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***On the German Vorverfahren and the Polish administrative appeal
proceedings***

(Instytucja Vorverfahren, a konstrukcja polskiego postępowania odwoławczego)

SUMMARY

Ph.D. dissertation prepared
in the Department of Comparative
Administrative Procedure under the
supervision of dr hab. Joanna Wegner, prof.
UŁ.

Łódź 2023

SUMMARY

The subject of this dissertation is the German institution of *Vorverfahren*.

The theme of this thesis is a legal institution that does not exist in the Polish legal system, and which, as of yet, has not been subject of a comprehensive scientific analysis in the Polish doctrine of administrative law. The dissertation deals with *Vorverfahren*, or preliminary proceedings, an institution of German procedural administrative law. It is one of the most peculiar phenomena of the German legal culture. This is due to the fact that *Vorverfahren* is intended to secure legal protection of the individual, while at the same time to provide the authority with the opportunity to verify any administrative act challenged by the individual. This legal remedy is part of the German system of protecting the rights of the individual and is implemented by activating one of the means of challenging administrative acts. By *Vorverfahren* I understand – in concert with the prevailing position of the German doctrine of administrative law as well as judicial decisions – an institution aimed at verifying the contested act which takes place, as a rule, in two stages and is a condition of the admissibility of filing a complaint with an administrative court. The use of this legal means by the legislator is explained by pragmatic considerations.

This work shows both how *Vorverfahren* is functioning as well as how it is effective. The evaluation of the effectiveness of this legal instrument provides an occasion to contemplate the future of Polish appeal proceedings. This dissertation can be divided into two main parts. The first one, i.e. Chapters I-III, is dedicated to *Vorverfahren* as such. The second one, i.e. Chapters IV-V, examines the Polish administrative appeal proceedings and their future prospects.

In this country's legal system the means of administrative appeal has seen a rich literature, due to its importance and place of this legal remedy in the system of procedural guarantees to the individual. The right to appeal is one of the basic rights guaranteed to a party to administrative proceedings in the Constitution of the Republic of Poland. An appeal

is a regular legal remedy that gives a party the opportunity to challenge an administrative decision issued in the first instance of administrative authority. This right corresponds with the obligation of a higher level authority to reconsider and resolve an individual case through an administrative decision. This is a procedural right since it opens the process of reconsideration and resolution of the case, thus only by using this right a substantive change in the decision of the first-instance authority can be obtained. However, over the years, the appeal formula as prescribed in the Polish Administrative Code has devalued, giving way to a number of special administrative proceedings.

In this dissertation I have been trying to bring the result of comparing the constructions of procedural law adopted in Poland with *Vorverfahren*. The comparison of the two models of appellate proceedings provokes questions not so much about the need for appellate reform, but about its shape. In recent years there have been several changes to the Polish Code of Administrative Procedure that have brought renewed attention to the effectiveness of the institution of appeal. One example is the possibility of waiving the right to appeal. Recently, the appeal formula in Austria, a model for domestic regulation, has been modified.

Using examples taken from foreign legislation requires adequate theoretical reflection and, above all, avoiding the temptation to oversimplify. It should also be seen that when adopting foreign solutions one should not forget different circumstances and conditions of development of a given institution. That is because what works well in other legal system may not necessarily work as a solution in our - differently shaped - system of administrative law. Therefore, I have put forward my own proposal for a reform of the Polish administrative appeal procedure. My suggestion for the amendment can be described as an attempt to answer the question: what model of verifying administrative acts could the Polish legislator adopt in order to reform the appeal procedure? This is because there have been some attempts to amend lately, but with no clear answer as to what direction Polish appeal proceedings should

evolve. The system of Polish appeal proceedings is not a uniform one. Although certain patterns have been developed, it is difficult to speak of any profound concept of the construction of Polish appeal proceedings. Meanwhile, *Vorverfahren* appears to be a fixed tool of administrative process, highlighting its advantages against another, foreign solutions. The work on this dissertation revealed the great strength of attachment to theoretical concepts developed years ago even if they have often lost their relevance. Too much regard to certain stereotypes or accepted solutions may not be beneficial for the development of legal science. I think it is worth going beyond the pattern and looking at the institution of appeal as a relic of the old days, and thus it is useful to consider the need for a comprehensive reform of administrative appeal proceedings. The development of societies results on the one hand in the enlargement of the sphere of legal regulation, and in the growth of legal disputes in the area of public administration on the other. The former is evidenced by the growing content of the Journal of Laws, and the latter by the growing statistics of administrative courts. A differently shaped appeal procedure could respond to it.

Working on this dissertation I used comparative, dogmatic and historical methods. The essential aspect of consideration in this work was made the theoretical one, supplemented by some of practical significance.

The most prominent authors writing on the Polish administrative appeal proceedings such as J. Zimmermann, J. Jendrońska, B. Adamiak, and Z. Kmiecik in recent years, have made an extensive presentation and interpretation of the most important doctrinal approaches to this institution. The review of those doctrinal positions allowed the adoption of an appropriate point of reference to the German model presented earlier.

I also verified the thesis of the need for a thorough reform of the appeal proceedings specified in the Polish Code of Administrative Proceedings. It appears that there is a feeling of necessity of further amendments to the provisions of administrative appeal proceedings in

the Polish legislature, since it was planning another changes, as evidenced by the latest draft of amendments of September 2022. However, there is no clear vision of the future shape of appeal proceedings in that draft.

In the German system of administrative appeals, the name "appeal" is reserved for a legal remedy against the judgment of the court of first instance, and the legal means of initiating preliminary proceedings is called the objection. Thus, it is definitely more reasonable to translate *Widerspruch* as an objection rather than an appeal.

Seen from the perspective of Polish administrative remedies, preliminary proceedings in the German system turn out to be homogeneous but at the same time responsive to the challenges of modern times. These features are valuable indeed. For lawyers from the German-speaking area, the reliability and stability of legal constructions are of decisive importance, which does not mean that new and innovative solutions are not sought there. This is evidenced, e.g. by the introduction of mediation by the law of July 21, 2012. In Austria on the other hand the tradition of two-instance proceedings was given up. However, that was preceded by a long discussion of the future of both administrative proceedings and administrative judiciary. Having in mind the above German and Austrian examples the institution of appeal contained in the Polish Administrative Procedure Code seems to be rather outdated. This assessment is prompted by the increasingly extensive scope of separate regulations, contributing to the variety of the legal remedy in question.

The findings made in Chapter III allow us to assume that *Vorverfahren* is an effective legal means and it achieves the goals of this procedure adopted in the German jurisprudence. In view of numerous methods of measuring the effectiveness of a given legal institution, it is worth pointing out that none of the methods presented here can be dominant, and that the law as a cultural, social and historical phenomenon escapes clear evaluation. However, it is worth seeking ways to evaluate the performance of given institutions in practice, in order to be able

to provide the legislator with information on the practical functioning of given legal constructions, with the caveat that the measurability of the law's effectiveness is never exhaustive.

Since *Vorverfahren* works so well in the German system, could it somehow be brought in to the domestic legal order?

The answer to this question is not clear-cut. The division of preliminary proceedings in Germany into two stages is not an accidental one, and there are some important rationales behind such regulation. This is because the authority that issued the contested decision can conduct a supplementary evidentiary proceedings, and consequently - if it deems it justified - revoke the issued decision. Such a solution adopted by the German legislator could, in my opinion, be used in Polish appeal proceedings. It would allow to increase the effectiveness of the institution of remonstrance in Poland. Provided that the authorities of the first instance undertake additional actions and, as a consequence, change their decision - this would contribute to speeding up the proceedings, as the case would not have to be transferred to a higher instance authority. Therefore, I would suggest using the German experience not at the interface of administrative proceedings and judicial review of public administration, but only within the framework of administrative appeal proceedings.

In view of the above, the legislator should reform the model of appeal proceedings. The Polish system of verifying acts issued by public administration bodies is elaborate beyond measure, and it is impossible to improve the proceedings by *ad hoc* efforts. Attempts at reform to date should be assessed as too timid.

With regard to the administrative appeal in its current form, the thesis that this institution should be kept in its present form does not stand up to criticism. The current model of the Polish appeal procedure appears to be an outdated concept and out of step with modern times. While the need to conduct a full, substantive review in each case would be fraught with the

error of overgeneralization, it seems worthwhile to look for methods of organizing the administrative appeal proceedings in such a way as to provide the authorities with the possibility of conducting additional evidentiary proceedings. The *ratio legis* for the possibility of additional actions by the first-instance body does not mean to give the authorities additional powers, but to provide them with efficiency, flexibility, as well as proper tools without prejudice to the principles of legalism and the rule of law.

Support for the above position is also indicated by the data contained in the impact assessment relating to the 2017 amendment of the Polish administrative appeal procedure. This means that in most proceedings the legislator plans to maintain the institution of administrative appeal. Thus, it is all the more worthwhile to look for solutions to improve these proceedings.

Chapter one of this dissertation is devoted to the problems of the institution of *Ververfahren*, the conceptual framework, as well as the evolution of this institution and its place in administrative procedural law. In the second Chapter, J. Wroblewski's findings on the model of judicial application of the law are presented in order to consider whether in the course of *Vorverfahren* public administration bodies apply the law, and if so, whether this model contains any peculiarities. The third Chapter is devoted to the issue of efficiency. The first three chapters provide a primer on the shape of Polish administrative appeal proceedings. In the last Chapter my own concept aimed at improving the appeal procedure is offered.