Iuś Novum
2/2014

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CONSTITUTIONAL AND LEGAL ASPECTS OF THE PRINCIPLE OF DOUBLE-INSTANCE ADMINISTRATIVE PROCEEDING

The Constitution of the Republic of Poland provides every party to administrative proceeding with the right to appeal against rulings and decisions made in the courts of the first instance (trial courts)[1]. In the doctrine, it is assumed that law defined in this way is public subjective law, whose content is the right to challenge, with the use of legal steps, public administration commending activities[2]. At the same time, it plays a supervisory role with regard to the decisions made during a particular instance, however, the constitutional legislator does not define the concept of the right to appeal against the proceeding and leaves the decision on how this right is to be executed to ordinary legislation, which adopts different solutions, most often those developed in the past. Because of that, the treatment of the principle of the right to appeal is a derivative of the historical development of the scope of supervision of public administration. As a result, the already existing solutions developed in the pre-constitutional period are accepted and this means that many of them can raise doubts from the point of view of the constitutional principle.

It seems that the doctrine treats this issue routinely, thus it does not make an attempt to critically assess the former regulations and does not confront them with the content of Article 78 of the Constitution. The organs whose main task is to ensure the compliance of acts with the Constitution act in a similar standard way and there is a complete lack of consideration to the discussed constitutional principle and its compliance with international law that Poland is a signatory[3] to. This state must arouse fears and anxiety, especially in the times when the

[1] Article 78 of the Constitution of the Republic of Poland (Journal of Laws No. 78, item 483, with the changes that followed).

[2] See: A. Błaś, and J. Boć [in:] *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.* [Constitutions of Poland and a commentary on the constitution of the Republic of Poland of 1997], Wrocław 1998, p. 140.

[3] Article 13 on the Protection of Fundamental Human Rights and Freedoms (Journal of Laws of 1993, No. 61, item 284 with the amendments that followed).

legislative power more and more often gives up a systematic solution of norms and accepts a temporary one and alternative procedures to protect rights and freedoms. Thus, everything is unclear, including the issue whether whatever protection is possible and guaranteed. It should be also stated that the state occurs in a situation when there is an increased number of constitutional organs whose task is to protect constitutional virtues.

The question about a constitutional scope of the principle of the right to appeal (courts of first and second instance) against administrative proceeding is in fact a search for *ratio legis* for the "specific" appeal system existing in the Polish law, adopted from the past, e.g. in social insurance, which – despite the new regulation of 1998, i.e. after the Constitution had entered into force – maintains anachronistic solutions of the times of the People's Republic of Poland because it deprives a party of the right to appeal with results typical of administrative proceeding. There are many such cases and they do not only result from the past. The legislative presence is eager to create them[4]. Such exceptions stop being exceptional and it is difficult to find justification for them in the time when there is a full court supervision of public administration. It seems that the belief that administration works best when it is not supervised has won. Thus, the exertion of appropriate understanding of the constitutional principle of the right to appeal in administrative proceeding is in fact an attempt to ensure an adequate standard of human rights protection.

Referring these comments to particular examples, it is necessary to highlight all kinds of the appellate procedures, in which courts were given the power to supervise the decisions taken by administrative organs. A model for such proceeding is Article 83 item 2 of the Act on the System of Social Insurance [ASSI][5], which provides that an appeal can be made to a court and not to the administrative organ of the second instance. Such a solution seems to be defective. Article 78 of the Constitution creates the right to appeal against a decision issued by an administrative organ of the first instance for every party. Thus, for the party, whose case is adjudicated in the course of a decision, it creates a specific proceeding "claim" that consists in a request to launch a proceeding before an organ of the second instance, which aims to supervise the adjudication issued formerly. The consequence of the system of supervision that was designed this way is the principle of the right to appeal. On the other hand, its essence is such a construction of the proceeding, where a civil-legal decision is made,

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[4] E.g. Articles 109–110 of the Act of 27 August 2004 on providing health care services financed from public funds (Journal of Laws No. 164 of 2008, item 1027 with the amendments that followed); in accordance with the Act, the President of National Health Fund is an organ that decides on the provision of services in the case when the issues are subject to court competence; due to that there is a legal mess, both in the field of subjective and objective matters. Such a state is neither good for the stability, nor the authority of a court.

[5] Act on the System of Social Insurance of 13 October 1998 (Journal of Laws No. 205 of 2009 item 1585 with the amendments that followed) hereinafter referred to as ASSI.

that the organs of two instances within the same administrative structure, could supervise the way in which the case had been dealt with formally and as to the subject matter.

The principle of the right to appeal expressed in Article 15 of the Code of Administrative Proceeding[6] does not allow for exceptions. It seems that Article 78 of the Constitution does not legitimize such an exception, however, the regulation's second sentence says that any exceptions to the principle of each party's right to appeal against decisions and rulings issued by an organ of the first instance can be constituted by an Act. However, accepting the conclusion made based on the linguistic interpretation of Article 78 second sentence of the Constitution, which assumes that there may be legal situations with no appeal against a decision, as happens in Article 83 item 2 of the ASSI, would be in conflict not only with the first sentence of Article 78 of the Constitution, but also with Article 6 item 1 of the European Convention on the Protection of Fundamental Human Rights and Freedoms and Article 14 item 1 of the International Covenant of Civil and Political Rights. It would not meet the requirement of procedural justice, which is indispensable in the process of an appropriate protection of rights. Thus, it is necessary to treat the rule that some decisions issued by public administrative organs can be exempt of appeal against as unacceptable.

Appeal as a mechanism of supervision of non-absolute administrative decisions is a condition *sine qua non* of a properly built legal order, i.e. such that meets the rule of appropriate protection of an individual's rights against the commending activities of the State and which ensures legal activities of public administration organs. An exception made in this matter in Article 83 item 2 of the ASSI does not apply these values. Although it allows for filing an insurance case appeal in court, it does not give a court a possibility to fully supervise whether the ruling issued by ZUS [Social Insurance Institution] is in compliance with law. The compliance is to refer to the correct use of regulations of the substantive and proceeding law because an appeal as a complaint measure is supposed to implement the constitutional principle of legality and law abiding operation of administration.

Limitations to that lead to a violation of the fundamental procedural rights of a party to an administrative proceeding because the party has no possibility of questioning the appropriateness of the proceeding while it is pending. The approval of this state is connected with a permission and consent for a radical limitation to the rights of a party to the administrative proceeding in comparison with the standard proceeding defined in the provisions of the Code of Administrative Proceeding (CAP). It is necessary to highlight that the proceeding conducted by ZUS is a type of administrative proceeding, which is stated

[6] To read more about the principle see: Z. Kmieciak, *Odwołanie w postępowaniu administracyjnym* [Appeal in administrative proceeding], Warszawa 2011, p. 54.

in Article 180 § 1 of the CAP and, if the Act on Insurance does not introduce exceptions, it is pending based on those provisions. There must be an appeal organ within this proceeding because Article 181 of the CAP says separate regulations are to establish this organ.

Thus, an appellate organ cannot be any court, either a common court or an administrative one. Courts are not organs of administration, which is stipulated in the Constitution, which in Article 10 introduces a principle of the separation of powers and in Article 184 defines administrative courts' cognition. At the same time, Article 177 specifies the scope of tasks of the judiciary, emphasizing that its main task is the administration of justice in all cases, except those whose adjudication was restricted to a special court jurisdiction. On the other hand, administrative courts supervise administrative activities with regard to the scope specified in the Act. The analysis of these regulations unanimously shows that none of the discussed courts can be an appellate organ. This means that every decision issued by ZUS should not be subject to supervision in the course of appeal filed in a court of appeal as was regulated in Article 181 of the CAP.

What model of supervision can be adopted is another issue. The Act can choose if it is a full devolutionary model[7], adequate to the Polish system of law, or if the legislator uses a non-devolutionary model. Regardless of this choice, which is left to the legislator to decide on and is stated in Article 78 second sentence of the Constitution, every kind of adjudication of the administrative organ must be subject to supervision within an administrative proceeding. Such a conclusion is the main condition and assumption of appropriate protection of rights in the relations between a citizen and public administration. The system of appeal to a court against the decisions made by ZUS does not meet the requirements because it deprives a party of the right to supervise such adjudication and thus violates Article 78 sentence 1 of the Constitution. It is worth saying that, in the rulings of the Constitutional Tribunal, the supervision of decisions in appellate proceedings is recognized to be the fundamental guarantee of the protection of the rights of an individual. The examination of a case twice is of key importance for ensuring that protection (see the ruling of the Constitutional Tribunal of 15 December 2008, P57/07, and the ruling of the Constitutional Tribunal of 14 October 2009, Kp4/09).

In such conditions, a situation defined in Article 83 item 2 of the ASSI cannot be treated equivalent to appeal and one cannot assume that the course of decision verification adopted there means the administration of the constitutional rights to appeal. Article 78 of the Constitution supports the state of no approval of this solution. Since everybody has the right to appeal against a decision of the first instance, the exceptions from that rule cannot consist in depriving anybody

[7] More on the topic of administrative course of appeal: J. Zimmermann, *Administracyjny tok instancji* [Course of administrative instances], Kraków 1986, p. 11 and next.

of that right. They can, however, occur in two situations. One of them is the right to appeal to the same organ (non-devolutionary means), which – according to rulings – meets the constitutional requirement but can be connected with the adoption of a principle that administrative proceeding is only a preliminary procedure preceding a court proceeding. Then, administrative proceeding can take place in one instance. Then, a court does not supervise an administrative decision in the course of adjudicating the appeal, but autonomously rules in the case, which can be filed in court because the administrative proceeding has been exhausted. In both cases, there is an exception in view of Article 78 second sentence of the Constitution. Such an exception can be accepted because it does not violate constitutional principles and does not make a court an appellate organ whose task is to supervise administration. A different interpretation of the discussed exception remains in conflict with the rules provided by the Constitution.

Highlighting the unconstitutionality of the present solution, it is also necessary to consider that the administrative course of instances plays a supervision and control role[8], and due to that it guarantees the administration of the constitutional rule of law defined in article 7 of the Constitution. In accordance with the provision, the organs of public authority act in compliance with law and within the limits of law. From that principle, the Constitutional Tribunal rulings derive many other detailed principles, e.g. the principle of legal certainty, the principle of definiteness (unambiguity) of law or the principle of the legal system completeness. Based on these considerations, the principles that deserve special attention are those that request that the organs of public authorities "dealing with the case" (decision making bodies as well as those administering law) act in a way that guarantees law certainty. Meeting this legal demand is only possible in the case when an organ adjudicating an appeal can verify activities undertaken within administrative proceeding and assess decisions about rights and duties.

A lack of such a possibility frees an organ from the necessity to act in compliance with law because the violation that takes place there does not translate into the final assessment of the ruling. Just because of these reasons, there is a possibility of change in the interpretation and administration of law that is adjusted to the situation and meets political needs but does not serve the appropriate administration of law. This kind of practice is in conflict with the opinions expressed by the Constitutional Tribunal many times, e.g. the violation of the demand to ban "the change of rules" in the course of the proceeding in order to satisfy a party's particular interests, i.e. "within the same case", including improper interpretation of law. Sometimes, the principle is also called a principle of observance of interests pending or a ban on using traps (compare rulings of the Constitutional Tribunal: (1) of 12 September 2005, S 13/05, Journal

[8] See J. Zimmermann, *Polska jurysdykcja administracyjna* [Polish administrative jurisdiction], Warszawa 1996, p. 178 and next.

of Laws No. 186, item 1566, OTK ZU Series A, No. 8, item 91, p. 1084; (2) of 14 March 2005, K 35/04, Journal of Laws No. 48, item 461, OTK ZU Series A No. 3, item 23, p. 276 and (3) of 2 December 2002, SK 20/01, Journal of Laws No. 208, item 89, OTK ZU Series A, No. 7, item 89, p. 1162).

Thus, the defective interpretation of the constitutional principle of the right to appeal against administrative decisions (two instances) has various consequences. Not all of them have been discussed because they are not only important from the legal point of view. They are often connected with irresponsibility of the State for the economic consequences of discretionary acting and lead to the liquidation of an economic entity. Such actions are possible in the time when no wójt (mayor of a rural commune) can expect a lack of supervision of their discretional decision even if it solves a minor case. In the same legal system, the decisions of ZUS worth many-million zlotys and those of other regulatory organs are not subject to such supervision. The obvious lack of balance between these situations has no justification if the principle of the right to appeal is connected with the idea of a democratic rule of law state.

CONSTITUTIONAL AND LEGAL ASPECTS OF THE PRINCIPLE OF DOUBLE-INSTANCE ADMINISTRATIVE PROCEEDING

Summary

The article discusses the issues connected with a party's constitutional right to appeal against a decision made by public administration organs. A model conception assumes that appropriate protection of an individual's rights is possible only in a situation when an organ of the second instance can supervise a decision made by an organ of the first instance. The formal condition of appropriateness of such supervision is a statutory assumption that the two organs remain in the administrative structure and this way they create an administrative sequence of instances. In so designed constitutional model, an administrative court is an instance of supervision of the final decisions of the above-mentioned organs. Law approves some exceptions to that solution, which consist in exemption of some administrative decisions from supervision by another instance and appeals against them are adjudicated by a common court, which – in accordance with the Constitution – has no supervision power over administration, thus has a limited jurisdiction over its operation. The article highlights constitutional doubts that are connected with the phenomenon and threats it can pose to the protection of an individual's rights.

ASPEKT KONSTYTUCYJNOPRAWNY ZASADY DWUINSTANCYJNOŚCI POSTĘPOWANIA ADMINISTRACYJNEGO

Streszczenie

W artykule została podjęta problematyka konstytucyjnego prawa strony do odwołania się od rozstrzygnięcia organów administracji publicznej. Modelowe ujęcie zakłada, że prawidłowa ochrona praw jednostki jest możliwa tylko w sytuacji, gdy decyzja organu pierwszej instancji może być skontrolowana przez organ wyższego stopnia, przy czym warunkiem formalnym poprawności takiej kontroli jest ustrojowe założenie, iż organy pozostają w strukturze administracji i w ten sposób tworzą administracyjny tok instancji. Ostatecznie działania organów w tak ukształtowanym, konstytucyjnym modelu kontroluje sąd administracyjny. Od tego rozwiązania prawo dopuszcza wyjątki, które polegają na wyłączeniu niektórych spraw administracyjnych spod kontroli instancyjnej, a odwołania w nich składane rozpoznaje sąd powszechny, który konstytucyjnie nie sprawuje kontroli administracji, zatem ma ograniczone kompetencje w zakresie ingerowania w jej działalność. Artykuł wskazuje na związane z tym zjawiskiem wątpliwości konstytucyjne oraz niebezpieczeństwa, które mogą wiązać się z ochroną praw jednostki.

L'ASPECT CONSTITUTIONNEL ET LÉGAL DU PRINCIPE DE DEUX INSTANCES DE LA PROCÉDURE ADMINISTRATIVE

Résumé

Dans l'article on présente la problématique du droit constitutionnel de la partie pour appeler d'un jugement des organes de l'administration publique. La présentation modèle admet que la protection juste des droits de l'individu n'est possible que dans le cas où la décision de l'organe de première instance peut être contrôlée par l'organe du degré supérieur où la condition formelle de la correction de ce contrôle repose sur un principe constitutionnel que les organes restent dans la structure de l'administration et ainsi forment tout un système des instances. Finalement, l'action des organes dans ce modèle constitutionnel ainsi formé est contrôlée par la cour administrative. De cette solution le droit admet quelques exceptions qui excluent certaines affaires administratives du contrôle de l'instance et leur appel est traité par la cour universelle qui de point de vue constitutionnel n'accomplit pas de contrôle de l'administration alors, elle a des compétences limitées dans le cadre d'intervention à son activité. L'article indique tous les doutes constitutionnels et les dangers qui peuvent être liés avec la protection des droits de l'individu dans cette situation.

КОНСТИТУЦИОННО-ПРАВОВОЙ АСПЕКТ ПРИНЦИПА ДВОЙНОЙ ИНСТАНЦИИ АДМИНИСТРАТИВНОГО СУДОПРОИЗВОДСТВА

Резюме

Статья поднимает проблематику конституционного права стороны на обжалование решений государственных органов. Такой подход предполагает, что соответсвующая защита прав субъекта возможна только в ситуации, когда решение органа первой инстанции может быть контролировано органом высшей инстанции, причём формальным условием правильности такого контроля является конституционная предпосылка, что органы остаются в рамках административной структуры и таким образом представляют ход инстанций. Окончательные решения в сформированной таким образом конституционной модели находятся под контролем Административного суда. Право допускает исключения из такого решения, состоящие в освобождении некоторых административных вопросов от контроля инстанциями, а предъявляемые обжалования рассматривает общий суд, который с точки зрения Конституции не осуществляет контроля над государственными учреждениями, в связи с чем имеет ограниченные компетенции в сфере вмешательства в их деятельность. Статья указывает на связанные с этим явлением сомнительные моменты конституционного характера, а также опасности, касающиеся защиты прав субъектов