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Summary

of the article: A judge and “correcting” law – the essential dilemmas

The opinion that an administrative court judge does not have the capacity to supplement, “correct” or develop law is expressed strongly and rather generally. These are solely the powers of the legislative branch.

A judge is forced to “correct” law when in the course of the legislative process the legislator violates the standards of political and legal culture. In such event law has qualified defects and therefore the judge does not merely apply law but rather helps to co-create it. His role is not reduced to the plain application of the laws and regulations. But it is true only in the event of particularly complicated, difficult, non-schematic cases and matters. The more general, complicated, unclear, incoherent, full of qualified praxeological and logical gaps the regulations the more specified part of the power to co-create law actually transfers from the parliament to the judge. And this happens because the factor of axiological justification of norms plays an important role. It is a corrective role that the judicial branch is able to play. This axiological correction performed by the judge supplements the “written law”. The judge uses the text of the laws and regulations only as the matter in which it searches for the idea of law”. What should a judge considering a difficult case being unable to identify a standard of the judicial decision in the rules of law do ? There are three – not only theoretical - solutions

- he may reject the provisions of positive law and found his decision overtly and directly on the axiological values, including these he may infer from the Constitution;
- he may expand or reduce the scope of application of the statutory law in accordance with the requirements of the indisputable axiological norms;
- he may annul the procedural norm inferred from the statutory law justifying his decision by simply referring to the axiological values.

Rooting the sources of law in the social facts allows the judge supplementing law in the process of its application to make two fundamental assumptions. Firstly, “the idea of law” i.e. its essence requires that the doubts concerning the issues to which the law refers defectively, insufficiently be dispelled taking into account the universal, indisputable axiological values. Secondly, the universal, indisputable axiological values apply irrespectively of the generally agreed legislative conventions. This means that the norms resulting from the non-disputable system of values may manifest themselves as the correction of positive law.

Summary

of the article: The scope of protection of historic real property and the selected judgements of the VAC in Warsaw

This article discusses, with a short commentary from the author, the recent decisions of the VAC in Warsaw concerning protection of historic real property from the perspective of three issues:

1) the differences in the scope of national heritage conservator's protection of an individual historic real property and the facilities comprising a historic urban or rural arrangement or a historic building complex;

2) the constitutional aspects of historic buildings protection, in the event of competition with other constitutional principles, such as: the principle of equality, proportionality, protection of property rights, protection of acquired rights and trust in the state;

3) the effect the decisions concerning protection of historic real property in the zoning plan as a form of historic buildings protection have on the investment activity.

The main theses of the article are such that entering a historic urban or rural arrangement or a historic building complex in the register of historic buildings does not exclude the possibility of entering into the register the individual historic real property comprising such arrangements or such a complex. The premise of entering a specific arrangement or complex in the register of historic buildings is the fact that it has historic value as a whole and this value will be destroyed if only the most valuable, most representative or the best preserved elements are isolated out of such arrangement or complex. It translates into the diversification of the scope of the executive powers of the national heritage protection authorities depending on the object of protection. The problems with determining the relevant scope of protection have their source in the temporary provision in the Act on Protection and Care of Historic Buildings dated 23 July 2003 (Art. 142) recognising as historic buildings within the meaning of the present act all the buildings that were entered in the register of historic buildings in the past. It does not regulate the differences in the statutory definitions of historic real property in the historic aspect and, therefore, in the scope of their protection.

Furthermore, the author attempts to challenge the thesis that seems to stem from the judicial decisions of the VAC that the norms concerning the protection of historic buildings are absolute i.e. even the rights acquired without any defects by virtue of the final administrative decision must give priority to them. This absolute priority in protection of historic buildings applies also to the other constitutional principles. In the author's opinion in each single case it is necessary to correctly balance the values resulting from all the constitutional principles in the event of competition with the principle of protection of historic buildings.

The author also confirms the thesis that the relevant decisions in the zoning plan may be the basis for the executive rulings in the area of the national heritage protection given that the zoning plan, as the local law, and at the same time one of the forms of protection historic buildings, determines the method of historic building protection, without the need to refer to the opinions of experts in the field of architecture who would issue opinions as to the effect an investment in the vicinity of a historic building would have on its appearance and visual values.

Summary

of the article: The legal character of the time limit to bring an opposition against the notification of construction works – the attempt to reinterpret Art. 30.5 of the Construction Law

This article presents one of the most important elements of the institution of an opposition against the notification of construction works regulated in Art. 30.5 of the Construction Law dated 7 July 1994 (the “Construction Law”) i.e. the time limit specified by the legislator for the architectonic-construction authorities to bring such opposition. The author attempts to propose a new, different from the generally accepted so far, view of the essence and function of the above-mentioned time limit. The author challenges the prevailing opinion that as a result of the lapse of this time limit the authority is unconditionally and definitively deprived of the right to bring the opposition and that actually it is the time limit “to handle the case” of bringing the opposition in all instances jointly. Relying on the literal wording of Art. 30.5 of the Construction Law and pointing to the purpose-oriented arguments the

author attempts to prove that the time limit set forth in the above-mentioned provision does not specify the time to finally handle the case but it is merely an element of construction of the legally relevant “silence” of the authority as a specific form of approving the construction project notified by an investor – having effects analogous to the construction of legal fiction of the positive handling of the case increasingly often applied by the legislator. From this perspective the time limit in question is of importance only at the initial stage of considering a notification that continues until the this time limit lapses ineffectively or the authority brings an opposition. Bringing an opposition and then an appeal against the decision on bringing the opposition initiates the proceedings whose course and speed are determined on the “normal” terms and conditions regulated in the Administrative Procedure Code (“APC”) – i.e. in particular the general principle of fast proceedings (Art. 12 of the APC) and the general time limits to handle a case (Art. 35 of the APC) – and bringing another opposition, if any (when the first opposition is rejected) by the appellate authority or a first instance authority to whom the appellate authority transferred the case for reconsideration, is not bound with the time limit of 30 days referred to in Art. 30.5 of the Construction Law.

In the author’s opinion the proposed interpretation of Art. 30.5 of the Construction Law makes it possible to harmonise to the fuller degree the private interests of the potential investors expressed mainly in preserving the maximum simplicity and speed of the notification procedure with the public interest, in this case related to providing the administrative authorities with real possibility to exercise effective control and verification (also in the administrative sequence of instances) over the contemplated construction projects notified by the investors.

Summary

of the article: “The environmental impact report” in the judicial decisions of the administrative courts

The environmental impact assessment is the basic instrument of the EU environmental policy – the principle of prevention. The assessment comprises a series of formalised actions. Until now the Polish doctrine has not paid much attention to the basic element of the assessment i.e. the environmental impact report. A significant part of the problems related to the legal nature of the report and its meaning for the correct course of the proceedings to issue the decision on the environmental conditions was solved in the relevant judicial decisions of the administrative courts.

The first problem concerns an author of the environmental impact report. The legislator abandoned the regulation consisting in instructing an expert to prepare a report in favour of the free selection of an author by an investor. The article presents the changes in the judicial decisions following the amendments to law.

The next problem is the legal nature of the report. The author refers to the judicial decisions determining it is a private document and not an official one. The above distinction has significant importance in the proceedings to take evidence because a private document is not covered with the presumption that its contents are consistent with the facts. The author also raised the problem of recognising the environmental impact report as an object of copyright. The judicial decisions providing otherwise emphasise the lack of unanimous approach by the administrative courts in this respect.

The next problem discussed in the article is the credibility and completeness of the environmental impact report and its effect on the correct course of the administrative proceedings. The article quotes the judicial decisions specifying the further steps the authority must take upon discovering that the report does not include all the elements required by law. The author discusses in detail the judicial decisions concerning one of the obligatory elements of the report i.e. specifying the alternative variations of the project.

The last problem discussed in the article concerns the court's control of the administrative proceedings to declare a decision invalid.

Providing the examples of judicial decisions the author attempted to present on the one hand the complexity of the issue in question and on the other – the difficult role of the administrative courts in shaping the lines of adjudication.

Summary

of the article: Applying the tax procedure – procedural violations might affect the result of the case

The problems of irregularities in application of the procedural regulations by the tax authorities are of particular importance for the party being the addressee of the decision concerning its rights and obligations under the tax laws and regulations, in particular correcting the result of self-calculation. As regards the violation of the procedural regulations, determining the consequences of such violation and its effect on the result of the case is not obvious in many situations. While it is possible to point to the most often violated procedural regulations and describe what they consists in, creating any new normative constructions on the basis thereof would be an ineffective legal endeavour. For this reason analysing specific irregularities and evaluating their potential effect against the background of a specific case, provided for in the Act on Proceedings Before Administrative Courts is the absolutely correct assumption. On the other hand one may have material reservations as to the formulated opinions on the legality of certain activities of the tax administration in the course of the tax proceedings, or evaluation of the potential effect of the irregularities on the result of the case. In practice numerous irregularities in applying the procedural regulations and doubts concerning the evaluation whether specific actions may be recognised as violations of the procedural regulations and of the effects they may have result from the fact that in spite of the declarations concerning the meaning of the general procedural principles formulated in the literature, the practice does not always appreciate their importance and usefulness. It should not raise any reservations that a remedy for the problems presented in this article should be the court control of the activities of the tax administration. The administrative courts controlling the legality of the decisions made should always shape the standards of conducting the proceedings relevant for this branch of law taking into account: the interventional nature of the tax law norms, the inquisitive model of proceedings and the presumed correctness of tax returns and the tax book in the proceedings correcting the result of self-calculation.