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THE POLISH CONCEPT OF ADMINISTRATIVE LIABILITY

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The tendencies of the Polish law concerning more and more frequent use of the administrative responsibility mechanism in response to othe persons behavior violating the current normative order are investigated. This provokes the question about the standard of protection of an individual subject to public administration bodies' sovereign and sanctioned activity. It was found that in 2017, the deficit of normative regulation observed in the doctrine resulted in the incorporation into the Act of 14 June 1960 – Code of Administrative Procedure, Section IVa, containing regulations on the imposition of administrative fines as on granting reliefs in their implementation. It was substantiated that despite its shortcomings, the regulation is a step in the right direction. It was argued that continuation of the legislative work is desirable to create a comprehensive regulation laying down the principles of liability adapted to the specificity of administrative law.
Keywords: administrative law; legal support; administrative responsibility; administrative responsibility mechanism.

ПОЛЬСЬКА КОНЦЕПЦІЯ АДМІНІСТРАТИВНОЇ ВІДПОВІДАЛЬНОСТІ

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Досліджено тенденції польського права щодо все частішого використання механізму адміністративної відповідальності у відповідь на поведінку осіб, що порушують чинний нормативний порядок. Це провокує питання про рівень захисту особи, яка здійснює суверенну та санкційну діяльність органів державного управління. Встановлено, що у 2017 р. дефіцит нормативного регулювання, який спостерігався в доктрині, призвів до включення до Закону від 14 червня 1960 р. Розділу IVa Адміністративного процесуального кодексу, що містить норми про накладення адміністративних штрафів та надання пільг при їх здійсненні. Обґрунтовано, що, незважаючи на наявні недоліки, регулювання є правильним кроком. Доведено, що продовження законодавчої роботи бажане для створення всебічного регулювання, що встановлює принципи відповідальності, адаптовані до специфіки адміністративного права.
Ключові слова: адміністративне право; правове забезпечення; адміністративна відповідальність; механізм адміністративної відповідальності.

The issue of administrative liability has not been attracting the particular attention of representatives of the Polish legal science relatively recently. It was mainly because administrative sanctions are a relatively new legal tool used by public administration bodies. In the light of the above, the idea expressed by F. Longchamps in 1960. that nothing related to punishing belonged to administrative law is hardly surprising (Longchamps, 1967). In recent years, the Polish legislator has been applying administrative sanctions as an adequate answer to breaches of law by individuals with an increasing frequency. The phenomenon is not foreign to other EU member states, either (Staniszewska, 2018). Progressing decriminalisation of behaviours penalised so far under criminal law has been observed. In contrast, the same behaviours began to fall under the regime of administrative liability – the trend has been named «a departure from criminal law» (Michór, 2005).

Initially, the doctrine appeared not to notice the above-described regularity. It may be explained by the fact that administrative fines, which serve as the flagship of administrative sanctions, were believed the domain of criminal law, according to administrative lawyers. In contrast, criminal lawyers used to approach them as an administrative and legal issue (Król-Bogomilska, 2001). In time, holding individuals liable, this issue has gained its rightful place in the scientific discourse. Today, it is no longer surprising that the administration has instruments to ensure the implementation of administrative obligations. As rightly indicated in the jurisprudence: «Where regulations impose obligations on natural or legal persons, there should also be a provision specifying the consequences of failure to fulfil the obligation. The lack of an appropriate sanction makes the provision dead, and failure to fulfil the obligation is common» (judgement of the Constitutional

Tribunal of 18 April 2000, file ref. K 23/99, OTK 2000, No. 3, item 89).

First, terminology must be established to continue analysing the issue. Due to the chosen topic, undoubtedly, «administrative liability» is a critical concept. After A.Michór, it should be defined as «a legally regulated possibility for a public administration body to initiate ex officio legal measures against a specific entity, carried out in administration forms and procedure, due to the negatively valued by law behaviours attributed to him, without any conditioning causal relationship with his legal behaviour» (Michór, 2009). The second concept-tool are administrative sanctions, i.e. «imposed by an act of applying the law by a public administration body, resulting from the administrative and legal relationship, negative (unfavourable) consequences for legal entities that do not comply with the obligations arising from legal norms or acts of law application» (Wincenciak, 2008).

As nothing happens without reason, the increasing popularity of administrative sanctions carries some features of administrative liability that make it appear more attractive than other types of legal liability, and criminal liability, above all, from the legislator's perspective. The imposition of administrative sanction is definitely faster than bringing individuals to justice by the courts. Moreover, it relieves the workload of the common judiciary, overwhelmed by the multitude of cases (Zaborowski, 2007). Furthermore, administrative liability generates lower costs from a public spending perspective.

However, the above-specified features cannot divert attention from its shortcomings, which – as it turns out – are not lacking. First of all, the punishment function is not traditionally attributed to public administration. Contrary to criminal law, the long and rich normative tradition which has developed the modern standard of holding individuals liable for an act prohibited under penalty of punishment, administrative law has not yet developed a uniform, general normative regulation on administrative liability. Undoubtedly, one of the reasons for this state of affairs is the lack of a general part in administrative law that could constitute the aforementioned principles. After all, in the general part of the Penal Code, the legislator specifies, inter alia, the concept of an offence, the principles and conditions of criminal liability, and the conditions for its avoidance, sentencing directives, the statute of limitations (Rogalski, 2014). Another reason is the extraordinary variety of administrative sanctions in substantive administrative law, ranging from typical administrative fines to sanctions involving the withdrawal or limitation of the administrative and legal power previously granted to an individual, making it challenging to undertake codification work. J. Zimmermann considers the multiplicity and variety of sanctions in administrative law to be a specific feature of this branch of law (Zimmermann, 2013).

The absence of a normative administrative regulation in the indicated areas, coupled with the severity of many administrative sanctions, meant that, paradoxically, criminal liability often appeared to be more «attractive» from the perspective of an individual. Not without significance is the observation expressed in the jurisprudence of the Constitutional Tribunal that «the boundary between an administrative tort and the resulting administrative penalty and a misdemeanour is fluid and its definition falls within the scope of the discretion of the legislature» (judgement of the Constitutional Tribunal of 15 January 2007, file reference number P 19/06, OTK-A 2007, No. 1, item 2).

The features of administrative liability include the possibility of attributing a tort not only to a natural person but also to conventional entities (Kardas, Sławiński, 2016), i.e. legal persons and organisational units without legal personality, as well as the fact that the application of sanctions does not follow criminal procedures (Leoński, 2003). Note that many issues of crucial importance from the perspective of the protection of an individual subject to the sovereign and sanctioning activities of public administration bodies are still considered controversial in the doctrine and jurisprudence. The function of administrative sanctions or the nature of administrative liability may serve as examples of such issues. In principle, it is assumed that if the wording of the tort provision does not define a premise of guilt as a condition for attributing liability to an individual, the nature of liability is objective. This signifies that the circumstances in which the infringement took place are irrelevant in legal terms or even the influence, if any, of the entity subject to punishment on the occurrence of the found infringement. In particular, this feature of administrative liability justifies demands for introducing normative solutions in the administrative law system that guarantee protection standards that are considered fundamental for criminal law to the entity to which the public administration body wants to attribute liability (Ziemski, 2018). Meanwhile, one reason for the legislative popularity of administrative sanctions was the desire to avoid the rules in force in criminal law (Bojarski, 2011).

A significant event that undoubtedly influenced the approach of the Polish legislator to the issue of administrative sanctions was the judgement of the Constitutional Tribunal of 1 July 2014 (file reference number SK 6/12, OTK-A 2014, No. 7, item 68), which declared normative regulations. They impose administrative liability for the removal of a tree or shrub without the required permit unconstitutional. The Court pointed out that the amount of the administrative fine imposed for committing the tort in question may, in certain circumstances, constitute a sanction disproportionate to the environmental damage caused by the removal of a tree or shrub. Moreover, the sanction is applied mechanically and rigidly, without considering the reasons for the violation of the law. In particular, situations where damage to a tree by nature or disease results in a threat to human life or health, which is why immediate removal of the tree (without obtaining a permit) is not considered. The Tribunal pointed out that even committing a tort in a state of greater necessity, under the provisions under review, does not exclude liability for the tort. It is purely objective and detached from the individual circumstances of the infringement. The liable entity was not guaranteed the possibility of exempting from liability by proving that the act prohibited by the legal act was committed for reasons beyond its control. Moreover, the constitutional court pointed out the inflexible method for determining the amount of the fine for removing a tree or shrub without a permit, which does not leave any room for taking the degree of damage to nature, the severity of the breach of a statutory obligation, or the financial situation of the perpetrator of the tort into account. The above circumstances determined that the challenged provisions were declared conflicting with the Constitution.

The factor that set the path for the Polish legislator towards the desired change of normative regulation was undoubtedly Recommendation No R (91) 1 of the Committee of the Minister to the Member States on Administrative Sanctions, adopted by the Committee of Ministers on 13 February 1991 at the 452nd meeting of the Ministers' Deputies. It set the standards for the application of administrative sanctions. These standards were also shaped partially by the jurisprudence of the European Court of Human Rights. In particular, note that the Tribunal has a specific, autonomous understanding of the «criminal case» referred to in Art. 6 sec. 1 of the European Convention on Human Rights. In its jurisprudence, it has repeatedly recognised that imposing an administrative sanction on an individual may fall within the scope of its designates, which updates the obligation of states-parties to the convention to guarantee a standard of protection, which is provided for by the aforementioned provision to individuals. The factor determining the criminal nature of an administrative sanction, in the Tribunal's opinion, is its repressiveness (Błachnio-Parzych, 2011).

In 2017, the Polish legislator, on the occasion of a thorough amendment of the Act of 14 June 1960 – the Code of Administrative Procedure, decided to extend the scope of regulating the Act to the issue of imposing administrative fines, as well as granting reliefs in their implementation. The provisions in question were grouped under section IVa of the procedural act, entitled 'Administrative Fines'. They reiterate the criminal law principle of *lex mitior retro agit* into administrative law (the more relative law acts retroactively), govern the directives of sentencing, provide for the exclusion of liability in the event that the act was breached as a result of force majeure, and provide obligatory and optional grounds for waiving the imposition of a penalty, establish limitation periods for the imposition of an administrative fine, provide options for granting relieves in the execution of an administrative fine.

However, these regulations are not free from some shortcomings. First of all, justified doubts may be raised because, despite its substantive nature, it is included in the procedural act to a large extent. So far, while the substantive regulations could be found in the code, their number was relatively low. The legislator's action disturbed the purity of the code regulation as an act containing procedural standards and was criticised by representatives of the doctrine (Bąkowski, 2017).

Among the imperfections of the provisions of section IVa of the Code of Administrative Procedure, one may also identify powerful inspiration from criminal law solutions that do not fit with administrative liability. To demonstrate it, the provisions of art. 189c of the Code of Administrative Proceedings should be quoted, as it introduces the principle *lex mitior retro agit* as a standard. It reads: «If at the time of issuing a decision on an administrative fine, law other than the time of the violation of the law as a result of which the penalty is to be imposed is in force, the new law shall apply. However, the law in force previously shall be applied if it is more relative to the party». The legislator omitted the fact that the quoted norm refers to the situation of amending the «act». Simultaneously, in administrative law, the factors co-shaping the liability for an administrative tort may also be included in regulations or acts of local law. More statutory shortcomings of similar nature can be found; however, a broader reference

to these shortcomings would go beyond the scope of this study.

Note that art. 189A par. 2 of the Code of Administrative Procedure regulating the scope of standardisation of section IVa of the Code of Administrative Prodecure provides for the priority of application of separate (non-Code) provisions to the extent that they regulate: 1) the reasons for the imposition of an administrative fine, 2) waiving the imposition of an administrative fine, 3) limitation periods for the imposition and enforcement of an administrative fine, 4) interest on an overdue administrative fine, 5) relief in the execution of an administrative fine. The main problem of such a solution lies in the fact that «in the case of administrative fines, exceptional regulations, scattered across many specific acts, constitute the majority, which, in practice, makes the code regulation an exception and not a rule» (Sawczyn, 2020).

Moreover, it is worth noting that section IVa of the Code of Administrative Procedure regulation regulates the issues of liability for torts carrying administrative fines. However, it does not apply to other administrative sanctions, which, as already mentioned, come in abundance in administrative law. This results in a diversification of the legal situation of individuals subject to sovereign, sanction-oriented interference by public administration bodies. It isn't easy to find reasonable grounds for diversification. At this point, it is worth recalling the view expressed by W. Radecki, who indicates that «what the legislator described in section IVa of the Code of Administrative Procedure is a typical makeshift act that cannot replace a decent law on liability for administrative torts» (Radecki, 2020).

The above leads to the conclusion that the Polish legislator has not yet succeeded in developing administrative liability. The normative solutions that have been introduced in recent years, which are far from perfect, only partially regulate the fundamental issues related to the subjecting of an individual to liability under administrative law. It appears that the development of a coherent concept of administrative liability is mainly hindered by the breadth of administrative law and the related variety of sanctions and their functions (Wyrzykowski, Ziółkowski, 2012). However, this is by no means an argument for abandoning attempts to develop a model of this liability that would correspond to the standards of a democratic state ruled by law. The current normative state requires public administration bodies to proceed with particular caution when applying sanction provisions. The lack of statutory regulation of crucial issues when it comes to setting standards for the protection of an individual does not exempt the authority from resorting to constitutional and international law norms, in so far as they allow for the creation of a model of the legal protection of an individual against interference in their legal situation. In many instances, it will require some complex efforts at interpretation. As indicated by A. Kaźmierska-Patrzyczna and A. Rabiega-Przyłęcka, the standards for applying administrative sanctions can be derived from various provisions defining the position of the administered person in relation to public administration. The Constitution of the Republic of Poland of 2 April 1997 should play a unique role in this respect. It sets rudimentary (also in the scope of applying administrative sanctions) standards of the rule of law (Kaźmierska-Patrzyczna, Rabiega-Przyłęcka, 2011). Similarly, the jurisprudence of courts, and above all administrative courts, have an essential role to play, as the latter, within their competencies, perform a judicial review of sanction decisions.

However, it seems that the most desirable solution to ensure the appropriate standard of protection to an individual in the process of administering administrative liability is to create a statutory regulation that would govern all aspects of the core issues that influence this liability. It should take into account the hitherto achievements of the doctrine of administrative law and the jurisprudence of administrative courts and the Constitutional Tribunal. Time will tell if we have long to see it coming.

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