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ACCORDING APPLICATION OF THE PROVISIONS OF THE CODE OF ADMINISTRATIVE PROCEDURE AND THE CODE OF CRIMINAL PROCEDURE ON THE BASIS OF THE LAW ON HIGHER EDUCATION – SELECTED ISSUES

1. General remarks

According to Article 156 para. 1 of the “Rules of Legislative Technique” in the normative act references can be applied if it appears to be necessary to achieve the brevity of the text or to ensure consistency of the regulated legal institutions. The provision of section 4 of this paragraph provides that if the legal institution is regulated as a whole entity and the complete list of the provisions which it refers to is not accessible, exceptional reference is possible to the provisions which were substantially defined, on the condition that these provisions can be unquestionably distinguished from others; a referential provision is formulated as: “To ... (specify institution), the provisions of ... (substantial definition of the provisions) are applied.¹

The warrant to apply certain provisions “accordingly” means that in their application one should consider the specific characteristics of the cases to which such a reference is made.² In the Resolution of 6 December 2001 The Supreme Court (SC) stated that “It is generally accepted – briefly speaking – that while applying accordingly a provision it can be applied directly, or with some modifications, justified by the difference of the state ‘undergoing’ the applied provision or the inadmissibility of its application to the state in question. This inadmissibility can thereby result either directly

¹ Regulation of the Prime Minister of 20 June 2002 on the “Rules of Legislative Technique” (Dz. U. No. 100, item 908).

² G. Wierczyński, *Redagowanie i ogłaszanie aktów normatywnych. Komentarz*, Warszawa 2009, pp. 769–770.

from the content included in the legal regulation in question or from the fact that the application of this particular standard may not be reconciled with the specificity and the unique nature of the state in question”.³

In its resolution of 30 January 2001, the Supreme Court held that if the provision that is referred to regulates another legal institution, the provision of reference commonly uses the statement of the according application.⁴ This, ie. using the provision in the area of standardization of different legal institutions, expresses the basic meaning of the “according” application of legal provisions. The standards subsequently derived from the two provisions (the provision that is referred to and the referring provision) are thus different due to the elements associated with only one of these institutions.⁵

Our subject of consideration was the “according” application of the Code of Administrative Procedure (CAP),⁶ provisions on the procedure at the administrative courts⁷ as well as the Code of Criminal Procedure (CCP)⁸ in matters determined by the Academic Teaching Act (2005).⁹ While considering both academic writings and case law (including judgment by the Constitutional Tribunal (CT)) serious doubts occur as to the proper meaning of the notion of “according” application of law. The doubts appear to be particularly serious in the field of administrative and administrative court procedures, when applied to decisions by university authorities. The same applies to the according application of the provisions of the Code of Criminal Procedure as applicable accordingly in the disciplinary proceedings.

2. According application of the provisions of the Code of Administrative Procedure and the Law on proceedings at administrative courts

The right to appeal against decisions made by a higher education body is guaranteed to a student by the provision of Article 207 para. 1 of the LHE, according to which the Code of Administrative procedure and provisions on

³ Resolution of SC dated 6 December 2001 r., III CZP 41/00, LEX no. 44281.

⁴ Resolution of SC dated 30 January 2001 r., I KZP 50/00, LEX no. 45016.

⁵ See J. Nowacki, “*Odpowiednie*” stosowanie przepisów prawa, PiP 1964, z. 3, pp. 367–376.

⁶ Act of 14 June 1960 the Code of Administrative Procedure (consolidated text Dz. U. 2000 No. 98, item 1071 with later amendments).

⁷ Act of 30 August 2002 – Law on Proceedings before administrative courts (consolidated text Dz. U. 2012, item 270).

⁸ Act of 6 June 1997 (Dz. U. No. 89, item 555 with later amendments).

⁹ Act of 27 July 2005 (consolidated text Dz. U. 2012, item 572).

the appeal against the administrative court decisions are applied to decisions on admission to university or admission to doctoral studies as well as individual decisions issued by the university authorities in individual cases of undergraduate students or doctoral students (post-graduate students) and in matters of supervision of university student organizations' activity and student government activity. Moreover, under Article 207 para. 4, the provision of Article 207 para. 1 should be applied accordingly to decisions made by the scholarship committee and the appeals scholarship committee [...].

It is thus necessary to consider what decisions, made in individual cases of Polish university students, will undergo administrative appeal proceedings. This question is really of great importance due to the discrepancy between viewpoints in this matter.

On the basis of both case law of administrative courts as well as the view of the doctrine, before the provisions of LHE went into force, there was established a viewpoint according to which the legal regime of the Code of Administrative Procedure is applied to external acts issued by higher education bodies, thus excluding internal acts issued by universities out of administrative control.¹⁰

In case law it has been established that external nature thus characterizes decisions concerning enrolment and exclusion from the list of students, and in the matter of scholarship (both for students with high academic achievements and those of poor material status) the party has the right to appeal.¹¹ It was believed that the assessment of a candidate's knowledge or the assessment of the kind of questions asked during the entrance exam were not of an administrative nature.¹² In another case, prolonging a student's exam session, and thus changing the decision to exclude the student from the list of students, is a decision that can be appealed at the administrative court of law. Similarly, it was thought that a decision made by a higher education institution which concerns an individual user of an administrative body, such as a school, stating the transformation or dissolution of the contract (professional relation) is also a case of

¹⁰ Resolution of SAC dated 12 June 1990, SA/Kr 368/90, ONSA 1990, no. 2-3, pos. 48.

¹¹ See J. Borkowski, *Zarządzanie...*, op. cit., p. 95; resolution of SAC dated 29 June 1982 r., II SA 532/82, OSPiKA 1983, no. 1, pos. 20; resolution of SC dated 26 September 2002 r., II CKN 466/00, LEX no. 74408; resolution of SC dated 27 September 1983 r., III AZP 3/83, LEX no. 11715.

¹² J. Homplewicz, Gloss to the resolution of SAC dated 22 February 1994, SA/Wr 2073/93, OSP 1995, no. 11, pos. 223; resolution of SAC dated 2 December 1994 r., I SA 1636/94, ONSA 1995, no. 4, pos. 176.

an external administrative act.¹³ Referring to the internal nature of an institution's acts, in one of its provisions the Supreme Administrative Court stated that denial of a student's conditional admission to the exam session is not an administrative decision.¹⁴ The Supreme Administrative Court also stated that refusal of the Dean's leave grant is not an external administrative decision which can be appealed against at the administrative court, where such refusal does not pre-empt the further course of study of such a student.¹⁵ In 1987 the Supreme Administrative Court stated that the decision on social scholarship is an internal act, which was strongly criticised by J. Homplewicz in his right to express an opinion about the ruling of the Court.¹⁶ As such were also taken the Rector of the University's decisions to exempt or his refusal to exempt some students from fee paying for classes of weekend studies.¹⁷

The opinion that only external acts can be subject to administrative appeal has not changed on the grounds of the provision amended in 2001 of Article 161 of 12 Sept. 1990 on higher education.¹⁸ Originally, this provision specifically indicated against which decisions one could appeal at the Supreme Administrative Court. After the amendment, Article 161 para. 1 stated generally that to the decisions made by the university in individual cases as well as in matters of student organizations control and student government control one should accordingly apply provisions of the Code of Administrative Procedure as well as provisions of the appeal against decisions at the administrative court. The decisions made by the Rector in the first instance were final. The second paragraph of this article, however, stated that the provisions of para. 1 sentence 1 should be also applied to the decisions made by the scholarship committee and the appeals scholarship committee [...], and after the amendment it introduced a possibility to appeal against any decision taken by the university bodies in an individual student's cases.

¹³ Resolution of SAC dated 25 September 1986 r., SA/Gd 513/86, OSP 1988, no. 4, pos. 88.

¹⁴ Resolution of SAC dated 31 August 1984 r., SA/Wr 357/84, PIP 1985, z. 5, pp. 134–136.

¹⁵ Resolution of SAC dated 12 June 1990 r., SA/Kr 368/90, ONSA 1990, no. 2–3, pos. 48.

¹⁶ J. Homplewicz, Gloss to the resolution of SAC dated 16 April 1987 r., I SA 448/87, OSP 1988, no. 10, pos. 223.

¹⁷ Resolution of SAC dated 12 January 2000, II SA/Wr 499/99, OSP 2000, no. 12, pos. 182.

¹⁸ Act of 20 July 2001 amendment of the Act on higher education, vocational higher education institutions and some other laws (Dz. U. No. 85, item 924).

Still, on the basis of the amended Article 161 para. 1 of the LHE the prevailing opinion was that this provision applies only to external decisions, disposing acts stating creation, transformation, duration, or termination of the institutional relationship.¹⁹ Based on earlier Administrative Courts' rulings, according to which as towards bodies such as universities, it did mean that an individual decision made by the university authorities was necessary for the acts of institutional authority such as a decision stating the MA exam submission and the decision to award the MA title,²⁰ as well as the decision to exempt or refusal to exempt some students from fee paying for classes of weekend studies.²¹

Notwithstandingly, unilateral legal action of the institutional body directed at specific individually marked legal consequences within the institutional relationship, which does not affect the very existence of this relationship, would not demand issuing an individual decision (so called internal acts).²²

In the doctrine the approval of the so-far used case-law was given particularly by Z. R. Kmiecik, who stated that the substantive amendment of Article 161 of the LHE is therefore at best merely of a "quantative" nature, not "qualitative" at all. The same as before, Article 161 of the LHE in its current form does not allow for questioning decisions that are not administrative decisions made by higher education institutions before any court.²³ Next, he claims that it is not enough to assume that the Act is an administrative decision within the meaning of the Code of Administrative Procedure, as a prerequisite for the decision of the administrative act is also the external nature of the act.²⁴ In his opinion, the wording used in the provision 'decisions taken by the university bodies' to denote acts subject to the procedure laid down in the CAP, should be interpreted as decisions within the meaning of the Code; that is, external university institutional acts and not as any decision of a higher education body.

The provisions of Article 207 para. 1 of the LHE is almost a repetition of the inapplicable Article 161 para. 1. Although there are still court decisions in which it is assumed that the appeal is granted only to individual

¹⁹ Resolution of CT dated 5 October 2005, SK 39/05, OTK-A 2005, no. 9, pos. 104.

²⁰ Resolution of SAC dated 12 June 1992 r., SAB/Po 41/91, OSP 1994, no. 4, pos. 69.

²¹ Resolution of SAC dated 12 January 2000 r., II SA/Wr 499/99, OSP 2000, no. 12, pos. 182.

²² See resolution of CT dated 5 October 2005, SK 39/05, OTK-A 2005, no. 9, pos. 104.

²³ Z. R. Kmiecik, *Prawo studenta do sądu a autonomia szkół wyższych*, "Przegląd Sądowy" 2003, no. 3, p. 54.

²⁴ Ibidem, p. 55.

external acts, it can be noticed that some courts change approach to the interpretation of Article 207 of the LHE and recognize that an appeal is rightful against any decisions taken by the university.

An example of a decision in which the opportunity to appeal only against an individual external decision was granted is an administrative court decision in which the court stated that the Dean's decision to refuse agreement on changing the thesis supervisor is not subject to control.²⁵ In the justification of this decision one can read that: "In the case under question it was necessary to consider whether the fact that the proceedings before bodies of the autonomous entity, such as a higher education institution, apply the provisions of the CAP, and that the proceedings are in certain cases divided into two instances and that some rulings made by these bodies are called decisions, results in recognizing these rulings as administrative decisions within the meaning of Article 104 para. 1 and para. 2 of the Code of Administrative Procedure. The CAP does not define the notion "administrative decision". It is necessary in such a situation to refer to the achievements of the doctrine, which recognizes an administrative decision as a unilateral administrative act, stating in an authoritative way about an individual administrative case. In this sense, university authorities handle the case by an administrative decision if there is a need to establish, dissolve, or format a legal relationship between the university and the addressee of the decision (in this case – a student) which have external legal consequences." In its decision, the court also relied on E. Ochedowski, who claims that the unilateral legal activity of institutional bodies targeted at achieving certain individually marked legal consequences within the institutional relationship which do not affect the existence of this relationship (so called internal acts), does not demand issuing individual decisions and consequently is not subject to the regime of the Code of Administrative Procedure.²⁶ According to the court, "[...] internal acts also include the decision about the refusal to change the thesis supervisor. This act does not create a new legal relationship between the student and the higher education institution, nor does it transform it in a way which results in external legal consequences outside the university. In no way does it affect the rights and the obligations of a student".

²⁵ Decision of Provincial Administrative Court of 16 February 2010 r., II SA/Ol 26/10, available in Central Database of Decisions of Administrative Courts, www.orzeczenia.nsa.gov.pl.

²⁶ E. Ochedowski, *Zakład administracyjny jako podmiot administracji państwowej*, Poznań 1969, p. 214.

A similar interpretation of Article 207 para. 1 of the LHE was accepted on 15 July, 2008 in the judgment of the Provincial Administrative Court.²⁷ According to this court, “Internal institutional acts are not subject to the regime of the Code of Administrative Procedure. However, one can appeal against external institutional acts i.e. rulings which are of high importance as to the rights and obligations of a student, deciding whether to establish, refuse to establish, transform or terminate the institutional relationship”.

However, it is difficult to agree with the above presented viewpoints. It seems that the meaning of Article 207 para. 1 of the LHE introduces the possibility to apply the rulings of the Code of Administrative Procedure not only to the external decisions, but also the internal decisions made by the university authorities. If it concerned only external decisions, thus administrative decisions made in Article 207 para. 1, the reference to the CAP would be redundant as it is applicable to such acts according to Article 1 para. 1 of the CAP. Similarly, it would be unnecessary and unreasonable to restrict in this provision that the CAP and LPAC should be applied “accordingly”.

Referring to the provisions which supplement the matters governed by a particular case law should only apply when necessary. Therefore, it should not be introduced when the obligation to apply certain provisions is already expressed in the legal system (it is a consequence of other provisions or general principles of the legal system). Thus, for example, it is rarely necessary to refer a specific case to the Code.

The role of codes in a legal system results in the fact that their provisions will be applied any way, even if the provisions of an act belong to a certain legal branch.²⁸

According to B. Adamiak and J. Borkowski, according application means that when assessing the possibility of applying the provisions of the CAP one has to take into consideration the character of the proceedings before the university authorities as well as the core issues of the cases under procedure by these authorities. Taking into consideration these circumstances may lead to applying the provisions of the Code of Administrative Procedure directly or to applying them with the necessary changes, or to the decision not to apply them at all in a certain case. B. Adamiak and J. Borkowski believe that in the case of proceedings concerning students,

²⁷ II SA/Bk 320/08, available in Central Database of Decisions of Administrative Courts.

²⁸ G. Wierczyński, *Redagowanie i ogłaszanie aktów normatywnych. Komentarz*, Warszawa 2009, p. 768.

it is necessary to apply, inter alia, provisions for decisions and their verification in the resumption mode or stating their annulment.²⁹

The term “a decision taken by the university” used in Article 207 para. 1 of the LHE should be understood as all decisions including those which were taken on the university forum and which are not of an “external nature”. This is confirmed by the Constitutional Tribunal’s judgment of 8 November 2000.³⁰ It refers to the inapplicable Article 161 para. 1 but, due to the fact that the current Article 207 para. 1 is almost identical to its meaning, the provision is still up to date. The Constitutional Tribunal (CT) stated that “The legislature in the Law on Higher Education through Article 161 introduced the principle that all ‘decisions taken by the university authorities in individual student cases’ are subject to the provisions of the Code of Administrative Procedure”. According to the CT “the obligation to use The Code of Administrative Procedure should be understood as the fact that everything that is guaranteed to the addressee of the administrative decision under the CAP should also be applied to the addressee of the ‘decision’ by the Rector of the university unless the specific character of the case makes it inapplicable”.

It seems that some courts have also started to reject the opinion that the division between the external and the internal decisions taken by the university authorities does not apply under Article 207 para. 1 of the LHE.

An example of such ruling is the judgment of the Provisional Administrative Court (PAC) in Olsztyn of 12 December, 2010,³¹ which ruled the case of refusal to exempt from payment for educational services. The court stated that the university bodies are obliged to apply accordingly the provisions of the CAP and found that the university authorities violated its provisions, which could have a significant impact on the outcome of the case. According to the court, the infringement was due to the fact that the resolution included in the university Senate’s provision stating that an application for exemption from payment after the appointed date which results in leaving the application without adjudication, is not consistent with the provisions of the CAP, which in Article 64 para. 1 and 2 indicates other conditions on leaving a case without adjudication.

²⁹ B. Adamiak, J. Borkowski, *Zakład administracyjny w postępowaniu administracyjnym*, [w:] *Współczesne problemy administracji Publicznej*, “Studia Iuridica” 1996, no. 32, p. 27.

³⁰ SK 18/99, OTK ZU 2000, no. 7, pos. 258.

³¹ II SA/OI 779/10, available in Central Database of Decisions of Administrative Courts.

Moreover, according to the court, admission of lateness of an application infringes the principle of deepening citizens' trust in public authorities included in Article 8 of the CAP as well as the obligation to accurately clarify the factual state of matters and settle the case, taking into account the public interest and the legitimate interest of citizens (Article 7, Article 77 para. 1 and Article 80 CAP). The administration authorities did not reply to the plaintiff's arguments concerning the actual submission of the application and made no decision in this regard.

The above cited latest ruling confirms the thesis that Article 207 para. 1 of the LHE does not apply only and exclusively to external universities' acts but to all decisions made by their bodies and that they are obliged to accord application of the principles of administrative procedure stated in the CAP. This means that universities have been deprived of the right to self-regulate the principles and procedures for appealing against individual decisions on a student's issues.

The implementation of judicial decisions taken by the university is ensured by the above discussed Article 207 para. 1 of the LHE, according to which the university authorities' decisions mentioned in Article 169 para. 7 and 8 of the LHE (ie. recruitment committees), on individual issues concerning students and doctoral students and issues concerning the control of student organizations' activity as well as student government, may be appealed against under the provisions of appeal to the administrative court. This provision is also applied to decisions taken by the scholarship committee and appeal scholarship committee (Article 207 para. 4 of the LHE).

The provisions on the possibility to appeal against the decisions made by university bodies have evolved. Firstly, the law did not predict any provision concerning universities' decisions and the right to appeal to the SAC was based on the Article 169 para. 2 of the CAP in the version of 1980. Next, the provisions stated clearly against which acts one can appeal to the administrative court. Nowadays, the wording of Article 207 para. 1 of the LHE provides a general common right to appeal against decisions made by universities.

A complaint to the administrative court, as well as appeal against a decision, under the current law is independent of the fact whether the decision is external or not. Article 207 of the LHE does not provide for either administrative decisions or institutional authority acts.

The basis to appeal against universities' administrative acts and judgments is Article 3 para. 2 (1) or (2) of the LPAC. Under these provisions, controlling the activity of public administration bodies by administrative courts includes adjudication in cases of complaints about administrative

decisions – decisions issued in administrative proceedings – which can be appealed or terminate the proceedings, as well as against adjudication ruling the case as to its core. In other cases, the ruling will be based on Article 3 para. 3 of the LPAC, according to which administrative courts adjudicate on cases in which the provisions of special laws provide for judicial control and apply the measures referred to in these provisions. According to Article 1 para. 2 of the Act of 25 July 2002 – Law on System of Administrative Courts,³² the criterion of judicial control will be compliance with the law, unless the Acts provide otherwise. Administrative courts will thus review the university bodies and their proceedings in terms of their application of the principles of the CAP, provisions of the LHE, and European Union Law.

There can be other possibilities to appeal against the university bodies' decisions to the administrative court, apart from the ones discussed when pointing to the right to appeal in administrative proceedings. In the judgment of 16 Sept 2010 of the PAC in Cracow³³ the court upheld a student's complaint against the decision of the Rector of her university, in which he refused to allow transfer to a different course of study. The court found that the university proceedings violated the provisions of Article 7 and Article 77 of the CAP; therefore the duty to sufficiently clarify the actual state in order to settle the matter, to collect sufficient evidence as well as to investigate it, should be based on defining *ex officio* what facts are necessary in order to settle the case and what evidence is substantial.

Administrative courts will not have the right to adjudicate on cases of a clearly academic character such as e.g. grades obtained in entrance examinations to the university, or grades obtained during the course of studying. In the thesis of the adjudication of the PAC in Warsaw we can read: "Evaluation of the examination papers is exclusively up to the people appointed to this duty by the university and the number of points scored, reflecting that assessment, is not part of an administrative decision".³⁴ Moreover, it is worth paying attention to the fact that decisions of a strictly academic nature are not a manifestation of the examiner's will, but a reflection of knowledge. Administrative courts are not competent to examine this aspect of the assessors' proceedings. Evaluation is not equal to deciding.

³² Dz. U. No. 153, item 1269 with later amendments.

³³ III SA/Kr 1209/09, available at Central Database of Decisions of Administrative Courts.

³⁴ Decision of PAC dated 8 August 2008 r., I SA/Wa 133/08, LEX no. 566530.

3. According application of the provisions of the Code of Criminal Procedure

The law on Higher Education in three cases refers to the according application of the provisions of the Code of Criminal Procedure. The first one concerns disciplinary proceedings against university teachers (Article 150 of the LHE). The next one relates to the investigation and disciplinary action against students (Article 223 of the LHE). The last one is the case which takes place during investigation and disciplinary proceedings against doctoral students at a university and in a research unit (Article 226 sec. 1 of the LHE), for doctoral students' disciplinary liability is regulated analogically to disciplinary proceedings against students.

Due to the framework of this elaboration, we focused on the issue of the proper application of the provisions of the CCP to university teachers. Disciplinary procedure against academics in addition to these rules is governed by the Regulation of the Minister of Science and Higher Education on the detailed procedure of the investigation and disciplinary action against university teachers.³⁵

Secretion of the disciplinary liability is grounded in the autonomy of higher education institutions referred to in Article 70 sec. 5 of the Constitution of the Republic of Poland.³⁶

The doctrine lacks consistency with respect to the character of the disciplinary liability. On the one hand, it is deprived of its status of criminal liability;³⁷ on the other hand, it is considered as a broad sense of criminal liability adjusted to individual professional groups³⁸ or even as a branch of criminal law.³⁹

In the case of disciplinary tort the nature of reprehensible deeds differs from the nature of deeds liable to criminal proceedings. Actions that cause it are of a diverse nature following violation of employee discipline, including constituent elements of criminal behaviour. Only in the latter case is criminal liability possible. Moreover, disciplinary delict has to be judged not only

³⁵ Regulation of the Minister of Science and Higher Education dated 14 March 2007 on the detailed procedure of the investigation and disciplinary action against academic teachers (Dz. U. No. 58, item 391).

³⁶ Sentence of CT dated 8 December 1998, K. 41/97, OTK ZU 1998, no. 7, p. 656.

³⁷ K. Dudka, *Stosowanie przepisów k.p.k. w postępowaniu dyscyplinarnym w stosunku do nauczycieli akademickich* [w:] *Węzłowe problemy procesu karnego*, (red.) P. Hofmański, Warszawa 2010, p. 354.

³⁸ See K. Buchała, A. Zoll, *Polskie prawo karne*, Warszawa 1995, p. 6.

³⁹ W. Świda, *Prawo karne*, Warszawa 1986, p. 17.

in the normative perspective, but also from a professional, ethical one.⁴⁰

Disciplinary procedure, which provides for proper application of the provisions of criminal procedure is similar to regulation of criminal procedure, but it cannot be equated with criminal proceedings.⁴¹ The Constitutional Tribunal has stated that disciplinary action is a specific procedure which should be applied according to rules provided by a certain constitutional law. The provisions of the CCP may be applied subsidiarily.⁴²

Discussion of the proper application of the rules, as was stressed earlier, is the subject of many scientific studies⁴³ and adjudicates.

An example of the latter is the Supreme Court judgment of 27 August 2007, in which the Supreme Court identified three categories of “proper” application of provisions. The first refers to the situation when a certain provision without altering its content may be applied on the grounds of the Act to which it refers. The second one covers those provisions which, in general, cannot be applied to the referential system, mainly due to their superfluous nature or total contradiction to the rules governing these relations, on the grounds of their according applicability. The third one includes incidents where the rules can be and should be applied after certain modifications. This is the category which is a classic example of the “right” rather than “direct” application of the provision implemented to another range of reference.

It is worth emphasizing that the provisions of the CCP can be applied to disciplinary proceedings provided for by the LHE if they comply with the specific character of disciplinary procedure.

The purpose of such regulation is not to state that the disciplinary procedure is similar to criminal proceedings, but to ensure that the person who is charged has full rights and a guarantee that their rights and good will not be breached in the disciplinary procedure.⁴⁴

It is therefore necessary to agree with the opinion expressed in the doctrine⁴⁵ that the disciplinary procedure is not only dissimilar to the criminal procedure, but also does not have the attribute of justice under Article 175 sec. 1 of the Constitution of the RP.⁴⁶

⁴⁰ Judgement of CT 27 February 2001, K 22/00, OTK 2003, no. 3, pos. 48.

⁴¹ See judgment of CT dated 27 February 2001, K 22/00, OTK 2001, no. 3, pos. 48, judgment of CT dated 11 September 2001, SK 17/00, OTK 2001, no. 6, pos. 165.

⁴² Judgment of CT dated 27 February 2001, K 22/00, OTK 2001, no. 3, pos. 48.

⁴³ See J. Nowacki, “Odpowiednie...”, op. cit., p. 370–371, M. Hauser, *Przepisy odsyłające. Zagadnienia ogólne*, “Przegląd Legislacyjny” 2003, no 4, p. 88 and following.

⁴⁴ Judgment of CT dated 27 February 2001, K 22/00, OTK 2001, no 3, pos. 48.

⁴⁵ K. Dudka, “Stosowanie...”, op. cit., p. 356.

⁴⁶ The Constitution of the Republic of Poland dated 2 April 1997, (Dz. U. No. 78, item 483 with later amendments).

Accordingly, a disciplinary authority is required to assess whether suitable application of the provisions depends on applying them directly or with suitable modifications or even state that they are inapplicable.⁴⁷

According to Article 150 of the LHE to disciplinary procedures against university teachers in cases unregulated by the Act, one should apply the provisions of the CCP except for Article 82 of the CCP.

The wording of the above mentioned provision makes an assumption that the goal is to accordingly apply the provisions of the CCP in so far as it is not regulated, obviously without the legislature of the Article 82 CCP.

The consequence of such an approach is the fact that there will be provisions of the CCP applied, which will provide for general norms concerning the whole process of the procedure of an institution in disciplinary proceedings, and particular norms – only when they concern only the institution appointed in the proceedings.⁴⁸

In practice, according application of the provisions of CCP in disciplinary procedure evokes a lot of doubt due to lack of definite criteria which would clarify how to apply a certain provision of the CCP. This means the above mentioned direct application of the provisions of CCP, modified application, or lack of a possibility to apply them at all.

As to the last ones, it is clearly visible in the inability to apply coercive measures by the disciplinary committee, such as an ordinal penalty. Despite the fact that Article 146 sec. 2 of the LHE provides for running a procedure while the defendant is absent, in the case when the defendant is refraining from participating in the proceedings, the legislator did not predict any possibility to execute the presence of the witnesses.

Under Article 285 CCP, a witness who, without a justifiable reason did not come to the subpoena of the institution running the proceedings, or who, without a permit issued by this institution, abandoned the place of the proceedings before its termination, is liable to a fine up to 10,000 PLN. Moreover, the witness can be arrested and brought to court.

In the doctrine, it is emphasized that the disciplinary committee's lack of such licence results from the fact that these provisions interfere with the sphere of rights and freedom of a human being, which can be limited, but

⁴⁷ See also K. Kurzępa-Dedo, *Odpowiedzialność dyscyplinarna nauczycieli akademickich* [w:] *Szkolnictwo wyższe w Polsce. Ustrój – prawo – organizacja*, (red.) S. Waltoś, A. Rozmus, Rzeszów 2008, p. 263.

⁴⁸ D. Kaczorkiewicz, *Instytucje prawa karnego procesowego w postępowaniach dyscyplinarnych*, [w:] *Węzłowe problemy procesu karnego*, (red.) P. Hofmański, Warszawa 2010, p. 364.

only when there are special provisions. Moreover, when limiting the rights, the rule of proportion should be respected.⁴⁹

In the literature, it is claimed that personal freedoms can be limited only if otherwise there was a risk of more serious damage than the one that can emerge from limitations. Interference should be done in such a way so that the person under consideration bears minimal health, wealth or personal situation side effects.⁵⁰ Moreover, applying restrictions must undergo a specific kind of control procedure. Therefore, it is to be verified whether:

- the evidence to prove achievement of the intended goals of the introduced regulations is sufficient,
- there is a necessity of the application of a norm limiting the rights and freedoms,
- the effects which arise as a result of the introduced legislation will be proportional to the burden imposed on citizens.⁵¹

Consequently, disciplinary proceedings apply such procedures as search or controlling and recording conversations.

Many provisions of the CCP cannot be applied to disciplinary procedure due to the previously mentioned distinction between criminal and disciplinary proceedings – the CCP regulates institutions which have no reference to disciplinary procedure, e.g. international relations proceedings.

It should also be noted that failure in applying the provisions of the CCP may be a result of the fact that the power under a certain regulation is connected with a specific entity, e.g. the court can direct to psychiatric observation or appoint a professional psychiatrist to assess the mental condition of the accused. In consequence, the disciplinary committee has no power to appoint such an expert, although it can appoint other experts of different specializations.⁵²

According application of the provisions of CCP may lead to lengthening disciplinary procedures. An example of such can be a delivery institution (Article 131-133 CCP).⁵³ On the other hand, it is worth remembering that

⁴⁹ See further K. Dudka, *Odpowiedzialność dyscyplinarna i zakres stosowania przepisów kodeksu postępowania karnego w postępowaniu dyscyplinarnym wobec nauczycieli akademickich*, *Studia Iuridica Lublinsia* 2007, t. IX.

⁵⁰ S. Waltoś, *Proces karny, Zarys systemu*, Warszawa 2002, p. 402–403.

⁵¹ See M. Wyrzykowski, *Granice praw i wolności – granice władzy*, *Biuletyn RPO*, No. 38, Warszawa 2000, p. 24; M. Safian, *Ochrona prawa do prywatności w prawie polskim*, *Szkoła Praw Człowieka*, Zeszyt 4, Warszawa 1998, p. 81 and following.

⁵² See also K. Dudka, *„Stosowanie...”*, *op. cit.*, p. 359.

⁵³ Summons, notices and other documents from the date of service, run dates, shall be served by mail or other authorized entity engaged in the service of correspondence by the consignor or the employee, if strictly necessary – by the police. If, on the set of so

the provisions of CCP provide certain frames within which organs running a disciplinary procedure must operate. That means procedural guarantees and principles as well as standards characterizing a thorough fair trial which, as we know, every citizen is entitled to in a democratic lawful country. Fairness of the proceedings is in fact a guarantee of lawfulness of the state and all the rights and freedoms of an individual.

In justification of the above quoted judgment of the CT we read that application of the institutions deriving from criminal law and criminal procedure to disciplinary procedure will serve the purpose of security. The legislator, taking into account the repressive nature of the disciplinary procedure, decided that application of such institutions and legal principles, which would give opportunities to provide the accused with optimal rights and freedoms, was justifiable.

It is of vital importance in terms of disciplinary procedures because of the possibility of, inter alia, a judgment providing for permanent or temporary deprivation of the right to practice as an academic teacher.

It is worth paying attention to the SC resolution of 27 Sept 2012, sig. III CZP 48/12, in which the SC held that a member of the university disciplinary committee may be held liable under Article 415 of the Civil Code for damage caused by a breach of the disciplinary procedure.

Taking into consideration the fact that the function of the committee's members and their guaranteed independence makes their status similar to that of a judge, doubtful is the fact that they are liable in torts for the damage caused by the judgment under Article 415 of the Civil Code. For the judge participating in the tort that caused damage and was against the law is not responsible for the damage but the Treasury, under the condition

many victims that their personal notice of their rights would cause serious impediment to the investigation, they shall be by advertisement in newspapers, radio or television. If there is an obligation of service provision, provisions of § 2 shall apply accordingly. Should always served it to that victim, who in the mandatory period of 7 days from the date of this notice to pay. Letter personally delivered to the addressee. In the event of temporary absence of the addressee in his apartment, the letter should be delivered to an adult member of the household, and if not – the administration at home, caretaker home, or softys should undertake to deliver the letter to the addressee. Letter can also be delivered via fax or email. In this case, the proof of service is to confirm the data. If delivery can not be done in the manner indicated in Article. 132, letter sent by mail is left in the local post office near the public operator, and sent in another way – in the nearest police unit or the appropriate municipal office. About leaving the magazine in accordance with § 1 serving a notice placed in a box to mail service or on the door of the apartment, the recipient or other visible indication of where and when the letter was left, and that they should be received within 7 days, in the event of an ineffective lapse of the deadline, action notice must be repeated once, the same rationale applies in the event of service administration letter home, caretaker home or softys. The letter can also be left to a person authorized to receive mail at the permanent place of employment of the recipient.

that the provisions of Article 417 §1 and 417¹ §2 of the CC were met. This in turn raises the question whether the university disciplinary committee imposing the penalty of dismissal is a public authority.⁵⁴

Summary

Summing up, it has to be stated clearly that on the grounds of the LHE there exists a problematic issue of the according application of the administrative procedure, proceedings before the administrative courts, and the Code of Criminal Procedure. In the case of administrative procedure and judicial-administrative procedure, the problem may be caused by an incorrect understanding of the meaning of reference in law. As a result, both in doctrine and case law there is still doubt as to which university acts – internal or external – these provisions can be applied to. As to the Code of Criminal Procedure, the most serious problems concern lack of definite guidance on the use of disciplinary procedure the provisions of which it includes. This may lead to obstruction of the legal procedure e.g. in the case of inability to use institutions enforcing certain behaviour.

Moreover, it is worth noting another important issue, according to Art 146 sec. 4 of the LHE, parties may appeal against the final judgment of the disciplinary committee referred to in Article 142 sec. 1 (2) of the LHE to the Court of Appeal in Warsaw – the court of Labour and Social Security. This evokes a question whether this court will be able to assess whether the disciplinary committee accordingly applied the provision of the Code of Criminal Procedure, especially when the issue provokes so much interpretative doubt.

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⁵⁴ These considerations are beyond the scope of this paper so we suggest reading resolution of SC available in: <http://www.sn.pl/orzecznictwo/SitePages/Najnowsze%20orzeczenia.aspx?ItemID=45&ListID=411c5dda-68cb-4ad8-b865-2705079f8593&el=Izba%20Cywilna> and judgment of TC dated 4 December 2001, SK 18/2000, (Dz. U. No 145, item 1638).