of private parties so that political connections do not influence the method of using those public funds, as such behavior might create informal connections where only private arrangements are important at the cost of effectiveness, quality and efficiency of local services. Such undesirable actions lead to an assumption that those who are at power use it not to serve the local community but to secure their own and their associates’ needs and interests. This, on the

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<sup>20</sup> D. Lewis, *Whistleblowers and Job Security*, “The Modern Law Review” 1995, Vol. 58, Nr 2, p. 265; L. M. Seagull, *Whistleblowing and Corruption Control: The GE Case*, “Crime, Law & Social Change” 1995, Vol. 22, p. 385–390.

other hand, leads to the erosion of democratic institutions and to the crisis of society's trust towards the local government organs, which is difficult to overcome and which can eventually result in the return of centralized governance of public matters. Such a XIX-century method of governance is very likely to occur in the situation of erosion of the local government authorities although it cannot function properly in the civilized conditions of a modern democracy.

The introduction of the best legal regulations will not be enough if there is no strong social and political will to prevent partial and corruptive actions of local government civil servants. In building such will, it is necessary to inform the society not only about the manifestations of partial behavior but also about examples of applying responsibility for breaches of ethical behavior as well as about the court decisions settling such conflicts. The role of press and mass-media is invaluable because they should make public every unethical action of local government functionaries even when a breach of ethics does not constitute a crime.