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The division of Competences between Administrative Courts and Common Courts in Poland

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Abstract: *The constitution defines the competences of a two-instance court consisting of 16 voivodship administrative courts and the Supreme Administrative Court as the control of public administration bodies. The judiciary in this respect is, therefore, subject to checking the legality of administrative bodies. This control generally does not provide for substantive adjudication replacing administrative acts. Administrative courts do not take over the case to recognize but perform its control. Such a case is still being decided by a public administration body.*

Administrative courts first appeared in the territory of Poland as early as at the beginning of the 19th century, that is soon after the concept was created and implemented as having specialized entities, other than common courts, examine the cases of litigations between the administration and entities subordinate to it. In the Constitution of the Duchy of Warsaw from the year 1807, in Title III, the Council of State was established, which, according to Article 17, was to deal, “with conflicts of jurisdiction between administrative and judicial bodies, administrative disputes, and

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the judgment of public administration officials”¹. Therefore, the Council of State was an entity whose competence involved examining competence disputes between bodies of the public administration and civil and penal courts as well as deciding in cases laid against administrative bodies in cases connected with the way they applied the law. As for the cases concerning the scope of the administration applying the law, the State Council examined them as a body of second instance. This was because the body of first instance were prefectural councils. This model of resolving disputes between public administration and entities subordinate to it survived until Congress Poland’s autonomy was abolished in the year 1866². After regaining independence, the democratic Constitution from 1921 provided for the creation of a two-instance administrative judiciary, although during the existence of the Second Polish Republic (1918–1939), this ambitious goal was never realized. In the period 1922–1939, only the Supreme Administrative Tribunal operated as a one-instance court. After the year 1944, at the beginning of the People’s Republic of Poland, the administrative judiciary was not recreated at all. Only on the grounds of the Supreme Administrative Court Act from 31st January 1980 and on the basis of the change of the Code of Administrative Procedure³ was the Supreme Administrative Court established, which, like its predecessor from before the war, examined cases within a one-instance procedure. The Supreme Administrative Court was subject to judiciary control because the Public Prosecutor General, the Minister of Justice, the Head of the Supreme Administrative Court, and the First President of the Supreme Court could launch an extraordinary revision of its judgments. The Supreme Administrative Court did not have a strong position in the political system because the Constitution of the Polish People’s Republic from 22 July 1952⁴ did not establish its position.

In the Constitution of the Republic of Poland from 2 April 1997⁵, which referred to the best democratic traditions, after more than 50 years,

¹ Quotation after the website of the Polish American Historical Association: <http://polishfreedom.pl/en/document/coming-soon-we-are-still-working-on-it>; for the Polish original see e.g. M. Adamczyk, S. Pastuszka, *Konstytucje polskie w rozwoju dziejowym 1791–1982*, Warszawa 1985, p. 65.

² More on this subject: J.S. Langrod, *Zarys sądownictwa administracyjnego ze szczególnym uwzględnieniem sądownictwa administracyjnego w Polsce*, Warszawa 1925, pp. 171–172 and J. Borkowski, *Reforma polskiego sądownictwa administracyjnego*, «Państwo i Prawo» 2002, fasc. 5, p. 3.

³ Journal of Laws No. 4, item 8.

⁴ Journal of Laws No. 33, item 232 with amendments.

⁵ Journal of Laws No. 78, item 783 with amendments.

the position of administrative judiciary in Poland was established again. Article 175 § 1 of the Constitution of the Republic of Poland directly indicates administrative courts as a type of state authority that, alongside the Supreme Court, common and military courts, is responsible for administering justice. Therefore, the legislator decided that only the courts enlisted in the above-mentioned rule of the Constitution of the Republic of Poland were entitled to administer justice; at the same time, “the catalogue of courts in the Constitution is purely enumerative and it excludes the possibility of creating, in statutes, new kinds of courts (in the understanding of the Constitution), not included as one of the categories enlisted in the discussed rule”⁶. Thus, the democratic Constitution of the Republic of Poland from 1997 precisely lists administrative courts among the subjects exclusively entitled to administer justice in Poland. The jurisdiction of administrative courts is established in Article 184 of the Constitution of the Republic of Poland, according to which “The Supreme Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration. Such control shall also extend to decisions on the conformity to the laws of resolutions of bodies of local government and normative acts of territorial bodies of government administration”.

The above-mentioned Article 184 of the Constitution of the Republic of Poland is of fundamental significance for distinguishing the competences of common courts and administrative courts. It is even sometimes stated that this rule determines that, “the Constitution reserves the control of public administration for administrative courts and thus excludes the jurisdiction of common courts in this scope”⁷. Therefore, the legislator determined the scope within which justice is administered only and exclusively by administrative courts. It can be even said that Article 184 of the Constitution of the Republic of Poland formulated the presumption on the competence of the jurisdiction of administrative courts in cases where the correctness of public administration functioning was examined. Indeed, the Constitution provision positively established the jurisdiction of administrative courts, namely by determining

⁶ B. Naleziński, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, p. 527.

⁷ R. Hauser, *Konstytucyjny model polskiego sadownictwa administracyjnego*, [in:] J. Stelmasiak, J. Niczyporuk, S. Fundowicz (ed.), *Polski model sadownictwa administracyjnego*, Lublin 2003, p. 145.

the subjective scope and the objective scope of cases whose examination is included in the jurisdiction of this type of courts.

The subjective scope of the competence of administrative courts is determined by the notion of 'public administration'. It involves all entities that execute, in an authoritative way, actions associated with the functioning of state administration towards the entities not included in public administration. The definition of a public administration body can be found in Article 5 § 2 item 3 of the law from 14 June 1960, "Code of Administrative Procedure"⁸, according to which public administration bodies are understood as ministers, central bodies of government administration, voivodes, other local bodies of government administration (both integrated and non-integrated) acting on their behalf or on their own behalf, bodies of local self-government units as well as bodies and other entities of states and entities that are not state entities in case when, by virtue of law or in accordance with agreements, they are appointed to settle administrative cases. The Code of Administrative Procedure is therefore an open collection of entities fulfilling tasks within the scope of public administration as, "this rule adopts a broad understanding of bodies, including public administration bodies in the constitutional approach, by means of which the state executes administrative authority and whose main task is to realize this authority, as well as bodies of other entities, not belonging to this system, which fulfill functions appointed to public administration additionally, alongside their primary function"⁹. The notion of a public administration body, or, to put it more comprehensively, of public administration as such, is therefore broader than it is commonly understood. Indeed, it is commonly associated exclusively with the government or self-government administration. Instead it involves all the entities that, regardless of their organizational structure or ownership structure, act in an authoritative way towards the entities that are not included in 'public administration'. Thus, the entities included in 'public administration' constitute an open set, which is rather blurred. Besides government and self-government administration, it also includes state entities, which, as a rule, do not execute actions from the scope of public administration¹⁰, as well as professional self-

⁸ Journal of Laws 2018, item 2096 with amendments; later, the Code of Administrative Procedure.

⁹ K. Klownowski, [in:] H. Knysiak-Sudyka (ed.), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2019.

¹⁰ E.g. the Presidents of the Courts who issue administrative decisions in cases from the field of public administration (more on this subject in P. Szustakiewicz, *Praktyka udzielenia infor-*

government bodies, social administration bodies, foundations, and even enterprises¹¹. As a result, “the scope of the general competence is open and assigning it is not determined by the legal character of the entity, but it can be assigned in accordance with a legal rule or with a concluded agreement concerning the competence of taking decisions in individual cases by means of an administrative decision”¹².

The competence of administrative courts involves the ‘control’ of public administration. In colloquial language, the notion of control means, “checking something, examining, comparing the actual state of affairs with the required state of affairs, as well as determining any possible deviation”¹³. Therefore, control consists of two elements: determining the desired state of affairs and checking the object of control from the point of view of whether it meets the desired parameters. The notion is similarly conceived in the administrative law doctrine¹⁴; it is indicated that the, “function of control appears to be a sequence of actions like recognizing (determining) the existing state of affairs – its judgment – diagnosis of the causes (sources) of the irregularities – giving directions aiming at removing the irregularities and preventing the occurrence thereof in the future (recommendations of current corrective measures and formulating proposals for future)¹⁵. Thus, the controlling actions follow a certain dynamics moving from determining the desired state of affairs to presenting the controlled subject with the causes of the irregularities and the actions that should lead to removing the irregularities and to preventing the occurrence thereof in the future. At the same time, control does not involve functions of an authoritative character, within which the controlling entity, by intervening in the functioning of the controlled one, executes certain actions that aim to restore the state of affairs conforming with the accepted model of proceeding. This model of control was adopted during the work to create a two-instance

macji przez sądy na podstawie ustawy z dnia 6 września 2001 r. o dostępie do informacji publicznej, w świetle orzecznictwa sądów administracyjnych, «Wojskowy Przegląd Prawniczy» 2017, No. 4, pp. 76–96.

¹¹ Cf. the Supreme Administrative Court decision from 29 October 2013 file reference number I OSK 1213/16 concerning the obligation of the private power company CBOŚA to make public information accessible.

¹² B. Adamiak, [in:] B. Adamiak, J. Borkowski, A. Skoczylas, *Prawo procesowe administracyjne Tom 9*, Warszawa 2010, p. 102.

¹³ S. Dubisz (ed.), *Wielki Słownik Języka Polskiego*, Warszawa 2018, p. 449.

¹⁴ Cf. E. Komorowski, [in:] M. Chmaj (ed.), *Prawo administracyjne. Część ogólna*, Warszawa 2003, p. 84 and A. Wiktorowska, [in:] M. Wierzbowski (ed.), *Prawo administracyjne*, Warszawa 2006, p. 91.

¹⁵ J. Jagielski, *Kontrola administracji publicznej*, Warszawa 2005, p. 15.

administrative judiciary in the years 2000–2002. It was then argued that, “in a situation when the control of the functioning of public administration is executed by administrative courts, the case whose subject is connected with the activity of a given body of public administration, the proceedings of the case still depend on that given body.” The task of the administrative court consists of controlling (evaluating) this activity. The court, as a result of pursuing the action (omission) taken against the body, does not accept the case for final proceedings, but it is only obliged to control (evaluate) the activity of the body. For this reason, the administrative court, as a rule, is not entitled to replace a public administration body and issue a final decision concerning the case”¹⁶. Administrative courts are obliged to control the authoritative decisions of administrative bodies, as according to Article 3 § 1 of the law from 30 August 2002, “Law On Proceedings Before Administrative Courts”¹⁷, administrative courts execute control over the functioning of public administration and they apply the means determined in the law. In this law, a general competence premise was determined, which allows administrative courts to control those actions of public administration that have an authoritative character¹⁸. Therefore, they are not entitled to control those actions of administration in connection to which it acts like any other participant of legal transactions, e.g. as a party of a civil-law contract or an employment contract. The scope of control of administrative courts was determined in Article 3 § 2 of the Law On Proceedings Before Administrative Courts, in accordance with which the control of public administration executed by voivodship administrative courts and Supreme Administrative Court involves taking decisions in cases of complaints against:

- 1) administrative decisions;
- 2) rulings issued in the course of administrative proceedings which can be objects of complaint: either those finishing the proceedings or those deciding about the subject matter of the case;
- 3) decisions issued in enforcement proceedings and proceedings to secure a claim, which can be objects of complaints, excluding the creditor’s decisions about the inadmissibility of the lodged claim

¹⁶ R. Hauser, A. Kabat, *Właściwość sądów administracyjnych*, «Ruch Prawniczy, Ekonomiczny i Socjologiczny», 2004, fasc. 2 p. 26.

¹⁷ Journal of Laws 2019, item 2325, later, the Law On Proceedings Before Administrative Courts, transl. by Albert Pol, *Naczelný Sąd Administracyjny 2017*, 3rd edition, Warszawa 2017.

¹⁸ Cf. J.P. Tarno, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Warszawa 2006, p. 24.

as well as the decisions whose object is the creditor's standpoint in connection with the lodged claim.

- 4) acts and activities from the scope of public administration concerning the rights or obligations following the legal regulations other than those determined in items 1–3, with the exclusion of acts or activities undertaken within the administrative proceedings determined in the Code of Administrative Procedure, determined in parts IV, V and VI of the law from 29 August 1997 Tax Ordinance¹⁹, proceedings mentioned in part V in the 1st Chapter of the National Fiscal Administration Act from 16 November 2016²⁰, as well as the proceedings to which the regulations of the appointed laws apply;
- 5) written interpretations of tax law regulations issued in individual cases, opinions to secure a claim and refusals to issue opinions to secure a claim;
- 6) local law acts issued by bodies of self-government units and by local bodies of government administration;
- 7) acts issued by bodies of local self-government units and their associations, other than those determined in item 5, issued in cases from the scope of public administration;
- 8) acts of supervision over the functioning of bodies of self-government units;
- 9) inactivity or prolixity in proceedings in situations determined in items 1–4 or prolixity in proceedings;
- 10) inactivity or prolixity of proceedings in cases concerning acts or public administration actions from the scope of public administration concerning rights or obligations following from the legal regulations undertaken within administrative proceedings determined in the law from 14 June 1960 "Code of Administrative Procedure", as well as proceedings determined in parts IV, V and VI of the law from 29 August 1997 "Tax Ordinance", and proceedings to which the regulations of the respective laws apply, but other than those determined in items 1–3;
- 11) objections concerning decisions issued in accordance with Article 138 § 2 of the Code of Administrative Procedure.

A detailed catalogue of cases subject to cognition of administrative courts indicates that the legislator intended to determine the competences of administrative courts in the broadest possible way so that there

¹⁹ Journal of Laws 2019, item 900 with amendments.

²⁰ Journal of Laws 2019, item 768 with amendments.

could be no doubts that each authoritative action of a public administration body towards an entity not being part of public administration is subject to judicial control.

It should be noticed, however, that in the contemporary Polish legal system, there are two solutions that appear to question the presumption of cognition of the administrative court from Article 184 of the Constitution.

First, there is a number of legal solutions subjecting administrative acts (including administrative decisions) to the cognition of common courts. They include cases concerning social insurance, in which the decisions of pension and disability pension bodies (the Social Insurance Institution, ZUS, or the Agricultural Social Insurance Fund, KRUS) to grant or to refuse to grant a benefit are subject to control which is part of common judiciary – social insurance courts. Another kind of such cases are issues connected with the remuneration of prison service officers. In accordance with Article 220 of the Prison Service Act from 9 April 2010²¹, cases from the scope of labour based relationship of prison guards concerning, “above all financial issues, that is those connected with the remuneration of officers, taking advantage of parental privileges, the working time as well as issuing the certificate of service and the evaluation report, after following the whole official procedure”²² are subject to the control of labour courts. In such situations a doubt arises whether the character of the division of cognition between administrative courts and common courts is not artificial, and whether the administrative court control could not possibly be replaced by common court control as it is the case in Anglo-Saxon countries. Nevertheless, it is indicated that, “the difference between public administration control executed by an administrative court and processing a case which results from the functioning of public administration is very clear. In a situation when the control of the functioning of administration is performed by an administrative court, it is significant that the proceedings of a case whose subject is connected with the functioning of a given public administration body does not cease to depend on that given body. The task of an administrative court consists of evaluating (controlling) this activity. It means that following a litigation of the acts (omission) of the body, the administrative court does not accept the administrative case for final

²¹ Journal of Laws 2019, item 1427.

²² R. Borek-Buchajczuk, [in:] M. Mauryk, M. Zoń (eds.), *Ustawa o Służbie Więziennej. Komentarz*, LEX 2013.

proceedings”²³. Essentially, the difference thus consists of the method of executing justice. Administrative courts only control the functioning of public administration bodies, but the case is still decided by the entities that, in accordance with Article 153 of the Law On Proceedings Before Administrative Courts, are supposed to follow the dispositions included in the justification of the judgment of the voivodship administrative court or the Supreme Administrative Court. If a public administration act is litigated to a common court, the case is taken over by that court for final proceedings. The common court judgment replaces an administrative act. Upon the reception of the common court judgment, the public administration body is obliged to only fulfill it and not to make a new decision in the case, following the guidelines included in the reasons of the sentence or of the decision.

Secondly, the law from 9 April 2015 on changing the Law On Proceedings Before Administrative Courts²⁴, in Articles 145a and 149b § 1b of the Law On Proceedings Before Administrative Courts, allowed courts to issue a judgment, “stating the existence or the non-existence of the entitlement or the obligation, if the character of the case allows it, as well as the circumstances of its actual and legal state that do not raise justified doubts.” The proposition above is consistent with the general tendency in European legal systems of administrative courts to take over the substantive adjudication in the case”²⁵. The solution above is facultative and it is required to meet a number of conditions, e.g. according to Article 145a, § 3 of the Law On Proceedings Before Administrative Courts, a substantive adjudication can be issued only if four prerequisites are fulfilled at the same time: 1) on the basis of Article 145a § 1 of the Law On Proceedings Before Administrative Courts a sentence was issued obliging the body to proceed the case in a given way, 2) the body did not issue the decision or the ruling or else there is no basis for issuing a substantive adjudication. It should be added that the new decision or ruling should be issued in accordance with the binding ruling. Therefore, if the content of the newly issued act is not identical with the binding ruling (even if the former was issued within the time fixed by the court), it should be assumed that the body acted as if it

²³ R. Hauser, *Rozstrzygnięcie sporów o właściwość między sądami administracyjnymi a powszechnymi*, [in:] M. Błachucki, T. Górzyńska (ed.), *Aktualne problemy rozgraniczenia właściwości sądów administracyjnych i powszechnych*, Warszawa 2011, p. 36.

²⁴ Journal of Laws 2015, item 658.

²⁵ *Uzasadnienie do projektu ustawy o zmianie ustawy – Prawo o postępowaniu przed sądami administracyjnymi*, Druk Sejmowy Nr 1633 and 2538/VII Kadencja, p. 19.

did not issue the act, 3) a party lodged an appeal demanding the issuing of a judgment stating the existence or the non-existence of the right or the obligation and thus the substantive adjudication cannot be issued *ex officio*, 4) the circumstances of the case allow to issue a sentence, e.g. the evidence in the case files presents the actual state in a way that does not raise doubts.

The character of the substantive adjudication made by an administrative court is therefore exceptional, and yet the principle is cassation judgment that consists of the control of the act or omission by a public administration body, and not in examining the case by an administrative court instead of the body.

It thus appears that both the questions of the judgments of common courts in administrative cases and the right of the administrative court to issue substantive adjudications that replaces the administrative act are certain exceptions that do not undermine the model of cognition of administrative courts resulting from Article 184 of the Constitution of the Republic of Poland. Within this scope, it does not appear to result in the necessity to re-evaluate or re-read the provisions of the Constitution of the Republic of Poland determining the judiciary of administrative courts²⁶. As a rule, the judgments of administrative courts in cases they do not proceed have the character of control; the courts do not handle administrative cases, but they evaluate the actions of administrative bodies from the perspective of their consistency with the law. As an exception, only in the situation when the legal state does not raise any doubts, an administrative body, despite a legally binding judgment of an administrative court, does not issue a relevant act or does not take action. In such cases, the administrative court makes the judgment in the administrative case by issuing a judgment replacing an administrative act. It appears that the presumption of competence of administrative courts determined in Article 184 of the Constitution of the Republic of Poland does not raise doubt, for it clearly determines the character of the cases subject to cognition of voivodship administrative courts and the Supreme Administrative Court, thus distinguishing them from the cases belonging to the competence of common courts.

²⁶ Such a solution is suggested by D. Gut, who claims that the control mentioned in Article 184 of the Constitution of the Republic of Poland can be interpreted in a way that would differ from the understanding of the notion to date – so as to admit administrative courts – instead of administration bodies – the competences to handle cases, cf. D. Gut, *Merytoryczne orzekanie polskich sądów administracyjnych w świetle Konstytucji RP*, [in:] W. Piątek (ed.), *Aktualne problemy sądowej kontroli administracji publicznej*, Warszawa 2019, pp. 11–26.

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