STUDIA IURIDICA LXXIX

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CONSTITUTION, JUDICIAL REVIEW AND THE RULE OF LAW IN THE JURISPRUDENCE OF ADMINISTRATIVE COURTS IN POLAND

1. INTRODUCTORY REMARKS. ADMINISTRATIVE JUDICIARY IN POLAND

The constitutional status and the scope of competence of administrative courts in Poland should be briefly explained as a way of introduction to the topic. These questions are regulated in the Constitution of the Republic of Poland of 2 April 1997[1] and in acts of the Parliament, in particular the Act of 25 July 2002 – the Law on the System of Administrative Courts, and the Act of 30 August 2002 – the Law on Proceedings before Administrative Courts[2].

Pursuant to Article 175(1) of the Constitution the administration of justice in Poland shall be implemented by: "the Supreme Court, the common courts, administrative courts and military courts". Common courts (*sądy powszechne*) and the Supreme Court (*Sąd Najwyższy*) adjudicate mainly on civil and criminal cases. Pursuant to Article 184 of the Constitution "the Supreme Administrative Court (*Naczelny Sąd Administracyjny*) and other administrative courts (*sądy administracyjne*) shall exercise, to the extent specified by statute, control over the performance of public administration. Such control shall also extend to judgments on the conformity to statute of resolutions of organs of local government and normative acts of territorial organs of government administration". The detailed scope of administrative courts' competence is enshrined in Article 3(2) of the above-mentioned 2002 Law on Proceedings before Administrative Courts. In particular, administrative courts adjudicate on complaints against final

[1] English translation: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (visited September 1, 2018).

[2] English translation: www.nsa.gov.pl/download.php?id=761 (visited September 1, 2018).

administrative decisions and other acts or actions of public administration concerning the individual persons' rights or duties[3].

Furthermore, Article 176(1) of the Constitution, according to which "court proceedings shall have at least two instances", is fully applicable to the proceedings before administrative courts[4]. Currently, there are 16 regional administrative courts (*wojewódzkie sądy administracyjne*; courts of first instance) in Poland and the Supreme Administrative Court which is 1) a court of the second instance in cases ruled by regional courts in the first instance and 2) a court exercising the judicial supervision over the activity of administrative courts. The Supreme Administrative Court is divided into three chambers, i.e. the Financial Chamber, the Commercial Chamber, and the General Administrative Chamber.

Administrative courts in Poland do not remain under any supervision of the Supreme Court, referred to in Article 183 of the Constitution. The Supreme Court is capable of reviewing judgments and decisions issued only by common courts and military courts, referred to in Article 175(1) of the Constitution (cited above). The legal relations between administrative courts and the Constitutional Tribunal are defined, in particular, by Article 193 of the Constitution, which concerns the question of law. This problem will be explained in detail hereinafter.

2. SUPREME ADMINISTRATIVE COURT BEFORE 1989

This article is focused on the methods of applying the Constitution by administrative courts in Poland. In particular, I would like to make reference to some cases in which the judgments of administrative courts were directly based on the rule of law principle, expressed in Article 2 of the Constitution ("The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice").

It should be, however, underlined that administrative courts had applied constitutional provisions not only after the 1997 Constitution's entry into force but also prior to that moment, including communist times. Since 1980, that is the year when the Supreme Administrative Court initiated its activity, the constitutional provisions have frequently been present in judgments of administrative courts. In particular, in the 1980s – by reinterpreting some provisions of the Communist Constitution of 22 July 1952 – the Supreme Administrative Court created

[3] Apart from that, administrative courts settle disputes regarding the competence between units of local government and units of government administration (Article 166(3) of the Constitution).

[4] See also Article 78 of the Constitution: "Each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute".

the standard according to which an individual administrative decision, addressed to a citizen, may be based only upon an act of the Parliament, as opposed to acts of lower rank, enacted by the government or ministers without statutory authorization[5]. I would dare say that this legal opinion of the Supreme Administrative Court created one of the foundations of the rule of law in Poland, despite the fact that the rule of law clause was explicitly introduced in Polish Constitution only in 1990, as a result of the "Round Table" compromise. The rule of law standards were courageously, bit by bit, "smuggled" by the Supreme Administrative Court to the Polish legal order from the very beginning of its activity.

3. TODAY'S RELATIONS BETWEEN ADMINISTRATIVE COURTS AND THE CONSTITUTIONAL TRIBUNAL

Currently, the Constitution is the stable component of administrative judges' everyday routine work[6]. It is worth to explain the methods of applying the Constitution, in particular the rule of law principle, in the jurisprudence of administrative courts.

The Polish judicial system is based on the Hans Kelsen's theoretical model, namely on the general assumption that there is only one state body empowered to verify the constitutionality of laws, namely the Constitutional Tribunal (Article 188 *et seqq.* of the Constitution). The Polish Constitution does not expressly provide for the dispersed (decentralized) judicial review of constitutionality of laws[7]. Accordingly – in general – should a court raise doubts as to the constitutionality of a legal provision which is supposed to be the basis of a forthcoming court decision, it is obliged to suspend the proceedings and present the so called question of law (preliminary question) before the Constitutional Tribunal[8]. The proceedings may be continued only after the Constitutional Tribunal's judgment is delivered. For instance, when in the course of reviewing the lawfulness

[5] See the Supreme Administrative Court's judgment of 6 February 1981, ref. No. SA 819/80.

[6] Detailed information concerning the activity of administrative courts in Poland, in particular the application of the Constitution, may be found in Annual Report 2016 (www.nsa.gov.pl/download.php?id=583; visited September 1, 2018), and Annual Report 2017 (www.nsa.gov.pl/download.php?id=758; visited September 1, 2018).

[7] Cf. the Constitutional Tribunal's judgment of 4 October 2000, ref. No. P 8/00 (English summary: http://trybunal.gov.pl/fileadmin/content/ omowienia/P_8_00_GB.pdf; visited September 1, 2018).

[8] Pursuant to Article 193 of the Constitution: "Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court".

of an administrative decision an administrative court arrives at the conclusion that the legal basis of such a decision may be unconstitutional, it should not, in general, nullify or quash the decision for that reason until the allegations are confirmed by the Constitutional Tribunal's judgment[9].

4. "PRO-CONSTITUTIONAL" INTERPRETATION OF LAW

1) This is the general principle. It is the consequence of the constitutional-makers' assumption that in Poland the Constitutional Tribunal should be the one and only state body empowered to review the constitutionality of laws, in particular the Acts of Parliament[10]. Nonetheless, in practice there are numerous cases in which constitution-related problems arising in proceedings before administrative courts do not need to be solved – or, in certain circumstances, even may not be solved – in cooperation with the Constitutional Tribunal.

2) I mean, in particular, cases in which the Constitution may be applied in the process of the interpretation of a legal provision (the so called "pro-constitutional" interpretation of law). In the situation where a court may derive from a legal provision a norm that is compatible with the Constitution, presenting the question of law before the Constitutional Tribunal would be pointless[11]. For instance, there are a number of cases in which in the course of administrative proceedings the Parliament amended the legal bases for administrative decisions failing, however, to introduce any transitional provisions (or introduced transitional provisions that do not encompass all situations). In consequence, it is unclear which – "old" or "new" – law should be applied to settle cases, which are pending on the day of an Amendment Act's entry into force. Such a situation is called a "transitional gap". In such cases administrative courts often apply the rule of law principle, in particular the principle of a citizen's trust in the state and its laws, the principle of the protection of acquired rights and the prohibition

[9] About the question of law procedure see: R. Hauser, A. Kabat, *Questions of law as a procedure for the review of the constitutionality of law*, "The Sejm Review. Third Special Edition" 2007, p. 83 *et seqq.*

[10] Cf. L. Garlicki, *The Role of a Constitutional Judge in the Creation of Constitutional Culture*, (in:) *Constitutional Cultures* (ed. M. Wyrzykowski), Warszawa 2000, p. 198.

[11] Furthermore, if a constitutional problem that occurred before a court may be resolved with the use of the pro-constitutional interpretation of law technique, presenting the question of law before the Constitutional Tribunal is inadmissible and the Tribunal should reject such a question. It stems from the fact that the question of law procedure is not aimed at resolving interpretational problems but rather at eliminating unconstitutional norms from the system of law (cf. the Constitutional Tribunal's judgment of 27 January 2004, ref. No. P 9/03; English summary: http://trybunal.gov.pl/ fileadmin/content/omowienia/ P_9_03_GB.pdf; visited September 1, 2018).

of law retroactivity[12]. In other words, in the above-mentioned situations the rule of law principle is used by courts as the source of a transitional norm, which constitutes the basis of a judgment[13]. *Nota bene*, it should be mentioned that the Polish Constitutional Tribunal is not empowered to rule on the constitutionality of the so called "legislative omissions" (legal gaps) and to supplement the law[14]. For that reason, if a court recognizes a transitional gap, it usually may not request the Constitutional Tribunal to declare in which way such a gap should be filled, and it should autonomously infer the transitional norm from the Constitution, in particular from the rule of law principle.

3) Another good example of applying the rule of law principle by administrative courts are cases in which courts verify the lawfulness of decisions imposing administrative penalties. The specificity of these penalties consists in the fact that, in general, they are automatically imposed by administrative bodies, frequently in the fixed amount prescribed by statutes, without making any reference to the circumstances of a particular case. For these obvious reasons, administrative courts recognize the special character of administrative liability, which should be distinguished from the criminal liability. Administrative liability is not founded on the principle of guilt and the presumption of innocence. *Nota bene*, administrative courts in Poland may not, in general, conduct evidence proceedings, in particular hear witnesses[15]. Nonetheless, administrative courts express the opinion that decisions imposing administrative penalties do not fall outside the scope of application of the principle of proportionality which is one of the inherent elements of the rule of law principle. That means, *inter alia*, that the interpretation of legal provisions describing activities punishable by administrative sanctions may not be extensive and, consequently, any doubts as to whether the administrative law was violated should be resolved in favor of an individual[16]. Administrative courts also underline that the circumstances empowering administrative bodies

[12] All these detailed principles are inferred by courts from the Rule of Law clause, referred to in Article 2 of the Constitution (see the Constitutional Tribunal's judgment of 4th April 2006, ref. No. K 11/04; English summary: http://trybunal.gov.pl/ fileadmin/content/omowienia/ K_11_04_ GB.pdf; visited September 1, 2018).

[13] Administrative courts assume that, in general, the lack of a transitional norm within an Amendment Act means that pending cases should be settled on the basis of the "new" law, unless there are important constitutional values (e.g. the principle of acquired rights or the prohibition of law retroactivity) whose protection obliges the court to apply the "old" law (see the Supreme Administrative Court's judgment of 12 April 2017, ref. No. II OSK 1141/16).

[14] See the Constitutional Tribunal's procedural decision of 13 October 2004, ref. No. Ts 55/04 (English summary: http://trybunal.gov.pl/fileadmin/content/omowienia/Ts_55_04_GB.pdf; visited September 1, 2018).

[15] Pursuant to Article 106(3) of the 2002 Law on Proceedings before Administrative Courts a court may only, on an exceptional basis, request additional documentary proof.

[16] Cf. the Supreme Administrative Court's resolution of 16 October 2015, ref. No. II OPS 1/15.

to impose penalties should be strictly and precisely defined by statutes in order to eliminate excessively broad scope of discretion[17].

4) It should be pointed out that Article 2 of the Constitution is considered to be the source of the legal presumption that individual cases should be settled in the form of administrative decisions, as opposed to other administrative acts. The aforementioned presumption applies to situations where a provision of administrative law empowers a state body to settle an individual case but, at the same time, it fails to expressly indicate the legal form in which the case should be settled. Should we assume that in such situations the case might be settled in a different form than an administrative decision (e.g. by information or notification which does not contain exhaustive factual and legal justification), that would deprive individuals of numerous procedural guarantees laid down in the Code of Administrative Procedure of 1960. For these reasons, in administrative courts' opinion in the democratic state governed by the rule of law cases concerning rights or freedoms of individuals may not be settled outside any procedural frameworks. Therefore, Article 2 of the Constitution is the source of the norm pursuant to which in the situation where the law fails to indicate the form of administrative activity addressed to a citizen, it is presumed that the case should be settled in the form of an administrative decision, issued on the basis of the Code of Administrative Procedure[18].

5. THE JUDICIAL REVIEW OF LAW?

1) Much more complex cases occur when the essence of a constitutional problem lies not in the interpretation of law but rather in the very contents of a legal provision. As it was mentioned before, in general, Polish courts may not autonomously, without presenting the question of law to the Constitutional Tribunal, rule on the constitutionality of laws and deny applying provisions which they deem unconstitutional. There are, however, some – more or less debatable – exceptions from that general principle that are identified in case law. Namely, in certain particular circumstances court judges consider themselves to be authorized to declare a legal provision unconstitutional. That may lead, *inter alia*, to invalidating an administrative decision which was based on such a provision without presenting the question of law to the Constitutional Tribunal[19]. It should be, however, empha-

[17] Cf. the Supreme Administrative Court's judgment of 6 May 2016, ref. No. II OSK 718/15.

[18] See the Supreme Administrative Court's resolution of 24 May 2012, ref. No. II GPS 1/12.

[19] A complex analysis of the methods of applying the Constitution by administrative courts is presented in R. Hauser, J. Trzciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego* [Lawmaking Significance of the Con-

sized that in such situations a legal provision deemed unconstitutional by a particular court adjudicating panel still remains valid as the part of the system of law and, theoretically, may be applied by other judges who do not share constitutional doubts. The general and *erga omnes* effective elimination of an unconstitutional provision from the system of law may only result from the moment a Constitutional Tribunal's judgment enters into force.

2) For years it has been undisputable that the courts in Poland, including administrative courts, are authorized to exercise the judicial review over the so called sub-statutory legal acts, in particular the President's or the Government's regulations (see Article 92 of the Constitution), so called acts of internal character (see Article 93 of the Constitution), and acts of local bodies (see Article 94 of the Constitution). The aforementioned courts' empowerment is derived from Article 178(1) of the Constitution, which reads: "Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes [i.e. acts of the Parliament]". *A contrario*, judges are not subject to other legal acts, in particular sub-statutory acts, and may exercise the judicial review in this respect. In consequence, if an administrative decision is founded on a sub-statutory act, a court may autonomously – without presenting the question of law to the Constitutional Tribunal – declare such an act to be unconstitutional and nullify the decision issued upon its basis. Alternatively, a court may present a question of law before the Constitutional Tribunal, which may lead to elimination of the unconstitutional act from the system of law with the *erga omnes* effect. The decision is up to the court and, in practice, it is conditional upon particular circumstances of an individual case[20].

3) There are some exceptional situations where judges recognize their power to autonomously declare – without presenting the question of law to the Constitutional Tribunal – that an act of the Parliament is unconstitutional and to deny its application when ruling on an individual case. Namely, administrative courts construed in their case law the original concept of the so called "evident (manifest) unconstitutionality" of a legal provision.

Firstly, a provision of the act of the Parliament may be contrary to a clear and unequivocal constitutional provision. Certain provisions of the Constitution are formulated so precisely that their violation is evidently recognizable at first glance. For instance, according to Article 46 of the Constitution, the forfeiture of a property may be decided only by a final court judgment, as opposed to a decision of any other state body, in particular administrative organ. Therefore, a legal provision empowering an administrative body to decide on the forfeiture of a property should be deemed manifestly inconsistent with the aforementioned con-

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stitutional Tribunal's Judgments in the Jurisprudence of the Supreme Administrative Court], Warszawa 2010, *passim*.

[20] Cf. the Supreme Administrative Court's resolution of 16 January 2006, ref. No. I OPS 4/05.

stitutional standard and, in such circumstances, the question of law to the Constitutional Tribunal would not be a court's obligation[21].

Secondly, a situation may occur where an act of the Parliament repeats a legal norm identical or analogous to the norm which has already been declared unconstitutional by the Constitutional Tribunal. Administrative courts express a viewpoint that in such situations initiating a procedure before the Constitutional Tribunal, by presenting the question of law, would be superfluous, since the constitutional problem has been already resolved by the Tribunal and the Tribunal's judgment was disrespected by the legislator[22]. For instance, in 1998 the Constitutional Tribunal ruled that imposing on a person both a penalty for committing a misdemeanor and an administrative penalty for the same infringement of the tax law violated the rule of law principle and the *ne bis in idem* principle[23]. A few years later, the Supreme Administrative Court considered a case concerning the cumulation of administrative penalty with the penalty for criminal offence for breaching the tax law. In the Court's opinion, presenting the question of law to the Constitutional Tribunal would have been unnecessary and judges autonomously declared unconstitutionality of the Value-Added Tax and Excise Tax Act 1993 provision, which envisaged the double penalization[24]. In other words, in the administrative courts' opinion, every Constitutional Tribunal's judgment resolves certain legal problem and when the same or analogous problem occurs in the court proceedings after the Tribunal's judgment, it is not necessary to engage the Constitutional Tribunal once again. This approach is, to a certain degree, similar to the *acte éclairé* doctrine within the meaning of the case law of the Court of Justice of the European Union.

6. WHAT IF THE CONSTITUTIONAL TRIBUNAL MAY NOT HELP?

1) As it was mentioned before, the main instrument which is at administrative courts' disposal if in a court's opinion a legal provision is unconstitutional, is the question of law filed before the Constitutional Tribunal pursuant to Article 193 of the Constitution. There are, however, legal norms which may be applicable

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[21] See the Supreme Administrative Court's judgment of 24 October 2000, ref. No. V SA 613/00.

[22] See the Supreme Administrative Court's judgment of 6 June 2018, ref. No. II FSK 1454/16.

[23] The Constitutional Tribunal's judgment of 29 April 1998, ref. No. K 17/97.

[24] The Supreme Administrative Court's resolution of 16 October 2006, ref. No. I FPS 2/06. It is worth mentioning that one of the judges presented a dissenting opinion and argued, *inter alia*, that the Supreme Administrative Court should have filed a question of law before the Constitutional Tribunal.

in court proceedings but, for certain procedural reasons, these norms are unchallengeable before the Constitutional Tribunal.

2) In particular, according to Article 59(1)(4) of the Act on the Organization of the Constitutional Tribunal and the Mode of Proceedings before the Constitutional Tribunal of 2016 (hereinafter referred to as: "the Constitutional Tribunal Act"), the proceedings before the Constitutional Tribunal shall be discontinued, if a challenged normative act ceased to be in force. This signifies that, in general, the Constitutional Tribunal is not empowered to review legal norms that lost their binding force[25]. For that reason, if a case pending before a court should be settled on the basis of a legal provision that lost its binding force, the court may not present a question of law concerning such a provision, since the question would be deemed inadmissible by the Constitutional Tribunal[26].

In a large number of cases administrative courts apply legal norms which lost their binding force. It is a consequence of the *tempus regit actum* principle, which assumes that the lawfulness of an administrative decision should be, in general, reviewed from the perspective of legal provisions in the version bindingat the moment of the decision's enactment[27]. Furthermore, there are some cases where an administrative decision under review was issued before the 1997 Constitution's entry into force (i.e. before 17 October 1997) and the constitutional standards applicable to the decision should be inferred from former Polish constitutional acts[28].

In view of this, it should be noticed that, on one hand, in certain circumstances administrative courts recognize the unconstitutionality of law but, on the other hand, they may not count on the Constitutional Tribunal's support, since either a legal provision ceased to be in force, or the case should be settled on the basis of a former constitutional act. For instance, in 2007 the Supreme Administrative

[25] An exception to that rule stems from Article 59(3) of the Constitutional Tribunal Act which stipulates that the Tribunal may review an act which ceased to be in force, provided that it was challenged by an individual's constitutional complaint (referred to in Article 79 of the Constitution) and it is necessary for the protection of constitutional rights and freedoms. The aforementioned provision is not applicable to questions of law presented by courts on the basis of Article 193 of the Constitution.

[26] It should be mentioned that the Constitutional Tribunal distinguishes legal provisions that lost their binding force from legal provisions that were repealed but, in fact, remained to be in force due to transitional provisions. For further details see the Constitutional Tribunal's judgment of 16 March 2011, ref. No. K 35/08 (English translation: http://trybunal.gov.pl/fileadmin/ content/omowienia/K_35_08_EN.pdf; visited September 1, 2018).

[27] Cf. the Constitutional Tribunal's judgment of 13 March 2007, ref. No. K 8/07 (English summary: http://trybunal.gov.pl/fileadmin/ content/omowienia/K_8_07_GB.pdf; visited September 1, 2018).

[28] The Constitutional Tribunal expresses a viewpoint that, in general, it is not authorized to verify the compliance of legal norms with Polish constitutional acts that were in force prior to the 1997 Constitution's coming into force (see the Constitutional Tribunal's procedural decision of 6 April 2005, ref. No. SK 8/04).

Court declared that a provision contained in the Council of Ministers' Regulation issued in 1947 was inconsistent with the constitutional norms in the version binding in 1947[29]. The question of law to the Constitutional Tribunal would be, for the reasons explained before, inadmissible and therefore, the Supreme Administrative Court was compelled to autonomously perform the judicial review.

Another good example are cases concerning the reform of the customs service, which was carried out in Poland in 2016. One of the elements of that reform consisted in creating the temporary bases for the extraordinary transformation of customs officers' public service, without their consent, into regular employment (the so called "privatization" of the customs officers' service). That was obviously unfavorable for customs officers subject to the reform, since the public servant status guarantees, in particular, higher level of stabilization than regular employment, based on the labor contract. In the legislator's intention the said transformation of service could have been performed, in an arbitrary manner, within 3 months from the day of the reform's entry into force (i.e. until 31 May 2017). The basis of the transformation was the so called "written proposal", as opposed to an administrative decision on the termination of public service. There was no obligation for a "written proposal" to be issued within any procedural frameworks, nor should it be motivated and there were no legal remedies that could have been filed against such a proposal. Furthermore, if an officer did not receive the said proposal, his service expired *ex lege*.

Some administrative courts argued that the aforementioned legal provisions were unconstitutional, as they violated, *inter alia*, the principle of the protection of acquired rights and legitimate expectations, stemming from the rule of law principle[30]. Simultaneously, the courts noticed that the question of law to the Constitutional Tribunal would be inadmissible, since the statutory time limits for presenting "written proposals" expired, the legal provisions in question had already produced legal effects and may not be applied in the future. Thus, these provisions ceased to be in force and, therefore, the Constitutional Tribunal would be incapable of assessing their constitutionality. Especially, one of the judgments of the Regional Administrative Court in Szczecin is worth mentioning herein[31]. Judges of this court pointed out that the court is obliged to deliver a judgment conforming to the constitutional standards also in the situation where, for procedural

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[29] The Supreme Administrative Court's resolution of 5 November 2007, ref. No. I OPS 2/07. The case concerned the nationalization of private enterprises by the post-war communist state bodies.

[30] See also the Constitutional Tribunal's judgment of 20 April 2004, ref. No. K 45/02. This judgment concerned a similar problem, namely legal provisions that made it possible to terminate, in an extraordinary and arbitrary manner, the public service of state security officers. That transitional mechanism was related to the reform of state security agencies (English summary: http://trybunal.gov.pl/fileadmin/content/omowienia/K_45_02_GB.pdf; visited September 1, 2018).

[31] The Regional Administrative Court's in Szczecin judgment of 4 October 2017, ref. No. II SA/Sz 897/17.

reasons, it may not present the question of law to the Constitutional Tribunal. The court ruled, therefore, that the aforementioned provisions of the act of the Parliament were unconstitutional and the "written proposal" should be considered to be an administrative decision. Consequently, the court quashed the "written proposal" addressed to the complainant, since it did not meet the conditions of an administrative decision, and ruled that the case should be reconsidered and concluded by an administrative decision, which should follow all procedural requirements prescribed in the Code of Administrative Procedure. In particular, customs officers should be informed, in a detailed manner, why – in the light of legal provisions – it is necessary to transform their public service into regular employment.

3) There are some other constitutional problems which occur in administrative courts proceedings and, for various reasons, fall outside the Constitutional Tribunal's scope of competence. For instance, from the day of Poland's accession to the European Union (1 May 2004) Polish customs offices became obliged to apply the Council's Regulation (EEC) No. 2913/92 establishing the Community Customs Code, being a part of the European Community secondary law. The Code has not, however, been officially translated into the Polish language and published in the Polish version of the European Union Official Journal until a few months after the accession, i.e. until August 2004. Yet, in the meantime (May-August 2004), the Community Customs Code was applied in Poland as the basis of administrative decisions with the use of unofficial translations. A few years later, some addressees of the customs offices' decisions issued during the aforementioned "transitional" period challenged these decisions before administrative courts. The problem was very difficult, as the Community Customs Code has been indeed binding in Poland since 1 May 2004. In the light of the EU law, its coming into force in Poland was not conditional upon official translation into Polish language. Nonetheless, the Supreme Administrative Court pointed out that in a state governed by the rule of law public bodies may not apply in relation to citizens the acts that were not published in the Official Journal and impose on citizens obligations stemming from acts that were not officially translated into Polish language – even when it comes to acts of the EU law. For these reasons, the Supreme Administrative Court, directly applying the Constitution, invalidated decisions issued on the basis of the Community Customs Code from May to August 2004[32]. It would not be a simplification or overstatement to say that the Supreme Administrative Court ruled that the application of the EU law secondary act was "temporarily" unconstitutional.

4) One more very interesting case based on the rule of law principle is worth mentioning. In 2008, the Regional Administrative Court in Warsaw filed before the Constitutional Tribunal a question of law alleging the unconstitutionality

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[32] See the Supreme Administrative Court's judgment of 27 September 2011, ref. No. I GSK 479/10.

of one of the provisions of the Minister of Agriculture's Regulation issued in 1945. That Regulation has never been repealed. For many years, also after the 1989 transformation of the Polish political system, it has been applied – in thousands of cases – by administrative organs and courts as the basis of returning agricultural real estates to the former Polish landholders, who had been illegally expropriated by the communist state bodies after World War II in the course of the so called rural land reform, initiated in mid-1944[33]. In 2010, the Constitutional Tribunal declared, however, that the said Regulation in fact expired in 1958 and thus it has not been a part of Polish system of law for over 50 years[34]. In practice, such a statement meant that, for the last half of a century, the application of the Regulation in question has been illegal, thousands of decisions on returning real estates should be nullified and all cases should be reopened and settled anew.

After the Constitutional Tribunal's decision, the question whether the 1945 Regulation indeed ceased to be binding in 1958 was presented before the Supreme Administrative Court, since the legal effects of the Constitutional Tribunal's decision remained unclear[35]. Judges of the Supreme Administrative Court did not share the Tribunal's view concerning the expiry of the Regulation. The Court – applying the rule of law principle – expressed the opinion that state bodies, including courts and the Constitutional Tribunal, may not retroactively declare that a legal act, which for many years has been without any doubts applied in practice, had been in fact non-existent for half a century. Such a situation may lead to unpredictable effects and legal chaos what should not take place in a state governed by the rule of law. For that reason, the Supreme Administrative Court ruled that the viewpoint expressed in the Constitutional Tribunal's decision was not binding upon administrative courts and should not be applied by these courts[36]. Similar opinion was presented by the Supreme Court, which shared the opin-

[33] For more details see the Constitutional Tribunal procedural decision of 28 November 2001, ref. No. SK 5/01 (English summary: http://trybunal.gov.pl/fileadmin/content/omowienia/SK_5_01_GB.pdf; visited September 1, 2018).

[34] The Constitutional Tribunal's procedural decision of 1 March 2010, ref. No. P 107/08.

[35] In the P 107/08 case the Constitutional Tribunal did not rule to the merits of the case, but it delivered the procedural decision to discontinue the proceedings due to the expiry of the challenged act's binding force. The opinion concerning the reasons for the expiry of the 1945 Regulation in 1958 was expressed not in the operative part of the decision but in the statement of reasons (*obiter dictum*).

[36] The Supreme Administrative Court's resolution of 10 January 2011, ref. No. I OPS 3/10. The Supreme Administrative Court underlined that the P 107/08 ruling was the Constitutional Tribunal's procedural decision, as opposed to a judgment adjudicating the case to its merits. Procedural decisions of the Tribunal are not vested with the universally binding force within the meaning of Article 190(1) of the Constitution. Furthermore, opinions expressed merely in the reasoning part of a Tribunal's judgments are not binding upon courts, what was also declared by the Tribunal itself (see the Constitutional Tribunal judgment of 26 March 2002, ref. No. SK 2/01; English summary: http://trybunal.gov.pl/ fileadmin/content/omowienia/ SK_2_01_GB.pdf; visited September 1, 2018).

ion of the Supreme Administrative Court[37]. In consequence, the 1945 Regulation is still considered as being in force and thus may be applied. One may say that the continuity of the binding force of the said Regulation is the result of applying the rule of law principle by the Supreme Administrative Court.

7. CLOSING REMARKS

To sum up, I believe that the case law presented in this article – illustrating only a small part of the Polish administrative courts' jurisprudence – prove that administrative courts frequently base their judgments directly on the Constitution, in particular on rule of law principle and the detailed principles stemming therefrom (*inter alia*, the principle of acquired rights protection, certainty of law, non-retroactivity of law, proportionality, loyalty of the state towards citizens).

The analysis of administrative courts' jurisprudence leaves no doubt whatsoever that in Poland application of the Constitution – including the rule of law principle – does not remain a monopoly of the Constitutional Tribunal. There are plenty of situations where administrative courts are capable to autonomously apply the Constitution without overstepping the Constitutional Tribunal's scope of competence. Therefore, the Constitution and the rule of law principle are permanent elements of administrative courts' every day activity. It is undisputable that the implementation of the rule of law principle in the Polish legal order is to a significant degree a contribution of administrative courts.

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[37] The Supreme Court's resolution of 17 February 2011, ref. No. III CZP 121/10.

Summary

In the light of Article 184 of the 1997 Constitution administrative courts verify the lawfulness of administrative decisions and some other acts of public administration. Furthermore, administrative courts may review the lawfulness, including the compliance with the Constitution, of the so called "enactments of local law" (referred to in Articles 87(2) and 94 of the Constitution). Pursuant to Article 8(2) of the Constitution "The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise". This constitutional competence is addressed, *inter alia*, to courts. In practice, administrative courts apply Constitution in three ways: 1) pro-constitutional interpretation of laws, 2) referring the so called questions of law to the Constitutional Tribunal, 3) ruling in a case directly on the basis of a constitutional provision. The provision applied by administrative courts in most cases is Article 2 of the Constitution, which stipulates that "The Republic of Poland shall be a democratic state governed by the rule of law (…)". The Article is focused on most important cases in which the rule of law principle was applied. Administrative courts, as well as other courts and the Constitutional Tribunal, consider the rule of law principle to be the source of several detailed principles, e.g. the certainty of law, the *lex retro non agit* principle, the loyalty of the State towards citizens, the citizens' trust in the State and the law, the principle of proportionality. Each of these principles was referred to in the large number of administrative courts' judgments as the basis of a ruling. This proves that the Constitution, in particular the rule of law principle, is one of the instruments utilized by administrative courts' judges in their everyday work.

KEYWORDS

rule of law, Constitution, administrative courts, Supreme Administrative Court, Constitutional Tribunal, application of the Constitution, judicial review of law

Streszczenie

W świetle art. 184 Konstytucji RP z 1997 r. sądy administracyjne zajmują się kontrolą legalności decyzji administracyjnych i innych aktów wydawanych przez organy administracji publicznej. Co więcej, sądy administracyjne kontrolują legalność, w tym konstytucyjność, tzw. aktów prawa miejscowego, o których mowa w art. 87 ust. 2 i art. 94 Konstytucji. Zgodnie z art. 8 ust. 2 Konstytucji: „Przepisy Konstytucji stosuje się bezpośrednio, chyba że Konstytucja stanowi inaczej". Ta kompetencja konstytucyjna jest adresowana w szczególności do sądów. W praktyce sądy administracyjne stosują

Konstytucję na trzy sposoby: 1) prokonstytucyjna wykładnia ustaw, 2) przedstawianie Trybunałowi Konstytucyjnemu tzw. pytań prawnych, 3) wydanie orzeczenia bezpośrednio na podstawie przepisu Konstytucji. Przepisem najczęściej stosowanym przez sądy administracyjne jest art. 2 Konstytucji, który stanowi, że „Rzeczpospolita Polska jest demokratycznym państwem prawnym (…)”. Artykuł koncentruje się na najważniejszych sprawach, w których została zastosowana zasada państwa prawnego. Sądy administracyjne, podobnie jak inne sądy i Trybunał Konstytucyjny, uznają zasadę państwa prawnego za źródło licznych zasad szczegółowych, np. zasady pewności prawa, zasady *lex retro non agit*, zasady lojalności państwa względem obywateli, zasady zaufania obywatela do państwa i stanowionego przez nie prawa czy zasady proporcjonalności. Każda z tych zasad była przywoływana w dużej liczbie wyroków sądów administracyjnych jako podstawa rozstrzygnięcia. To dowodzi, że Konstytucja, a w szczególności zasada państwa prawnego, jest jednym z instrumentów wykorzystywanych w codziennej pracy sędziów sądów administracyjnych.

SŁOWA KLUCZOWE

zasada państwa prawnego, Konstytucja, sądy administracyjne, Naczelny Sąd Administracyjny, Trybunał Konstytucyjny, stosowanie Konstytucji, sądowa kontrola konstytucyjności prawa