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SELECTED PROCEDURAL RULES CONCERNING THE DEFENDANT AND THE REGIME OF ADMINISTRATIVE RESPONSIBILITY

The matter of procedural rules is one of the fundamental issues of criminal proceedings. Defining their catalog, content and mutual relations determines the model of criminal proceedings and indicates its priorities. Treatment of procedural principles proves the nature of the procedure, showing the values that shape it. The system of principles is created by a model of criminal proceedings, indicating what is the most important in it. "It is widely recognized that the rules of criminal proceedings define its most important features in the broader sense, and thus the construction of the process, its model, the way of coming to final arrangements, position and scope of guarantees of its participants. Their breakdown allows to find an answer to the question about the nature and shape of criminal proceedings. The most important values expressed by law of criminal proceedings are related to procedural principles. It is even considered that they form a special kind of system, full of mutual connections and references"[1].

In the context of criminal proceedings, the situation of the person against whom the proceedings are to be conducted, particularly it is a reflection of the way it was shaped and how the procedural rules were implemented. It is also related to the attitude of the state towards its citizen and providing them with a sense of legal security. This constitutes a highly significant element of a democratic state ruled by law, in which, both normative and factual guarantees of fair proceedings are preserved, including rights of defense. One of the essential elements of this right is the status of the person against whom proceedings are conducted. When talking about this person, take a broad perspective, applying the defendant mainly in crim-

[1] P. Wiliński, *Doniosłość zasad w procesie karnym. Fenomen zasad procesu karnego* [in:] *System Prawa Karnego Procesowego*, ed. P. Hofmański, Vol. III, part 1: *Zasady procesu karnego*, ed. P. Wiliński, p. 89 and the indicated literature.

inal proceedings, but also in fiscal penal process, in which the provisions are properly applied pursuant to Art. 113, § 1 of the Criminal Code[2]. The defendant should also be included in this aspect in disciplinary proceedings.

When talking about this type of liability, it should be noted that it is in fact a type of broadly understood criminal liability, adjusted to the needs of individual corporations, which have different professional and ethical standards[3], however, with the reservation that in disciplinary proceedings generally one forecasts proper application of the provisions of the Criminal Procedure Code, although this does not transform disciplinary proceedings into criminal proceedings. Provisions of the CCP may be used only to the extent that results from the specificity of disciplinary proceedings[4]. When talking about the criminal trial *sensu largo*, it should also be taken into account the defendant in the proceedings in misdemeanor cases, in which in the defined by Art. 8 of the Code of Civil Procedure[5], the provisions of the Code of Civil Procedure are applied accordingly, although there are also regulations directly related to fundamental issues, e.g. the right to defense (Art. 4 of the Code of Civil Procedure).

The right to defense in criminal proceedings is recognized as a directive under which the defendant has the right to defend his interests in the trial and to use the assistance of a lawyer. This right is guaranteed to the defendant under Art. 42, paragraph 2 of the Polish Constitution, as well as Art. 6 of the Criminal Procedure Code. Thus, it is a constitutional and legally defined principle[6]. However, this law is understood in a broader sense. "The constitution-maker, establishing in Art. 42, paragraph 3 of the Constitution of Poland, the constitutional principle of the right to defense to define the subjective scope of this right, he did not use the term «defendant», but the descriptive phrase «anyone against whom criminal proceedings are pending». Thus, in a constitutional provision a different legislative method was used than, for example, in Art. 6 of the Criminal Procedure Code, which explicitly refers to the defendant in a broad sense, also including the suspect (see Art. 71, § 3 of the Criminal Procedure Code). Thus, it is rightly noted that the exercise of the constitutional right of defense does not depend on obtaining the status of a suspect or accused person. Referring to the reasons for adopting in Art. 42, paragrafh 2 of the Polish Constitution, such solutions are obvious. The use of a concept firmly anchored in a specific procedure would pose a risk of adopting too narrow of a subjective scope of the right to defense, lim-

[2] The Act of 10 September 1999 of Penal and Fiscal Code (Dz.U. 2020, Item 19 as amended).

[3] K. Dudka, *Stosowanie przepisów k.p.k. w postępowaniu dyscyplinarnym w stosunku do nauczycieli akademickich* [in:] *Węzłowe problemy procesu karnego*, ed. P. Hofmański, Warszawa 2010, p. 355 and the indicated literature.

[4] Judgement of the Court of Justice of 11 September 2001, SK 17/00, OTK 2001, No. 6, Item 165, Dz.U. 2001, No. 103, Item 1129.

[5] The Act of 24 August 2001 Petty Offences Procedure Code (Dz.U. 2020, Item 729).

[6] S. Waltoś, *Naczelne zasady procesu karnego*, Warszawa 1999, pp. 117, 122.

ited only to the passive party in these proceedings. At the same time, in its judicature, the Constitutional Tribunal autonomously understands the concept of criminal proceedings contained in Art. 42, paragraph 2 of the Polish Constitution, referring them not only to criminal proceedings *sensu stricto*, but to all proceedings concerning repressive nature, and thus such proceedings, the purpose of which is to subject the citizen to some form of punishment or some sanction"[7].

Therefore, the right to defense should be discussed from taking the first actual steps against a person, even without a formal decision. Performing procedural actions indicating that they were taken against a specific person in connection with the commission of a specific crime should, it seems, constitute the basis for assuming that proceedings have been initiated against them. In fact, this means acceptance of the previously rejected position that every person – and therefore also a trial suspect – if procedural steps against them are taken – should exercise the right to defense[8]. This determines the perception of actions directed against such people, creating a broader perspective in relation to their situation, which is also associated with the need to take into account the specificity of different types of proceedings. This is also related to the issue of procedural guarantees and their collision, which is extremely important in this aspect, that takes place with regard to participants in the proceedings, including, in particular, the defendant and authorities, which are provided with conditions for the execution of their tasks[9]. Obviously, this must be followed by the practice of the operation

[7] S. Steinborn, M. Wąsek-Wiaderek, *Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej* [in:] *Wokół gwarancji współczesnego procesu karnego. Księga Jubileuszowa Profesora Piotra Kruszyńskiego*, eds. M. Rogacka-Rzewnicka, H. Gajewska-Kraczkowska, B.T. Bieńkowska, Warszawa 2015, pp. 430–431 and the indicated there literature and judicial decisions. Cf. also: J. Skorupka, *O sprawiedliwości procesu karnego*, Warszawa 2013, p. 302: "Delay in presenting charges, when authority responsible for preliminary proceedings has at its disposal any incriminating evidence that would sufficiently justify the suspicion that a given person has committed a criminal Act is a violation of this Art. 313, § 1 of the Criminal Code and the standard of a fair trial. The interrogation of the suspect as a witness should also be considered as a contrary to this standard. There is no doubt, however, that the right to defense applies to all stages of the proceedings and is included in Art. 42, paragraph 2 of the Constitution of the Republic of Poland expression: «everyone against whom», it means that the right to defense depends not only from the phase *in personam* of the pre-trial stage, but is also done in the phase *in rem*. So where the constitutional right is applied to «all stages of proceedings», then this right applies also to the suspect. Hearing a suspect as a witness obliges him/her to testify (Art. 177, § 1 of the Criminal Code) against the criminal liability for declaring untruth or concealing the truth (Art. 190, § 1 of the Criminal Code) and makes it impossible to exercise the right to silence".

[8] P. Wiliński, *Analiza zakresu temporalnego zasady. Zasada prawa do obrony* [in:] *System Prawa Karnego Procesowego*, ed. P. Hofmański, Vol. III, part 2: *Zasady procesu karnego*, ed. P. Wiliński, p. 1546 and the indicated there literature and judicial decisions.

[9] Cf. f.e. T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne*, Warszawa 2014, pp. 55–61; K. Marszał [in:] *Proces karny*, ed. J. Zagrodnik,Warszawa 2019, pp. 39–41; J. Skorupka [in:] *Proces karny*, ed. J. Skorupka, Warszawa 2018, pp. 100–108.

of the authorities, which must take into account not only the procedural but also the constitutional pattern. These issues cannot be treated separately.

The importance of these issues is especially visible when juxtaposing criminal liability with administrative liability, especially in the face of the developing regulations on administrative fines. From the point of view of the principles and guarantees of criminal proceedings, there is a completely different philosophy of proceeding and imposing sanctions, as well as the position of the subject against whom the proceedings are pending. By way of example, among the newest normative solutions, one can indicate the procedure for imposing administrative responsibility in connection with the adoption of the so-called anti-crisis shield, which is provided for in Art. 15, paragraph 1 and 2, that in the event of a breach of the obligation of hospitalization, quarantine or isolation in connection with the prevention, counteracting or combating COVID-19, imposed by the competent authority or resulting from the provisions of law, the state (poviat) sanitary inspector imposes on the person who violates such an obligation by way of the decision, an administrative fine of up to PLN 30,000. The finding of a breach of this obligation may take place in particular on the basis of the findings of the police, other state services or other authorized entities[10].

Administrative liability is specific and separate from other forms of criminal or civil liability. It takes place when the use of ailments is a consequence of committing a prohibited act in the form of the so-called administrative tort. This act constitutes an act or omission in breach of the orders or bans established in generally applicable normative acts or in administrative acts addressed individually to the administered entity, which entails the possibility or obligation of the administrative authority to impose sanctions against this entity[11]. "Inclusion in The Code of Administrative Procedure the amendment of 7 April 2017 on administrative fines is an expression of the legislator's desire to unify the rules of liability for the so-called administrative torts – an institution that has a long tradition in our country, although not necessarily of native origin. An element of this tradition was identifying these torts with offenses and qualifying liability in this regard as criminal administrative"[12].

Administrative liability is imposed in a different manner, implemented according to a regime of a different nature to that applied in matters of broadly understood liability for prohibited acts. There is a general part in the penal code

[10] The Act of 31 March 2020 on amending the Act on special solutions related to the prevention, counteraction and combating COVID-19, other infectious diseases and the resulting crisis situations and some other Acts (Dz.U. 2020, Item 568).

[11] M. Śliwa-Wajda, *Odpowiedzialność administracyjna ad personam osoby zarządzającej krajowym zakładem ubezpieczeń w świetle najnowszych zmian ustawy o ochronie konkurencji i konsumentów*, „Rozprawy Ubezpieczeniowe. Konsument na Rynku Usług Finansowych" 2019, No. 32, p. 64 and the literature indicated therein.

[12] A. Krawczyk [in:] *Kodeks postępowania administracyjnego. Komentarz*, eds. W. Chróścielewski, Z. Kmieciak, Warszawa 2019, p. 960 and the literature indicated therein.

which defines, among others, the concept of a crime, rules and conditions of criminal liability and its exclusion, penalties, penal measures and the rules of their assessment and limitation[13]. However, there is no analogy in administrative law regulations that would define the concept of an administrative sanction, the rules and conditions of liability for an administrative tort, exclusion of administrative liability for conduct that exhausts the features of an administrative tort or limitation of criminal record. There is no statutory definition of an administrative sanction here, as well as rules concerning the conditions of liability and the rules governing the assessment of penalties money for an administrative tort, which means that the Polish administrative law uses inconsistent terminology. In the case of administrative liability, the responsible entity may not only be the perpetrator of an administrative tort, but also another legal entity linked by a specific legal relationship with the perpetrator[14].

The special nature of administrative responsibility is manifested in its elements on the border of criminal law and administrative law. It should be noted that most of the acts establishing the administrative and criminal liability were not expressed as its premise. Thus, the legislator did not, as a rule, make the imposition of an administrative penalty for infringement of applicable provisions conditional on the determination of the fault of the entity subject to liability. According to the vast majority of provisions establishing financial administrative liability, the body is only required to establish the facts of the case during the proceedings, and in the event of a violation of the law, apply strictly defined sanctions. Thus, in the judicature it is assumed that the basis of penalties, the imposition of which does not depend on the occurrence of the perpetrator's fault, constitutes a construct of objective responsibility. Also, the acts often do not specify the premises leading to the perpetrator being subject to punishment, including that the authority's right to refrain from imposing a penalty or to minimize its scope[15]. Thus, "in criminal law, liability is based on the principle of guilt, including when it comes to financial penalties. On the other hand, in the case of an administrative tort for which financial penalties are imposed, this liability may be based on the principle of guilt, but more often it is objective liability, independent of the degree of culpability, and different from criminal liability. In administrative law, a fine is imposed on various entities (not only for natural persons), an administrative decision subject to appeal to the administrative court. It is a reaction of the state not for a criminal act, but for another violation of the

[13] M. Rogalski, *Odpowiedzialność karna a odpowiedzialność administracyjna*, „Ius Novum, special edition" 2014, pp. 66–67.

[14] *Ibidem.*

[15] D. Szumiło-Kulczycka, P. Czarnecki, P. Balcer, A. Leszczyńska, *Analiza obrazu normatywnego deliktów administracyjnych*, Warszawa 2016, pp. 84, 96 and indicated there judicial decisions and literature.

legal order. It is not imposed on behalf of the state by an independent court in a special proceeding in which the defendant is guaranteed compliance with the rights pursuant under Art. 42 of the Constitution and ensures the impartiality of the decision"[16].

The provisions which determine liability for committing specific infringements are not treated by the legislator as criminal provisions, and financial penalties as fines. At the same time, the amount of penalties that may be imposed on natural persons by an administrative body, often significantly exceeds the amount of the fine specified in the provisions of the Petty Offenses Code, and sometimes also the maximum amount of the fine provided for in the Penal Code[17]. According to Art. 189b of The Code of Administrative Procedure[18] an administrative fine is understood as a financial penalty specified in the act, imposed by a public administration body, by way of a decision, as a result of a breach of the law consisting in failure to comply with an obligation or breach of the prohibition imposed on a natural person, legal person or organizational unit without legal personality[19]. Article 189d of the Code of Administrative Procedure sets out the directives on the level of this penalty. Thus, when imposing an administrative fine, a public administration body takes into account: 1) the importance and circumstances of the violation of the law, in particular the need to protect life or health, protect property in significant quantities or protect important public interest or extremely important interest of the party, and the duration of the violation; 2) the frequency of past failure or breach of the same type of prohibition as failure to comply with the obligation or violation of the prohibition, as a result of which a penalty is to be imposed; 3) prior punishment for the same behavior for a crime, tax offense, misdemeanor or tax offense; 4) the degree of contribution of the party on which the administrative fine is imposed to the infringement of the law; 5) actions taken by the party voluntarily to avoid the consequences of violating the law; 6) the amount of the benefit that the party has achieved or the loss it has avoided; 7) in the case of a natural person – the personal conditions of the party on which the administrative fine is imposed. The provision of Art. 189d of The Code of Administrative Procedure applies only to the imposition of an administrative fine, i.e. to determine its charge in the amount of money. However, it does not apply to the imposition of this penal-

[16] M. Rogalski, *Odpowiedzialność karna*…, p. 67.

[17] D. Szumiło-Kulczycka, P. Czarnecki, P. Balcer, A. Leszczyńska, *Analiza obrazu*…, pp. 75, 158.

[18] The Act of 14 June 1960 – the Code of Administrative Procedure (Dz.U. 2020, Item 256 as amended).

[19] In this definition, therefore, we can distinguish three elements which create administrative financial penalty, that is: a financial penalty, specified in the Act, imposed by a public administration body in the form of a decision, as a result of a breach of the law consisting in: failure to fulfill an obligation or breach of a prohibition, imposed on a physical, legal person or organizational unit without legal personality, cf. A. Wróbel [in:] A. Wróbel, M. Jaśkowska, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2018, p. 1198.

ty[20]. "The catalog of circumstances to be taken into account by the administration authority when imposing a sentence is closed. Taking them into account is obligatory (the authority «takes into account»), and these grounds should be applied jointly, unless, due to the nature of the act, some of them turn out to be outdated in the circumstances of a specific case. In that case, however, it should be indicated in the justification of the decision to impose a fine"[21].

As regards the procedure, there is a general rule that, in the absence of different regulations, the provisions of the Code of Administrative Procedure apply[22]. The administrative procedure consists of two stages. Proceedings before the first-instance bodies are characterized by the principle of legality, according to which the authorized body is obliged to initiate proceedings, establish the facts of the case and, in the event of a violation of the law, apply strictly defined sanctions.

The imposition of a penalty takes the form of a procedural decision, which may be issued in circumstances specified in a particular statutory provision. These enumerations form a closed catalog and cannot be specified by the authority in any way.

A party to the proceedings is an entity whose legal interest or obligation relates to the proceedings. It may act individually or together with an attorney, which may be any natural person with full legal capacity. The authority conducts a hearing ex officio or at the request of a party in the course of proceedings in each case in which it leads to the acceleration or simplification of the procedure or when it is required by law. However, authority must conduct a hearing in a situation where there is a need to reconcile the interests of the parties, or when it is necessary to clarify the case with the participation of witnesses or experts, or by inspection. The authority is obliged to collect and consider the collected evidence in an comprehensive way. Evidence can be anything that may contribute to the clarification of the case, and is not contrary to the law, especially documents, testimonies of witnesses, opinions of experts and inspections. At the same time, a party is entitled to submit requests for the taking of evidence, which the authority should take into account if the subject of evidence is a circumstance significant for the resolution of the case. The party also has the right to participate in the taking of evidence, to ask witnesses, experts and parties questions, as well as to testify[23].

Summing up, it should be noted that the regimes of broadly understood penal and administrative responsibility differ in a fundamental way. Therefore, a question may be asked whether, in the case of administrative liability, the material grounds and procedural rules provide sufficient protection to entities on which

[20] *Ibidem*, p. 1213.

[21] A. Krawczyk [in:] *Kodeks postępowania administracyjnego. Komentarz*, eds. W. Chróścielewski, Z. Kmieciak, Warszawa 2019, p. 991.

[22] D. Szumiło-Kulczycka, P. Czarnecki, P. Balcer, A. Leszczyńska, *Analiza obrazu*…, pp. 99–102.

[23] *Ibidem*.

sanctions are imposed, especially since their amount, as indicated, is often higher than fines punishable not only for committing offenses but also crimes. In a criminal trial *sensu largo*, the guarantees of the person against whom the proceedings are conducted are of a fundamental nature, resulting from the main procedural principles. In case of administrative responsibility, it does not have such a developed system, for example there is no presumption of innocence. Therefore, the direction of the legislator's expansion of the scope of administrative torts should be considered debatable, as the situation of entities against whom administrative fines are to be applied is not secured as it is in a criminal trial *sensu largo*.

Obviously, the above opinion should not be seen as an expression of general disapproval of the institution of administrative sanctions. In many situations, they are a useful instrument for achieving goals by state bodies. However, the replacement of penal liability with administrative torts should be considered controversial. The assessment of this phenomenon, made even from the perspective of the main procedural principles and guarantees of the accused (and also the accused), including in particular the principles of the right to defense and the presumption of innocence, must raise reservations.

These, only exemplary circumstances, not only show the differences between the two types of responsibility presented, but also testify to the importance of the solutions shaping the system of guiding principles and guarantees of the person against whom the proceedings are pending for a fair criminal trial *sensu largo*.

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Summary

The matter of procedural rules is one of the fundamental issues of criminal proceedings. Defining their catalog, content and mutual relations determines the model of criminal proceedings and indicates its priorities. Treatment of procedural principles proves the nature of the procedure, showing the values that shape it. The most important values expressed by law of criminal proceedings are related to procedural principles.

Keywords: procedural rules, accused, administrative responsibility, criminal proceedings

WYBRANE ZASADY PROCESOWE DOTYCZĄCE OSKARŻONEGO A REŻIM ODPOWIEDZIALNOŚCI ADMINISTRACYJNEJ

Streszczenie

Problematyka zasad procesowych należy do fundamentalnych kwestii postępowania karnego. Określenie ich katalogu, treści i wzajemnych relacji determinuje model postępowania karnego i wskazuje na obowiązujące w nim priorytety. Ujęcie zasad procesowych świadczy o charakterze postępowania, wskazując na wartości, które je kształtują. Z zasadami procesowymi wiążą się najważniejsze wartości wyrażone przez przepisy karnoprocesowe. Tym właśnie zagadnieniem będzie poświęcony artykuł.

Słowa kluczowe: zasady procesowe, oskarżony, odpowiedzialność administracyjna, postępowanie karne