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REVIEW OF DISCRETIONARY DECISIONS BY ADMINISTRATIVE COURTS

Summary
The paper concerns reviews conducted by administrative courts of decisions issued by public administration authorities on the basis of their administrative discretion. The author presents decisions of the administrative law doctrine and case-law of administrative courts, with particular regard to the current views. The author reflects on admissibility of the review of discretionary decision. He indicates the differences and similarities between a constrained decision and a discretionary decision, and also answers the questions whether it is admissible to conduct the review of the discretionary decision by administrative courts on the basis of the criterion of expediency and it is possible that the court considers only the criterion of legality.
According to the main conclusions of the paper, there are no differences between the constrained decision and discretionary decision in terms of the review by administrative courts; the criterion of expediency is permitted if it results from the regulations empowering the authority to issue discretionary decisions; it has also been observed that administrative courts increasingly expand the review capacity to ensure the compliance with law, so that any such review could also be used to verify the correctness of the discretionary decision which has been issued.

Key words: *discretionary decision, administrative decision, administrative court review, criterion of administrative court review, review of public administration authority*

Introduction

Article 177 of the Constitution of the Republic of Poland of 2 April 1997[1] states that common courts apply justice to all cases except from the ones legally reserved to other courts. Within the meaning of this provision, with regard to Article 184 of the Polish Constitution, administrative courts are specialized courts, for which certain types of cases are reserved by the law. Article 184 of the Polish Constitution

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[1]Journal of Laws No 78, item 483.

forwards the review of public administration to administrative courts within the scope specified by the law. The review also covers ruling on cases concerning consistency with the law by territorial self-government authorities and normative acts by local government administration authorities. Additionally, the Polish Constitution in Article 166 Section 3 forwards to administrative courts the ruling on disputes of competence between self-government authorities and government administration, and in Article 165 Section 2 the Polish Constitution forwards the protection of the autonomy of territorial self-government units to courts.

The subject of this paper is definition of the criteria of public administration review by administrative courts in the context of complaints concerning decisions of public administration authorities issued on the basis of administrative discretion. For the sake of accuracy of further reasoning, it should be stipulated that in this paper the review will be considered not as an inspection of a public administration authority's activity and its comparison to the required condition, without the possibility of a strong influence on this activity[2], but as a sequence of actions of the administrative court, which are a combination of control and supervision, which gives a specific form customarily called a review. As *T. Bigo* and *F. Longchamps* noticed, the term "review" does not fully fit to the administrative court activity, but it also cannot be called a "supervision" because there is no relationship of priority and dependence between the controlling and controlled entities and the court is not responsible for the results of the controlled unit"[3].

1. The discretionary decision and the constrained decision

An administrative decision is an ex parte "decision issued by a state administration authority on binding consequences of the applicable standard for an individually determined entity and a specific case, given by this authority in external relations"[4].

Both the constrained decision and the decision issued on the basis of administrative discretion are administrative decisions. The constrained decision is issued on the basis of substantive law, which clearly

[2] A. Sylwestrzak, *Kontrola administracji*, Koszalin 1998, p. 10.
[3] T. Bigo, F. Longchamps, *Kontrola administracji*, Studia Prawnicze, 1965, Issue 7, p. 23.
[4] Decision of 22 September 1983, SA/Wr 367/83, ONSA 1983, no 2m, item 75, p. 183.

determines that when legal standard is realized, the authority will issue a specific decision.

The discretionary decision is based on the so-called administrative discretion, which is an authorization of a public administration unit, resulting from the law, to determine a certain legal standard. *M. Mincer* determines administrative discretion as the last stage of the application of law, which is the settlement of legal consequences. The discretion takes place when the legal standard does not determine those consequences univocally, leaving the choice to the administrative authority. The discretion concerns the future. *M. Mincer* assumes that a standard consists of a hypothesis and a legal consequence, therefore, the discretion in this case means the choice on a legal consequence provided by law, made by the administrative authority[5]. According to *E. Ochendowski*, administrative discretion takes place when administrative authorities can choose from various solution to implement the legal condition. The discretion takes place when the standard does not determine univocally the legal consequence, but it leaves the choice to the authority, therefore, the law allows the choice on legal consequence from two or more possibilities[6]. When defining administrative discretion, *A. Błaś* sees its essence in the fact that the administrative authority, in the circumstances defined by the legal standard, has a choice of various types of attitude: it can settle the criteria of the decision by itself and on the basis of them, it can settle the content of this decision. *A. Błaś* indicates that the source of many forms of autonomy of the administrative authority, including administrative discretion, is a blanket legal standard. Administrative discretion is "the autonomy provided to the administrative authority by a blanket legal standard considered as a standard with a fully developed hypothesis, the disposition of which takes a disjunctive form, which means that the administrative authority has a choice on various types of attitude"[7].

In terms of administrative procedure, the differences between a constrained decision and a discretionary decision are not significant; nevertheless, they were noticed in case law of administrative courts.

[5] M. Mincer, *Uznanie administracyjne*, p. 63-64; also M. Jaśkowska, *Uznanie administracyjne a inne formy władzy dyskrecjonalnej*, [in:] *System prawa administracyjnego*, R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), Warszawa 2010, p. 260 and 261.

[6] E. Ochendowski, *Prawo administracyjne, część ogólna*, Toruń 2001, ppp. 190-191.

[7] A. Błaś, [in:] *Prawo administracyjne*, J. Boć (ed.), Wrocław 2007, p. 324.

Administrative courts indicate that decisions issued on the basis of administrative discretion have to be reasonably justified. "When issuing an adverse decision for a taxpayer in the field of administrative discretion, a tax authority has a particular obligation, resulting from Article 7 of the Code of Administrative Proceedings, to present in the justification its decision on why the case was not solved in accordance with the legitimate interest of the citizen. The justification of such a decision in such cases cannot be laconic, based on wording that does not explain the motivation for such a decision"[8]. In another judgement, "according to Article 107 Section 3 of the Code of Administrative Proceedings, an administrative authority is obliged to present in the factual justification of its decision the evidence relied upon and the reasons for which other evidence has been treated as not authentic. Fulfilling this obligation becomes particularly significant when an administrative authority settles a candidate for the perpetual usufructuary of the property among several persons applying for this position, according to discretion only, due to the lack of the legal criteria of choice. In such a situation, the authority is obliged to explain in detail the motivation for its decision in the case"[9]. A similar judgement was issued by the Supreme Administrative Court in Katowice on 14 May 1997, in which the court emphasizes: "Discretionary decisions also require a probing and logical justification."[10]

In Article 52 Section 1 and 2 of the Act on the Law of the Administrative Courts Procedure, the legislator regulated the premises of admissibility of lodging a complaint about the administrative decision in administrative court, restricting the judicial review to final decisions only. The complaint can be lodged after exhausting the remedies at law, in a situation when the party is not entitled to any remedy at law: a complaint, appeal or motion for re-examination of the case. Such a provision indicates that the legislator considers the judicial review as a kind of extraordinary control, which is not aimed at relieving from the duties the appeal bodies of public administration and replacing the appeal with a complaint to an administrative court.

When comparing the decision connected with (*sensu stricto*) the decision issued on the basis of administrative discretion, in terms of

[8] Decision of the Supreme Administrative Court of 21 April 1994 , SA/Po 3423/93.
[9] Decision of the Supreme Administrative Court inWarsaw of 22 October 1981, I SA 2147/81, ONSA 1981 2 item 104.
[10]Decision of the Supreme Administrative Court in Katowice, I SA/Ka 145/96.

admissibility of the complaint in the administrative court, it should be stated that there are no differences between them. The provision of law does not exclude admissibility of the complaint in the administrative court about the decision issued on the basis of administration discretion[11]. Only a direct exclusion of the review of discretionary decisions included in commonly applicable regulations could restrict the jurisdiction of administrative courts to the investigation of constrained decisions only.

2. Admissibility of the judicial review of the discretion decision

When discussing the criteria of administrative courts review of discretionary decisions, the possibility of such a review should be considered. In the current legal situation and conceptions shaped by the doctrine of administrative law, the admissibility of the review is undoubted. However, over the last century there has been a range of conceptions refusing the right of administrative courts to review the decisions issued on the basis of administrative discretion. Without going into detail of the historical and theoretical consideration, several aspects which became a fundament for the current conceptions of administrative discretion, should be noticed,

In the inter-war period, there was the binding Act on the Supreme Administrative Tribunal of 3 August 1922[12], which in Article 6 Subsection 2 directly excluded the administrative discretionary cases from the control by the Tribunal, within the boundaries of the discretion. Despite such an unambiguous statutory standard, most of the authors of the inter-war period interpreted the above provision very narrowly, indicating that the decision on the advisability and motivation of the administrative authority were not subject to review. The Tribunal could investigate if the legal boundaries of administrative discretion were respected. The Supreme Administrative Tribunal also ruled so, allowing the complaints about the administrative discretionary decisions. It was assumed that the discretion is not an unrestrained activity of the administrative authority, but like every other administrative activity is subject to legal boundaries. The exception is the view of *M. Zimmermann*, who claimed, on the basis of his theory, the existence or non-existence of a general standard ordering the administrative authority

[11] B. Adamiak, J Borkowski, *Postępowania administracyjne i sądowo administracyjne*, Warszawa 2009, p. 363.
[12] Journal of Laws of 1922, No 67, item 600.

action according to the public interest that the review of the legality of the administrative discretion acts is "impossible in the conceptual context"[13].

In the period of the Polish People's Republic, due to the lack of administrative courts the conceptions of administrative law doctrine were postulates in the discussion on the creation of administrative justice. The views of *J. Starościak* had a significant influence on the matter. According to him, an increase of significance of administration in Poland brings an increase of significance of the decisions based on discretion. The more the scope of discretion is, the more strict control over it should be[14]. As *J. Starościak* claims, the best solution is to subject the legality of the administrative decision to the judicial review, excluding the advisability, because entering of the court into this field would cause the replacement of the authority's discretion with the judicial discretion[15]. Similar theses were formed by other authors of Poland under the communist regime: *T. Bigo*[16], S. Jędrzejewski[17], or L. Bar[18].

The current views on the advisability of the judicial review of the discretionary decision, formed after the creation of the Supreme Administrative Tribunal, are homogenous. Nobody denies the advisability of the review any more. They differ only in terms of the review criteria.

Similar judgements were issued by courts, allowing the review of discretionary decisions in terms of compliance with the law. In the judgement of 11 June 1981, the Supreme Administrative Tribunal emphasized that: 1. in the current legal situation so-called administrative discretion lost its existing shape. The scope of the administrative authority's freedom, resulting from the substantive law, is currently restricted by general rules of the administrative proceedings, defined in Article 7 and other provisions of the Code of Administrative Proceedings (...) 4. an administrative authority, acting on the basis of the substantive law which states the discretionary nature of the decision, is obliged –

[13] M. Zimmermann, *Wywłaszczenie. Studium z dziedziny prawa publicznego*, Lvov 1933, p. 227.
[14] J. Starościak, *Swobodne uznanie władz administracyjnych*, Warszawa 1948, p. 105.
[15] Ibidem, p. 127.
[16] T. Bigo, *Kontrola uznania administracyjnego*, Gazeta Administracji, 14A, 1959, p. 65.
[17] S. Jędrzejewski, *W sprawie sądowej kontroli aktów administracyjnych*, Nowe Prawo 1972, issue 4, p. 548.
[18] L. Bar *Sądowa kontrola decyzji administracyjnych*, PiP 1973, z. 3, pp. 12-13.

according to Article 7 of the Code of Administrative Proceedings – to deal with the case in compliance with the legitimate interest of the citizen if the social interest is not an obstacle and it does not exceed the administrative authority's capacity resulting from its granted powers and measures[19].

To summarize, most of the authors, starting from the period when the Act on the Supreme Administrative Tribunal was in force, through abolishment of the administrative justice, to the current legal situation, did not undermine the possibility of the review conducted by administrative courts on decisions based on administrative discretion. In the period when there was no administrative justice, the doctrine formed postulates *de lege ferenda*, which were reflected in case-law and provisions. The conceptions denying the possibility of the judicial review of administrative discretion should be considered as exceptions, because they were not reflected in case-law of administrative courts. Concepts which exclude the possibility of judicial review of administrative discretion should be treated as exceptions as they did not find reflection in judicature of administrative courts.

3. The criteria of review of discretionary decisions

In the current legal situation and scientific works of administrative law, nobody denies admissibility of the review by administrative court on the decisions issued on the basis of administrative discretion. Differences of various views are the criteria, according to which administrative courts can infringe on the content of the discretionary decision. The criterion of legality is virtually not denied by anyone. Discrepancies appear at the review of advisability of discretionary decisions.

3.1. The criterion of compliance with law

Decisions issued on the basis of administrative discretion are subject to review by administrative courts in terms of their compliance with the current law. The court investigates if the authority did not exceed the boundaries of the applicable law when issuing the discretionary decision. The court particularly verifies if "the discretionary decision was issued by the competent authority and the party could participate in the proceedings and taking of evidence. If issuing of an authorizing decision or a decision imposing an obligation is left by the legislator to the

[19] ONSA 1981, No 1 item 57.

authority's discretion but the possibility of action is dependent on certain conditions, the court will be obliged to verify if those conditions actually existed. Also, any evaluation of evidence collected in the case or issuing of the decision against the actual state are the basis for a full infringement of the court"[20].

The criterion of legality was defined by *M. Mincer*, who claims that the court in the process of the review of discretionary decisions should investigate: the existence and correctness of the legal basis, obeying of the provisions on the administrative procedure and the competence of the authority issuing the decision. *M. Mincer* unambiguously indicates that the judicial review "should go as far as it is possible to evaluate the decision according to the criteria resulting from the law"[21].

The application of the criterion of legality in the review of the decisions issued on the basis of administrative discretion, conducted by administrative courts, results already from the Act on the Law of the Administrative Courts Procedure[22]. Article 3 Section 1 of the Act states that "administrative courts have control over public administration and apply the measures defined in the act". The review of compliance of the discretionary decision with the law covers the verification of compliance of the decisions with all the provisions of the substantive law and procedural law, which can be applicable to the case. In case-law the significance of the substantive law provisions is emphasized: "the state authority, acting within the administrative discretion, before issuing the decision to what extent it will use its rights, is obliged to explain in detail the actual state of the case, and before issuing the decision – to consider the actual state in terms of all the substantive law provisions that can be applied to the case"[23], as well as the procedural law: "in cases regarding tax liabilities the decision on the introductory issue is not a basis for an obligatory suspension of the proceeding but leaving it the evaluation of a tax authority. In consequence, when investigating the legality of such a decision, as in case of investigating the other decisions' legality issued

[20] J. Świątkiewicz, *Przedmiotowy zakres sądowej kontroli legalności decyzji administracyjnych*, PiP 1980, z. 3, pp. 14-15.
[21] M. Mincer, *Uznanie…*, pp. 152-153.
[22] Act of 30 August 2002 concerning the procedure of administrative courts, Journal of Laws No 153, item 1270 as amended.
[23] Decision of the Supreme Administrative Court, Katowice Branch, I SA/Ka 145/96.

within so-called administrative discretion, the court evaluates only if the rules of the proceeding were obeyed"[24].

3.2. The criterion of advisability

The review of discretionary decisions conducted on the basis of the criterion of advisability creates discrepancies in the administrative law doctrine. According to most of the views, it is indicated that advisability of the decision issued on the basis of administrative discretion can be investigated only if the purpose of the standard application was defined in the provision authorizing to discretion. *J. Świątkiewicz* said: "advisability aspects, therefore, administrative policy can determine the court's evaluation measures, only within the scope in which they are reflected in the formal provision of law. The provisions of law are a form of the policy implementation, but the policy is not always implemented with this method"[25]. Similarily, *A. Matan* noticed that when investigating the substantive law provisions, the court should verify if the boundaries of administrative discretion were not exceeded and the social-legal purpose of a given substantive provision was not infringed"[26].

Many views of the administrative doctrine regarding the review of the decision issued on the basis of administrative discretion in accordance with the criterion of advisability, take the form of postulates *de lege ferenda. J. Łętowski* pointed out that public administration increasingly infringes the lives of citizens, because the complicatedness of the social and economic life also increases. According to the author, in the modern world the concept of law and order, and the review of administrative compliance with the law should be redefined. The increasing competence of the authorities should be followed by the extension of the scope of review by administrative courts, also by the principles of fairness and justice[27].

When considering the reason for standard limitation of the scope of the review by administrative courts regarding the discretionary decisions, *J. Łętowski* pointed out "the prohibition of co-administration" by courts, which was one of the main fundaments of judicature form its very

[24]Decision of the Supreme Administrative in Warsaw of 22 April 1998, III SA 231/97.
[25] J. Świątkiewicz, *op. cit.,* p.14.
[26] A. Matan, [in:] G. Łaszczyca, C. Martysz, A.Matan, *Postępowanie administracyjne ogólne*, Warszawa 2003, p. 96.
[27] J. Łętowski, *W sprawie zakresu rzeczowego sądownictwa administracyjnego*, PiP 1982, z. 5. pp. 36-37.

beginning. There was a concern that courts would infringe the 'free decisions' and the judicial infringement in the activities of administration is something undesired, something that should be limited[28].

The views of *M. Mincer* relating to the criterion of advisability show similar conclusions. She claims that the court's review "should not evaluate the correctness of the decisions according to non-statutory criteria of advisability"[29]. The review should be conducted on the basis of law compliance, and in a situation when advisability results from a legal standard, it is also subject to the court's review. *M. Mincer* indicates that it is not the criterion of advisability that requires consolidation, because this aspect is taken into account within the appeal proceedings. According to the author, the review of legality requires consolidation, therefore, the review by the administrative court should be reduced to this basis[30].

Conclusion

The admissibility of the review of discretionary decisions conducted by administrative courts does not bring doubts any more. Currently, the applicable provisions of the Act on the Law of the Administrative Courts Procedure allow the complaint in the administrative court about the administrative decisions, without any exemptions regarding discretionary decisions. "… in the activity of public administration of a democratic rule of law all areas have to be related to law and cannot be excluded from the judicial review. It is obvious today that blanket legal standards of the administrative substantive law, including the legal constructions of the so-called administrative discretion, allow the unacceptable scope of autonomy of the administrative authorities in terms of the applicable law"[31].

The discretionary decision does not differ in terms of the review by administrative courts from the constrained decision. In both cases, the administrative court controls the compliance of the issued decision with

[28] J. Łętowski, *Prawo administracyjne. Zagadnienia podstawowe*, Warszawa 1990, pp. 168-169.
[29] M. Mincer, *Uznanie*…, p. 153.
[30] *Ibidem*, pp. 151-153.
[31] A. Błaś, *Sądowa kontrola decyzji uznaniowych (problemy jednolitości orzecznictwa NSA)*, [in:] I. Skrzydło-Niżnik, P. Dobosz (ed.), *Jedność systemu prawa a jednolitość orzecznictwa sądowo-administracyjnego i administracyjnego w sprawach samorządowych*, Kraków 2001, p. 67.

law, therefore it investigates if the authority obeyed all the provisions and did not exceed its competence. The argument that discretionary decisions are not subject to review in terms of legitimacy of the decision, does not allow their differentiation from the constrained decisions, because these also are not subject to review in term of their legitimacy. In relation to both types of decision, the judgement of the court is only a cassation decision, not an altered judgement.

When controlling the discretion decision, the court will verify if the public administration authority did not exceed the boundaries of administrative discretion[32]. The review of the grounds for discretion is considered as a verification if the administration authority was entitled to issue the decision based on administrative discretion and if the discretion authorization exists in the provisions of law. The review of the boundaries includes a verification if the authority, when issuing the decision, obeyed all the provisions of the substantive law and procedural law. The interpretation of the provisions conducted by the authority in order to read the legal standard is also subject to review.

With reference to the criterion of advisability of the discretionary decisions review, it should be noticed that despite the lack of grounds for review of discretionary decisions in the provisions of the Act on the Law of the Administrative Courts Procedure, administrative courts more often rule with regard to advisability of the issued decision, extending the scope of the review in terms of the compliance with law as much as possible. The implementation of the review based on the criterion of advisability would require changes in the provisions of law, both political and procedural changes. However, it may turn out *de lege ferenda* that such changes to the provisions will not be necessary. As *J. Łętowski* rightly points out, in the modern administrative law the boundary between legality and advisability becomes blurred, because advisability is frequently given a legal framework in cases, when the legislator is the one to define the purpose of the application of law by the public authority[33].

[32] J. Jagielski, *Kryterium legalności w kontroli administracji publicznej, Kontrola Państwowa* 2003, Issue 1, p. 16.
[33] J. Łętowski, *Prawo…* p. 167.

Literature

[1.] Adamiak B, Borkowski J., *Postępowania administracyjne i sądowo administracyjne,* Warszawa 2009, p. 363.

[2.] Bar L. *Sądowa kontrola decyzji administracyjnych*, PiP 1973, Issue 3, pp. 12-13.

[3.] Bigo T., F. Longchamps, *Kontrola administracji*, Studia Prawnicze, 1965, Issue 7, p. 23.

[4.] Bigo T., *Kontrola uznania administracyjnego*, Gazeta Administracji, 14A, 1959, p. 65.

[5.] Błaś A., [in:] *Prawo administracyjne*, J. Boć (ed.), Wrocław 2007, p. 324.

[6.] Błaś A., *Sądowa kontrola decyzji uznaniowych (problemy jednolitości orzecznictwa NSA),* [in:] I. Skrzydło-Niżnik, P. Dobosz (ed.), *Jedność systemu prawa a jednolitość orzecznictwa sądowo-administracyjnego i administracyjnego w sprawach samorządowych,* Kraków 2001, p. 67.

[7.] Jagielski J., *Kryterium legalności w kontroli administracji publicznej,* Kontrola Państwowa 2003, Issue 1, p. 16.

[8.] Jędrzejewski S., *W sprawie sądowej kontroli aktów administracyjnych,* Nowe Prawo 1972, Issue 4, p. 548.

[9.] Łętowski J., *Prawo administracyjne. Zagadnienia podstawowe,* Warszawa 1990, pp. 168-169.

[10.] Łętowski J., *W sprawie zakresu rzeczowego sądownictwa administracyjnego,* PiP 1982, Issue 5. pp. 36-37.

[11.] Matan A., [in:] G. Łaszczyca, C. Martysz, A.Matan, *Postępowanie administracyjne ogólne,* Warszawa 2003, p. 96.

[12.] Mincer M., *Uznanie administracyjne*, pp. 63-64 as well as M. Jaśkowska, *Uznanie administracyjne a inne formy władzy dyskrecjonalnej,* [in:] *System prawa administracyjnego*, R. Hauser, Z. Niewiadomski, A. Wróbel (ed.), Warszawa 2010, pp. 260 and 261.

[13.] Ochendowski E., *Prawo administracyjne, część ogólna,* Toruń 2001, pp. 190-191.

[14.] Starościak J., *Swobodne uznanie władz administracyjnych*, Warszawa 1948, p. 105.

[15.] Sylwestrzak A., *Kontrola administracji,* Koszalin 1998, p. 10.

[16.] Świątkiewicz J., *Przedmiotowy zakres sądowej kontroli legalności decyzji administracyjnych,* PiP 1980, Issue 3.

[17.] Zimmermann M., *Wywłaszczenie. Studium z dziedziny prawa publicznego,* Lvov 1933, p. 227.