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## RESPONSIBILITY IN THE LOCAL GOVERNMENT UNDER ADMINISTRATIVE LAW

### 1. Essence of the issue

Essence of the responsibility problem in the local government under the administrative law and administrative procedure law is that binding force of law doesn't create any feeling of responsibility for the public local functionaries. It concerns both impression of the recipients of the activities carried out through administrative power and – what might be believed to follow the examples of public behaviors by different public officials – frame of mind of the people employed in public administration.

The scope of the mistakes made during procedures taken by local-government organs in the matters regulated through Administrative Procedure Code (APC) and Tax Regulation testifies to exonerating liability of the public officials. It is illustrated by annual specification of information on the activity of the local government appeal board prepared by the Prime Minister. It is said that in many appeal boards more than 50% cases is finished by establishment of breach of the law by local administration of *gmina*, *powiat* and *województwo*. These are both breach of the procedures and the substantive law. Unfortunately, neither these official specifications nor information which was used, allow to ascertain precisely social and economic effects of ineffective legal and organizational solutions.

We dare to express a thesis that the mentioned above effects are really severe to society and economics, and the reason to indicate “imperfections” is assuming no responsibility for carrying out duties of local government institutions by persons who joined organs (boards, legislative and executive bodies) of local government units (LGU) or persons who perform its functions (*wójt*, *burmistrz* or *prezydent*). It is believed that it is caused by

improper mechanisms “coded” in the present system of law or lack of mechanisms extorting or at least stimulating them to responsible actions. To prove the base of accepted assumptions it demands deep, empirical research on mentioned phenomenon. Positive effect of the research should dispose academics to develop law-comparative and doctrinal studies, aimed at finding out what mechanisms should be introduced to Polish legal system to replace current feeling of irresponsibility by conviction that disadvantages of incorrect public duties fulfillment are inevitable.

## **2. Conception of administrative responsibility**

Whenever administrative responsibility is mentioned in literature on administrative law, we cope with considerations concentrating on personal responsibility of persons whose duties (orders or bans) arise from acts and other rules of common law in force which regulate relations between state (or public-private corporations) and citizens or established by them organizations and institutions. It is mostly about duties of persons who are recipients of public administration (administered ones), not organs and bodies which carry out public functions (administrators).<sup>1</sup> It is an attempt to define the conception of administrative responsibility this way.

The issue of administrative responsibility for environment protection is treated, e.g. by J. Boć (2000), as “legally regulated possibility to start legal instruments carried out in specific to public administration forms and procedures against concrete subject caused by its activity breaching environment”.<sup>2</sup> As we can see, the mentioned above author noticed exclusively in his definition responsibility of persons and organizations using the environment.

Similar attitude is represented by R. Paczuski, who believes that administrative responsibility is the principle of taking the consequences for events or state of affairs, actions or desistance by subject using the environment which are the subject of negative legal qualification and attributed the subject by environment protection law being in force.<sup>3</sup> It is specific that in their definitions neither of the authors take into account the “legal instru-

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<sup>1</sup> See: e.g. W. Radecki, *Odpowiedzialność administracyjna w prawie polskim*, “Zeszyty Naukowe Akademii Spraw Wewnętrznych”, No. 37 (1984), p. 116–141; A. Michór, *O charakterze odpowiedzialności administracyjnej*, “Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji”, No. 60 (2004), p. 215–234; Z. Leoński, *Zarys prawa administracyjnego*, Warszawa 2004, p. 397 & following.

<sup>2</sup> See: J. Boć, K. Nowacki, E. Samborska-Boć, *Ochrona środowiska*, Wrocław 2000, p. 323.

<sup>3</sup> See: R. Paczuski, *Prawo ochrony środowiska*, Bydgoszcz 2000, p. 136–137.

ments” or “consequences” at least minimum disadvantage to the subject who is responsible. It might be attributed to the obvious character of those factors in every definition of responsibility. Analogical attitude to the subjective aspect of administrative responsibility is represented by other authors with the only difference that they notice and emphasize the necessity of the consequences to those who are responsible.<sup>4</sup>

In fact, Environment Protection Act,<sup>5</sup> which regulates the most developed and constantly developing field of administrative law, doesn't contain any administrative penalties imposed on public bodies in forms and procedures specific to administration for inactivity in environment protection or for tolerance of actions taken without legal excuse. In the Act we can find exclusively rules containing administrative pecuniary penalties imposed on those who use environmental resources unlawfully in a way of administrative decisions. Does it mean that in fact Polish legal system doesn't regulate any administrative forms and procedures which could be used against public administration bodies breaching Environment Protection Act by exposing them to consequences? Does it mean that also in other fields of administrative law not carrying out or improperly carrying out duties imposed on public administration bodies do not include any legal forms specific to administrative law in means of disadvantages for breaching binding rules?

We stand for the idea that such legal solutions exist, however, consciousness and frequency of using them are imperfect, moreover, they are insufficient, which causes their ineffectiveness. Having said that we have in mind, e.g. legal regulation about supervision of LGU organs, which contain a duty to control those organs and react to not carrying out their duties and legally improper actions of local government bodies by *wojewoda*, Ministry of Public Administration and Prime Minister. However, the exclusive right to control is still not a mechanism. Apart from this, they don't comprise activities taken by local government bodies in respect of administrative decisions. They act practically without control and supervision in this field. Probability of taking the responsibility for administrative mistakes made during the mentioned above activity is finally lower.

Disregarding those instruments as means used also for its protection by people who deal with matters concerning environment protection law, they prove weakness and imperfection of the system. Researchers of legal

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<sup>4</sup> See: W. Radecki, op. cit.; A. Lipiński, *Elementy prawa ochrony środowiska*, Kraków 2001, p. 240.

<sup>5</sup> Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska [Environment Protection Act of 27<sup>th</sup> April, 2001], Dziennik Ustaw [Journal of Laws], No. 62, item 627.

rules and control as well as supervision institutions have pointed out many critical arguments to the whole sphere of the local government activity,<sup>6</sup> which unfortunately – were left without any proper reaction from the public authorities responsible for state of law and protection of fundamental social values. If expressed thoughts and critiques could have been supported by empirical data, the chance to notice the need to change the actual, but rarely used, solutions would have definitely arisen.

M. Wincenciak presents a different attitude to the definition of administrative responsibility of the mentioned above authors.<sup>7</sup> According to the author, the subject of responsibility in administrative law is an action or illegal relinquishment by every object of relations under administrative law. On the other hand, the subject of responsibility are the parties having administrative capacity – administrators, and in some situations, administrated subjects. Aiming at research process on imposing administrative sanctions he divided administrative responsibility into responsibility resulting from breaching administrative law and responsibility resulting from non-breaching it. Administrative responsibility resulting from breaching administrative law is – according to the author – secondary responsibility in relation to the basic one. It is created exclusively in a situation when appreciation of an action is negative.<sup>8</sup> Therefore, fundamental for the administrative responsibility is the act according to which rules regulating consequences of ignoring it, administrative relation could be created.

The presented above point of view should be supported, however, one might find it difficult because of high level of abstraction when trying to understand it and use in practice. It is also impossible to share an opinion of the mentioned above author, as he states it without deep and convincing reflection that administrative responsibility for breaching administrative law is “secondary responsibility in relation to the basic one” and it is applicable only when “appreciation of an action is negative”. These statements excessively restrict the defined term and are in opposition – what is proved in the further part of the paper – to positive law. These are the case studies when both estimation of the administrative law breach by specific beha-

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<sup>6</sup> See: D. Kijowski, *Skuteczność i zupełność nadzoru nad samorządem terytorialnym*, (in:) *Reforma administracji publicznej 1999 – dokonania i dylematy*. Edited by M. Stec, Instytut Spraw Publicznych – Ekspertyzy – Rekomendacje – Raporty z Badań, Warszawa 2001, p. 36 and next; D. Kijowski, M. Kulesza, W. Misąg, St. Prutis, M. Stec, J. Szlachta, J. Zaleski, *Diagnoza stanu terytorialnej administracji publicznej w Polsce*, “Samorząd Terytorialny” 2004, No. 1–2, p. 152–157.

<sup>7</sup> See: M. Wincenciak, *Sankcje administracyjne i ich stosowanie*, unpublished Doctor’s thesis, Faculty of Law University of Białystok, p. 19–22 (tutor: prof. B. Kudrycka).

<sup>8</sup> See: *ibidem*.

violation and the responsibility imposed on them take place according to the same procedure.

The most important is that in the latter example of the related term the necessity of research on administrative responsibility essence was noticed. It concerns not only citizens (administered subjects) but, first of all, administrators of public administration bodies and public officials. The mentioned author hasn't taken detailed research on administrative responsibility so far, but he paid his attention mainly to sanctions imposed on the administered subjects. The further research on responsibility in local government is undoubtedly an aim, otherwise our attitude to responsibility in local government will be left in the sphere of intuition.

Aiming at the postulate of research on responsibility of the local government we propose an assumption that administrative responsibility is imposed by administrative acts on both administrators and administered ones addressing to them the consequences of breaching orders and bans.

The proposed definition is based on the widest assumption of responsibility which points at disadvantages of the subject against whom it is imposed (or person who is responsible). We don't concentrate on the sphere of breaching the administration law assuming that the public administration bodies are obliged to comply with the legal orders and bans addressed to them. On the other hand, behavior which doesn't breach directly the administrative law may also cause administrative consequences.

The tribe and forms of describing the legal situation and duties of the person responsible on the basis of breaching legal system should forejudge about the administrative character of the responsibility. During the legal process (and qualification procedure) civil, criminal (collective responsibility as well) and employees responsibility is imposed. In a way of resolving law – depriving LGU of competences in matters where they were not able to fulfill their duties correctly<sup>9</sup> – the specific political responsibility is imposed on. In case of the local election *wójt* and *burmistrz* (or *prezydent*) are politically liable for improper fulfillment of their duties. To sum up, we deal with administrative responsibility in the cases where executive public organs (public administration) or controlling them administrative courts decide about consequences of breaching legal orders and bans.

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<sup>9</sup> It may appear soon that this possibility is real because during previous and current term of Parliament the conception of depriving *gminas* of the right to decide on placing investments at their ground is considered. It could happen on condition that they don't use all possibilities of land management by resolving proper land management plan. As the newspaper informed, the government has prepared a draft of the act ("Rzeczpospolita", 24<sup>th</sup> November 2005, p. 6A).

### **3. Relations of responsibility in public administration to administrative law and its doctrine**

The issue concerning the feeling of the responsibility by public officials and the reality of imposing it on them does not seem to be closely tied to the field and methods of regulation by the administrative law. In general opinion, it is connected more to classic types of responsibility and issues of labour law as well as civil and criminal law. However, this attitude is not a proper one. It doesn't fit positive law and challenges of modern administration. It is difficult to give in this rather short discourse even a vague "picture" of legal rules which could be classified as administrative law which ensures responsible fulfillment of public duties. Apart from this, we could indicate the most specific few examples, e.g. the mentioned above disciplinary responsibility of nominated local servants, teachers, city guardians or policemen. However, it concerns responsibility for breaching employees' duties and is similar to the responsibility imposed and executed in actions of law trial (especially criminal actions), but undoubtedly decisions made during disciplinary actions are of authoritarian character, closely tied to the legal status of nominated official regulated by decision on nominating him to the concrete post. According to it, disciplinary actions are not taken by judicial organs but by specially elected panels (disciplinary commissions) or by public officials possessing disciplinary power (e.g. commander, Chief of Police etc.). It is worth mentioning that since 27<sup>th</sup> May, 1990 (caused by a mistake of parliamentary reporter and the MPs oversight)<sup>10</sup> the rule excluding appliance of Administrative Procedure Code (APC) hasn't been bound in disciplinary actions.

Decisions taken during disciplinary actions are characterized by all essential elements typical to administrative decisions (acts), that is a reason why research on current solutions, their application and postulates for eventual modifications should be based on basic rules of administrative law and academic research.

Following instruments – the means of administrative responsibility according to the above definition – are decisions on suspending or dissolving

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<sup>10</sup> Reports concerning work of Parliamentarian Special Commission elected then by contractual Sejm aiming at preparing drafts of act introducing in Poland local government recorded that commission proposed Sejm and Senate not to exclude in art. 3 in § 2 of APC a rule excluding applying it in disciplinary actions, but a rule excluding judicial control of disciplinary actions. A parliamentary reporter had presented arguments of Commission, then proposed inverse solution and MPs (having no idea on the proper solution to vote) voted draft law opposite to its justification. The author, as the Commission expert, was the witness of this sitting.

local government bodies, regulated by three fundamental local government acts. Indeed, decisions on dissolution of LGU legislative body was constitutionally reserved to Sejm, however, the reasons for making such decisions and their legal meaning and required procedure justifies the statement that the effects of breaching Constitution and acts brings consequences addressed to all local-government institutions also carrying out their executive power.

Typical administrative acts' structure and essence forejudged administrative character of this type of solutions. Such construction is characteristic, based on applying abstract and general rule to the concrete case. The essence of this solution is to apply the act, to apply the administrative or constitutional law.

The legal status of an organ applying this instrument isn't also an obstacle. General competence to dissolve LGU legislative body is reserved by Constitution to the Sejm. In the Constitution also it was allowed to charge Sejm with the executive power, however, it doesn't change the administrative nature of the decision.

Suspending LGU bodies is, without doubts, an administrative act which is given as a consequence of breaching legally binding rules. It is not always administrative law, however, but the act taken in administrative procedure and by administrative executive organ. Moreover, it should be noticed that this type of administrative responsibility, especially threatened by applying it, can be used to extort duties from LGU apart from its legal character forms realization and type of organs obliged to carrying out duties of concrete LGU. It is also regulated by local government acts.<sup>11</sup>

Moreover, we can add to the catalogue of examples of administrative responsibility sanctions regulated by law on procedure of administrative courts applied in situations when administrative organ doesn't execute the administrative court judgment. According to Art. 154 § 4 of the Act of 30<sup>th</sup> August, 2002 – Law on Administrative Courts Procedure (LACP), in case of not executing the judgment on inactivity claim and in case of organ inactivity when the reversing or quashing act or action judgment was given, a party has the right to take legal action claiming imposing a fine on this organ after a previous written call addressed to the organ competent to execute a judgment or to deal with a matter. It should be emphasized that

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<sup>11</sup> According to Art. 97 p. 1 USG, in case of hopeless lack of efficiency in fulfillment public duties by *gmina* bodies, Prime Minister, according to the motion given by Minister of Public Administration, is in power to suspend *gmina* body and appoint receivership for the term of two years, not longer then election of the council and *wojt* for the next term. Identical rule is regulated in art. 84 p. 1 usp and Art. 85 p. 1 usw which regulate suspending organs of *powiat* and *województwo*.

the fine is imposed on the organ, not on the person who holds the position of the organ. However, as it was mentioned, imposing consequences of breaching the law on public administration organ is essential for administrative responsibility.

It doesn't interfere with assenting this sort of action taken by administrative courts as a feature of administrative responsibility and the fact that it is imposed by judicial organ exclusively as a result of a claimant bringing an action to the court. The main task of the court is not only executing judicial power in administrative cases but also controlling public administration. The administrative court applies in these matters exclusively the administrative law and takes decisions which are more similar to imposing fines in administrative procedure than deciding a dispute between the administrator and claimant. Therefore, classifying administrative courts as a legal instrument (Art. 154 § 1 LACP) of administrative responsibility is justified.

It is difficult to admit as an instrument of administrative responsibility for breaching duties by local government organs solutions regulated by art. 155 § 1 LACP. According to that rule, in case of ascertainment of serious breach the law or factors influencing such action, the panel of judges is in charge of informing competent organs or their superiors about the transgression. According to Art. 155 s. 2 LACP, a competent organ is obliged to inform the court within 30 days of a taken standpoint after consideration of the provision. In case where the local government organs are not supervised by any superior organs (e.g. *wójt*, *starosta* or *president* are in such position because *gmina* and *powiat* councils don't have any supervision power) such courts provisions are exclusively the reason for a mood of a person holding the public post. The usefulness as a reason for feeling a responsibility between officials of *gmina* is slender. The same situation is in *powiat* and *województwo*.

However, the instruments presented above are rarely used and – apart from a case of appointing compulsory administrator in Warsaw in 2001 – they are not noticed by public opinion. Doctrine hasn't been also interested in the subject so far. What are the reasons? Why – apart from general critique of local government, its officials' lawlessness and judicial judgments' disrespect – aren't they used? Undoubtedly, the subject is worth conducting a systematic research.

Continuing these thoughts, we should ask: What is the reason for administrative responsibility of "classic" judgments of administrative courts (invalidating resolutions of LGU organs and lawful decisions of *wójt*, *starosta* and *marshall*) or typical supervising decisions of *wojewoda* and *RIO*? Their administrative character leaves no doubt. This way competent bodies

decide on consequences of breaching general rule of law: acting on the base and within binding law. However, applying these instruments doesn't cause direct disadvantage of the responsible object. This way local government organs are deprived of a possibility to fulfill legally taken decisions and enforced to reconsider decisions already taken. It is obvious to the addressee that these decisions are arduous.

The administrative procedure is based on the constitutional right of appeal (Art. 78 s. 2). Moreover, final LGU decisions, even not appealed, may be reversed in officio (as some authors say "form of supervision") by supervising bodies. According to the general fiscal administrative procedure, also interference of supervisors is possible in case when LGU organs' actions caused essential breach of parties' procedural rights and correct reversing procedure so a reversal decision was necessary to take.

At this point it is inevitable to ask a question: Shouldn't we treat eventual changes of decisions taken in appeal or special procedure, reversing them or forcing to reversal procedure as a specific responsibility for illegal action in the case? It is without a doubt: decisions taken as a result of this procedure are the administrative decisions, and they are examples of applying the administrative law. The answer to the above questions needs deeper analysis and it is impossible to give it here. However, an assumption of a possible answer gives automatically a question for research: Are these instruments (forms of responsibility) correct? Do they guarantee the increase in fulfilling the responsibility or does it go the other way around or maybe both?

Mentioned in section 1 of the paper, the information about LGU organs jurisdiction duties are part of essential but not dominating activity of local government. Mass-media – newspaper, radio, television and academic publications<sup>12</sup> emphasize an enormous number of critique addressed to the local government. It is really desired to provide an empirical research (based on documents, comparative law and theory) which could give a precise diagnosis. The diagnosis could be the base for preparing new mechanisms and introducing legal solutions which aim at strengthening the responsibility of organs and public officials in the local government. Following examples of administrative responsibility of persons holding public functions in local government are regulated in every local government act where it is prohibited to share functions in local government with other ones, such as to share them with professional and individual business activity. Sanctions regulated

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<sup>12</sup> See: D. Kijowski, M. Kulesza, W. Misiąg, St. Prutis, M. Stec, J. Szlachta, J. Zaleski, *Bariery prawne efektywnego i skutecznego funkcjonowania lokalnej i regionalnej administracji publicznej oraz propozycje ich likwidacji lub ograniczenia*, "Samorząd Terytorialny" 2005, No 1–2, p. 5 and next and idem, *Diagnoza...*, op. cit.

by Art. 5 Act of 21<sup>st</sup> August, 1997 on limitation of business activity by persons holding public functions<sup>13</sup> are also similar. These rules regulate the loss of the mandate, revoking the post, etc. and other consequences of breaching the bans regulated by the mentioned act. The decisions are taken in form of individual administrative acts by executive organs. Therefore these are examples of administrative responsibility.

To conclude, we could say that, having in mind significant capacity of the term “administrative act”, which includes both the double concrete act and general situation act as generally addressed act, and the fact that loss of the possibility to take independent decision or necessity to adjudicate reversely the case with the threat to take it out by superior organ or other appointed organ, are also a disadvantage to the organ which activity could be reached by consequences, we could recognize the following examples of administrative responsibility:

- 1) personal and merit decisions taken as supervision act on local government organs
- 2) disciplinary responsibility of appointed local government officials
- 3) taking reformatory decisions in administrative procedure during appeal actions
- 4) decisions and resolutions of appeal organ taken in cases finished by final decisions
- 5) imposing punishment (pecuniary and other, depriving of the right to take up activity or hold a post) on persons holding functions in local government and local government organs
- 6) the loss of the mandate to hold a function or a post
- 7) other situations regulated by law but not mentioned in the paper

Present knowledge on the estimation of the administrative law regulating responsibility in local government is, without doubts, insufficient. Moreover, the research on the subject hasn't been conducted for a long time, neither has been any comprehensive publication on administrative responsibility of persons and institutions hasn't been published yet. The proposals to regulate it systematically aren't also known. There are not also presented in Poland the legal rules' best practices and worldwide known systems responsible for legal and illegal actions of institutions and public administration personnel. It justifies an idea to organize and prepare the research on the mentioned issue. The result of the research should present the analysis of the current situation as well as the proposals of new, efficient legal and organizational solutions.

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<sup>13</sup> Dziennik Ustaw [Journal of Laws], No. 106, item 679.

The academic research should be based on Polish and European systems of law, jurisdiction and doctrine presented in library resources, computer data base and systems of academic information exchange.

The research should analyze and estimate current solutions concerning:

- administrative procedure as a collection of fundamental rules for taking all the mentioned types of administrative responsibility
- legal position of a “sufferer” in official and disciplinary procedures
- mechanisms of individual interest protection of persons responsible in administrative procedures aiming at establishment of the responsibility
- mechanisms of public interest protection of persons responsible in administrative procedures which aim at establishing the responsibility.

As consequence of the previous step, it is necessary to establish a possibility of different legal solutions of administrative responsibility in local government based on assumptions prepared individually by the team members and best practice of other countries.

#### **4. Illusion of conviction about Polish law perfection**

After few years of a new political situation, it is the right time to prove the need to verify a general conviction that Polish law is perfect but people are not able to use it properly. It is an illusion. The reality is different. Currently regulated by law rules of responsibility for social consequences of local government actions and their officials are not working or they cannot achieve the expected results.