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Legal Succession in Polish Administrative Law

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Abstract
The implementation of succession of rights in administrative proceedings raises many controversies in science and case law. The article presents key controversial issues in a comparative approach. The author defends the thesis on the effectiveness of civil law actions for rights and obligations in the sphere of public law.

Keywords
succession of rights; administrative proceedings; civil law

Resulting from Article 7 of the Constitution of the Republic of Poland and Article 6 of the Administrative Procedure Code of 14 June 1960[1] (hereinafter the "APC") the principle of legalism obliges the authorities not only to identify the party to proceedings initiated *ex officio*, but also to examine the correctness of the applicant's declaration that they are entitled to that status.[2] Administrative proceedings modelled on the judicial civil procedure differ from their prototype in that, according to the dominant view presented both in legal science and in case law, the notion of legal interest determining the status of a party to administrative proceedings is objective in nature. It remains strictly dependent on the validity of the provision of law constituting the source of the interest or obligation that is to be the subject of the decision in an individual case.[3] A subjective conviction of an individual that they have the status of a party to the proceedings does not make it so, though in the literature different views have been presented

1 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483; Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [Act of 14 June 1960 Code of Administrative Procedure] [2022] JoL 2000.

2 See the judgment of the Supreme Administrative Court II OSK 2592/16 [2017].

3 See J Borkowski in J Borkowski, J Jendrośka, R Orzechowski, A Zieliński (eds), *Kodeks postępowania administracyjnego. Komentarz* [Code of Administrative Procedure. Comment] (Wydawnictwo Prawnicze 1989) 111.

on this.[4] However, they were expressed in the legal state when Article 61a was not yet in force and it was reasonably pointed out that there was no basis for resolving the lack of legitimacy of a party in any other way than by means of a decision ending the proceedings.[5] The obligation of the authority to verify the claims of an individual concerning the status of a party to the proceedings is anchored in Article 7 of the APC, obliging the authorities to uphold the rule of law. These determinations must inevitably be accompanied by the issue of the legal capacity of the entity that is to act as a party in a given trial.

Legal subjectivity is one of the basic institutions of any legal system. It has been recognised in the literature that the meaning of this term is given not by the construction of definitions, as these turn out to be tautological, but by the interpretation of the provisions regulating it.[6] The law doctrine classifies this concept, along with others like *negotiorum gestio*, *conditio*, or the intention of human actions producing legal effect, among the universal concepts common to public and private law.[7] This regularity has long been noted in German literature, although the scope of the indicated "common part" has not been uniformly understood from the beginning.[8] Perhaps the crystallisation of the common part is a result of administrative law's continuous use of the civil law acquis, as H. de Wall emphasises.[9] This would undermine the thesis of O. von Mayer on the separation of administrative law from civil law and the unreliability of the postulate of this scholar on the development of an autonomous grid of concepts for administrative law.[10] This problem has been pointed out by H. Kelsen, L. Duguit, and in the Polish literature by W. Jaworski.[11] It seems that the content of the "common part" is sometimes variable, depending on the activity of the legislator in the area of public law. On the one hand, by subjecting particular fragments of the field hitherto occupied by private law to the regulation of public law, it automatically frees these areas from the "yoke" of civil law, although it is debatable whether such a decision by the legislator is in every case well-considered and necessary. On the other hand, the intensive development of administrative law makes it enter areas hitherto unknown to it, requiring the use of civil law institutions, e.g. force majeure, possession and easements.[12] These phenomena seem to prove at least a partial blurring of the boundaries between these branches of law.

The legal subjectivity common to them is the capacity to incur rights or obligations.[13] The legal subjectivity of private law entities is granted to all individuals from the moment of conception (provided

4 See e.g. E Iserzon in E Iserzon, J Starościak (eds), *Kodeks postępowania administracyjnego. Komentarz, tekst, wzory formularze* [Code of Administrative Procedure. Comment, Text, Templates and Forms] (Wydawnictwo Prawnicze 1965) 62–64.

5 See W Brzeziński, 'Recenzja książki W. Dawidowicza "Ogólne postępowanie administracyjne. Zarys systemu", Warszawa 1962' [Review of the Book by W. Dawidowicz "General Administrative Proceedings. System Outline", Warsaw 1962] (1963) Państwo i Prawo vol. 1, 122.

6 M Lehmann, 'Der Begriff der Rechtsfähigkeit' (2007) Archiv für die civilistische Praxis vol. 2, 226.

7 H Meier-Branecke, 'Die Anwedbarkeit privatrechtlicher Normen im Verwaltungsrecht' (1926) Archiv des öffentlichen Rechts 50(2), 238 et seq.

8 See, in particular, F Fleiner, *Institutionen des deutschen Verwaltungsrechts* (Mohr Siebeck 1912) 50, G Jellinek, *System der subjektiv-öffentlichen Rechte* (Mohr Siebeck 2011) 66.

9 H de Wall, *Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht* (Mohr Siebeck 1999) 15.

10 O von Mayer, *Deutsches Verwaltungsrecht* (Duncker & Humblot 1985) 104 et seq.

11 H Kelsen, *Pure Theory of Law* (The Lawbook Exchange, Ltd. 2005) 281–284; L Duguit, *Law in the Modern State* (Cornell University Library 1921) 49–50, 244 et seq.; W Jaworski, *Nauka prawa administracyjnego: zagadnienia ogólne* [Learning Administrative Law: General Issues] (Instytut Wydawniczy "Biblioteka Polska" 1924) 196.

12 See, for example, on this subject the considerations of the Regional Administrative Court in Warsaw in its judgment VI SA/Wa 1344/19 [2019] Lex 3073372, as well as the Supreme Administrative Court in its judgment III FSK 415/22 [2022] Lex 3412350.

13 F Weyr, 'Zum Problem eines einheitlichen Rechtssystems' (1908) Archiv des öffentlichen Rechts 23(4), 555.

that the person is born alive), legal entities and unincorporated entities. The existence of a legal entity and an unincorporated entity is a sufficient condition for the attribution of legal capacity to them. The legal capacity of an individual, on the other hand, depends on their age and possible incapacitation. The consequence of the inequality of subjects inherent in administrative law and the sovereign nature of the relationship between the individual and the administrative body is the different shaping of the subjectivity of administrative bodies. It is expressed by the notion of competence, i.e. the ability to determine an individual's right or duty through the form of administrative action provided for by law. The attribution of competence to an administrative body in light of the principle of legalism must be anchored in an unequivocally expressed legal norm; it cannot be presumed. In contrast to the administration, which is only allowed as far as it is clear from the provision of universally applicable law, the activity of individuals in circulation does not require any legal basis. In German legal science, this freedom is derived from the personal freedom guaranteed by Article 2(1) of the German Constitution, which is only subject to statutory restrictions.[14]

Legal subjectivity in Polish administrative jurisdictional proceedings has not been standardised in an autonomous manner. The legislator – it may be presumed – striving to maintain systemic consistency, used the technique of reference, directing it in Article 30 § 1 of the APC to the regulations of civil law and applied them directly. He has only reserved the fact that separate provisions may normalise this issue differently, an example of which is the assignment of subjectivity in certain matters concerning civil partnerships.[15]

In light of Articles 8 § 1, 33 and 33^1 § 1 of the Civil Code of 23 April 1964[16] (hereinafter the "Civil Code"), undefined as "passive" capacity to be the subject of rights and obligations of a material nature is vested in every individual, legal entity and unincorporated entity.[17] By law, an individual acquires legal capacity from the moment of birth, i.e. the separation of the new born from the mother's body, under the promiscuous condition that it is born alive, i.e. it shows signs of life.[18] The legal capacity of an individual ends at the moment of their death, as indicated in the death certificate or in the court's decision declaring death or declaring the person dead (pursuant to Articles 29 – 32 of the Civil Code and Article 528 of the Code of Civil Procedure of 17 November 1964[19] – hereinafter the "Code of Civil Procedure").

The ability to take legal action in administrative proceedings depends on the legal capacity

14 G Jellinek (2011) 43.

15 In a resolution of seven judges in case II GPS 2/12 [2012] Lex 1163186, the Supreme Administrative Court stated that in the case of a group of persons bound by a civil partnership agreement, the status of an agricultural producer within the meaning of Article 3(3) of ustawa z dnia 18 grudnia 2003 r. o krajowym systemie ewidencji producentów, ewidencji gospodarstw rolnych oraz ewidencji wniosków o przyznanie płatności [Act of 18 December 2003 on the National System for Registering Producers, Registering Farms and Registering Applications for Payments] [2004] JoL 76 as amended, is vested in the civil partnership. At the time, the court explained that: "The capacity to be the subject of certain powers and obligations (legal capacity) is a normative category, and thus it is decided by the relevant legal provision."

16 Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [Act of 23 April 1964 – Civil Code] [2022] JoL 1360 as amended.

17 See M Pilich in J Gudowski (ed), *Kodeks cywilny. Komentarz. Tom I. Część ogólna, cz. 1 (art. 1 – 554)* [Civil Code. Comment. Vol. I. General part, part 1 (art. 1 – 554)] (Wolters Kluwer 2021) 240 and 248; M Dziurda in J Gudowski (ed), *Kodeks cywilny. Komentarz. Tom I. Część ogólna, cz. 1 (art. 1 – 554)* [Civil Code. Comment. Vol. I. General Part, Part 1 (Art. 1 – 554)] (Wolters Kluwer 2021) 613.

18 M Pilich (2021) 243 and 247; S Dmowski in S Dmowski, S Rudnicki (eds), *Komentarz do Kodeksu cywilnego. Księga pierwsza. Część ogólna* [Commentary on the Civil Code. Book one. General Part] (LexisNexis 2009) 73.

19 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Act of 17 November 1964 – Code of Civil Procedure] [2021] JoL 1805.

of the individual. While legal capacity is uniform by nature, not subject to gradation, it does vary depending on the age of the individual and possible incapacitation. The obligation for the individual to be represented by another entity is then at stake.[20] The issue of representation of legal entities and unincorporated entities is no less complex. However, these issues remain outside the scope of this paper.

The topic of the scope and criteria of the transferability of rights is considered in foreign science to be one of the more difficult theoretical issues.[21] This assessment must be shared, and it is, in my opinion, the result, on the one hand, of the fragmentary nature of the regulation at the code level, and on the other hand, the diversity within the public law powers and duties of the individual. Their imposition, abrogation and transfer of rights is the essence of turnover; this movement takes place in both the private and public law spheres, but the mechanisms governing it are different within them. These problems were also taken up in the works of S. Kasznica, who formulated remarks that were both up-to-date for a contemporary audience and at the same time convincing, as discussed further on.

The consequence of accepting the assumption of legal succession is, as aptly stated by D. Zacharias, the existence of rights or obligations that are subject to such succession.[22] This issue can be considered in two aspects: in relations between individuals and in arrangements between public administration bodies. The analysis of the latter must take into account the principle developed in German science of the exclusivity of the law in the creation of competence. Its change or transfer cannot take place by virtue of a legal act, but requires an express provision of the law.[23] In this respect, a distinction can be made between "universal succession", where a newly created or already functioning authority takes over its competences in place of one that is being abolished. "Singular succession", on the other hand, can be defined as a situation of one or more isolated competences being taken over by a different body than the previous one. The transfer of competences may relate both to rights or obligations in respect of which proceedings have not been instituted, and those where the resolution is still pending. It should be made clear from the outset that we are not dealing with a legal succession when, in spite of certain intra-organisational transformations, the subject of the right does not change.[24]

Administrative law – as a rule – does not establish rules for the horizontal transfer of rights or obligations between individuals (Article 30 § 4 of the APC refers only to the effects of the acquisition or inheritance of a right by an individual). Sometimes the legislator only normalises the scope of transfer of specific rights producing specific effects in the sphere of administrative law. This remark applies both to general succession, an example of which is the regulation of liability of legal successors for tax liabilities, and to singular succession, for example the takeover of rights resulting from a construction permit.[25]

Reflection on this topic is not facilitated by the lack of general administrative law provisions in the Polish system. Two positions have emerged in legal doctrine in this regard. The first,

20 M Gutowski, *Nieważność czynności prawnej* [Invalidity of the Legal Act] (CH Beck 2017) 105; judgment of the Supreme Administrative Court II FSK 3193/14 [2014] Lex 1598346; judgment of the Supreme Administrative Court II OSK 2074 [2012] Lex 1138057.

21 See D Zacharias, 'Rechtsnachfolge im Öffentlichen Recht' (2001) Juristische Arbeitsblätter vol. 8–9, 720.

22 In the remainder of this article, by "right" I also mean the obligations immanently associated with it.

23 G Jellinek (2011) 329.

24 D Zacharias (2001) 721.

25 See Article 93 et seq. of ustawa z dnia 29 sierpnia 1997 r. – Ordynacja podatkowa [Act of 29 August 1997 – Tax Ordinance] [2021] JoL 1540 and Article 40(1) of ustawa z dnia 7 lipca 1994 r. – Prawo budowlane [Act of 7 July 1994 – Construction Law] [2021] JoL 2351; A Żmijewska, 'Ustalanie przez organ podatkowy momentu powstania obowiązku podatkowego w podatku od nieruchomości' [Determination by the Tax Authority of the Moment of Tax Liability in Real Estate Tax] (2022) Samorząd Terytorialny vol. 4, 33.

which can be called restrictive, assumes the validity of a statutory provision explicitly providing for legal succession in certain cases. It is worth noting that not so long ago, in the 1970s, it was accepted in German literature that the rights regulated by administrative law provisions are inalienable. Some exceptions to this conception, described in detail, among others, by E. Forsthoff, assuming the personal nature of public law rights can be found – as J. Dietlein reminded us – also in the early works of W. Jellinek and F. Fleiner.[26] This view, now regarded as archaic in foreign literature, has, however, met with approval in Polish case law. In the court's resolution I OPS 1/22, it was indicated that the transfer of a right or obligation requires a specific legal basis in a provision of administrative substantive law.[27] In the recitals of this resolution, it was argued that "The statement that the effects of a legal act made by a civil law entity, including an assignment agreement, if the fact of its conclusion is not incorporated by the legislator into the content of a substantive legal norm, do not constitute a source of legal interest in the space of administrative law due to the fact that the act does not have the character of a legal norm, means that for the resolution of the legal issue presented, the argumentation relating to the content of the legal act loses its significance. This is because the content of the legal action does not make the action a legal norm". The thesis of the resolution reads as follows "1. From the agreement of transfer itself, included in Article 509 of the Civil Code of 23 April 1964, the object of which is a claim for compensation for the deduction of the right of ownership of real estate as a result of an event or act from the sphere of public law, the purchaser of this claim in the case for the determination of compensation referred to in Article 128 paragraph 1 of the Act on Real Estate Management of 21 August 1997, will not have the status of a party within the meaning of Article 28 of the Code of Administrative Procedure of 14 June 1960; 2. The source of the legal interest referred to in Article 28 of the Code of Administrative Procedure will be the norm of universally applicable law and not the effects of a legal act performed by a civil law entity".

In the resolution, the Supreme Administrative Court aptly noted that "(...) it is the substantive norm of universally applicable law, and not the effect of a legal act by a civil law entity that is the source of the legal interest underlying the legal standing in cases that are the subject of proceedings before administrative authorities and administrative courts, including the standing shaped by the content of Article 28 of the APC". This statement, however, did not direct the court's attention to legally significant issues, i.e. the assessment of the effectiveness of the transfer of a certain category of receivables for administrative proceedings.

The Supreme Administrative Court, while searching for the sources of a legal interest, rather peculiarly confronted the norm of substantive law and a legal action, as if the acquirer of the right were to derive their legal interest and related procedural claim from this action. Meanwhile, once created by a specific action of a legal norm, the entitlement is not reshaped due to the occurrence of an event resulting in its transfer to another entity. It is still based on a rule of law rather than on a legal act; the latter, after all, does not create any entitlement. After all, the essence of a transfer of a right, including by way of an assignment of claims, is to preserve its state at the time of the

26 J Dietlein, *Nachfolge im Öffentlichen Recht. Staats – und verwaltungsrechtliche Grundfragen* (Duncker & Humblot 1999) 27–28 and the literature cited therein.

27 Resolution of the Supreme Administrative Court I OPS 1/22 [2022] Lex 3361993. As many as 4 critical glosses have been published in relation to the resolution, see e.g. K Karpacka, 'Legitymacja procesowa w sprawie odszkodowania za wywłaszczoną nieruchomość. Źródło interesu prawnego z art. 28 k.p.a. – glosa do uchwały Naczelnego Sądu Administracyjnego z 30.06.2022 r., I OPS 1/22' [Legal Standing in the Case of Compensation for Expropriated Real Estate. Source of Legal Interest Under Art. 28 k.p.a. – Gloss on the Resolution of the Supreme Administrative Court of June 30, 2022, I OPS 1/22] (2022) Glosa vol. 4, 105–111.

event resulting in the change of subjectivity. This assertion is justified by the principle *nemo in alium plus iuris transferre potest quam ipse habet*.[28] Therefore, even posing the problem in the manner outlined in the resolution is already questionable. The thesis of the resolution itself is also debatable. In the opinion of the Supreme Administrative Court, the assignment of a claim does not result in transferring to the acquirer the right to direct a litigation claim aimed at the realisation of that claim in the proceedings provided for by the act.

The jurisprudence of the German administrative courts – first the higher administrative court (*Oberverwaltungsgericht*) of the Saarland and then the federal administrative court (*Bundesverwaltungsgericht*) – contributed to the change in the view of the inalienability of rights regulated by administrative law. The firmly expressed position at that time on the admissibility of the transfer of rights under public law was quickly developed in legal science.[29] In modern legal science, it is emphasised that the transfer of a subjective right cannot be subject to restrictions as long as it is transferable. In German literature, the individual's right to exercise their subjective right is treated as the realisation of the freedom of action guaranteed by Article 2(1) of the German Constitution.[30] Restrictions on this freedom may only result from an explicit statutory provision established in accordance with the principle of proportionality. They can only be introduced if, as a result of legal succession, there is a sovereign interference of the administration in the sphere of individual rights. Ensuring the exercise of this freedom requires – as has been recognised in the academic world – in certain situations, departures from the principle of the exclusivity of the law.[31] On the other hand, a sovereign, i.e. independent of an individual's will, transfer of a public right or duty without a relevant statutory provision cannot take place.[32]

In the case of transferring of rights regulated by public law, the source of an entitlement or obligation of an individual, *ergo a* legal interest within the meaning of Article 28 of the APC, does not have to be a provision of public law, but can also be a related provision of private law, or the latter itself. The right or duty is not then determined by the indicated legal event, but still by a substantive law norm. On the other hand, the event may lead to a subjective transformation of the entitlement or obligation, the scope of which, after all, does not undergo any modification. This means that J. Dietlein is right when he perceives the identity of the transferred obligation or entitlement.[33] Otherwise, after all, we would not be considering a subjective transformation, but a subjective modification of the relationship between the individual and the administration. Just like with the transferor, the source of the legal interest of the transferee is therefore that legal norm forming the right (obligation) of its original subject.[34] For this reason alone, it is difficult to agree with the assumption made in the resolution of the Supreme Administrative Court of 30 June 2022, I OPS 1/22, the justification of which analysed a legal action undertaken in civil trade as a potential source of legal interest.[35]

After all, no legal act or other legal event creates any entitlement or obligation in terms of its subject matter, but only constitutes a causative factor for its transfer to another entity. It is there-

28 See Z Radwański, *Prawo zobowiązań* [Law of Obligations] (CH Beck 1986) 269; judgment of the PSC I CKN 379/00 [2001] Lex 52661.

29 J Dietlein (1999) 29 and the case law and literature cited therein.

30 Ibid., 140 et seq.

31 Ibid., 147; G Jellinek (2011) 307–332.

32 D Zacharias (2001) 722.

33 See for example J Dietlein (1999) 43.

34 D Zacharias (2001) 721.

35 Resolution of the Supreme Administrative Court I OPS 1/22 [2022].

fore secondary to the source of the legal interest, which in each case is a provision of substantive law, rather than a legal act or the result of the process of applying the law. On the other hand, the result of their assessment on the basis of the criterion of legality may constitute grounds to recognise that this transfer of rights or obligations was defective. The scope or the nature of the defectiveness may even lead the administrative authorities to conclude that the transfer of the right was ineffective. An example of this is the rights arising from Article 119a et seq. of the Tax Ordinance of 29 August 1997,[36] which bestow the tax authorities with the right to independently determine the tax consequences of a transaction deemed to be artificial in the meaning of tax law.

The provision of Article 30(4) of the APC, referring to the attribute of the transferability of rights, has been in force for more than forty years. It was introduced into the code as early as 1980, on the occasion of a major amendment of this act, which could suggest that the issue of the transferability of rights in administrative law has been exhaustively developed in science and Polish jurisprudence. As it turns out, it has not received sufficient commentary. In contrast to the representatives of German science, no in-depth consideration of the issue has been undertaken in Poland. Not only is there no coherent theoretical conception of the acquisition of a right in the area of public law, but there is also no discussion on the subject, just as it is difficult to find an in-depth position of the administrative courts, which are more focused on isolated, casuistically defined cases.[37] Only one thing is certain – the occurrence of the phenomenon of legal succession; after all, this is what the text of APC refers to.

Legal succession – as indicated – is a legal construction originally developed in the field of civil law. It consists in a change of the subject of a right or obligation that keeps its previous shape. Legal succession is defined the same in administrative law.[38] It is pointed out in science that legal succession, understood as a new entity entering into the legal situation of the existing one, is a narrower concept than subject transformation, which may also include other situations.[39] The initial acquisition of rights or obligations in the public and private areas occurs both on the basis of a directly acting legal norm and as a result of applying the law. Unlike in private dealings, the acquisition of a right or the imposition of a public-law obligation requires appropriate documentation in order to respect the principle of trust of the individual in the administration and the certainty of dealings. This applies, in particular, to entitlements obtained through acts or actions constituting the exercise of the law, rather than its application.[40]

Within the framework of the belief in the transferability of rights regulated by administrative law provisions, there is a heterogeneity of views regarding the legal basis for legal succession. The literature sometimes presents the thesis that it is permissible to use analogy within public law provisions, provided that this method of legal reasoning can be applied in a given case. The use of analogy in public law is itself controversial. The literature postulates, for example, that this method of legal reasoning is only permissible for the acquisition of rights, but not for the imposition of public law obligations.[41] It is also emphasised that the use of analogy may only be for the benefit of the individual and never with the aim of worsening his legal position.[42]

36 Ustawa z dnia 29 sierpnia 1997 r. – Ordynacja podatkowa [Act of 29 August 1997 – Tax Ordinance] [2021] JoL 2351.

37 This remark also applies to the resolution of the Supreme Administrative Court I OPS 1/22 [2022].

38 See for example J Dietlein (1999) 43.

39 W Siedlecki, *Zarys postępowania cywilnego* [Outline of Civil Proceedings] (Państwowe Wydawnictwo Naukowe 1968) 132.

40 For example obtaining EU funding or paying an education grant.

41 B Frye, *Die Gesamtrechtsnachfolge im Verwaltungsrecht, insbesondere im Einkommensteuerrecht* (Leipziger Habilitationsschrift 2009) 124–139.

42 G Beaucamp, 'Zum Analogieverbot im öffentlichen Recht' (2009) Archiv des öffentlichen Rechts 134(1) 91 et seq.

However, according to the view considered dominant in German science and jurisprudence, situations governed by the provisions of civil law, appropriately applied in administrative proceedings,[43] should be considered as sufficient grounds for legal succession. The idea of the appropriate application of civil law provisions is nothing new, as it derives from the postulate to attribute to civil law the jurisdiction of the Roman law-based *ius commune* – the common law (*Derecho Común*), an idea that returns like a boomerang to the European scientific arena.[44] It has been pointed out in the literature that the initially absolute prohibition on assignment in Roman law was significantly relaxed in post-classical law.[45] During the period of intensive development of the *ius commune*, this prohibition was transformed into the principle of the permissibility of assignment, and some pandectists saw the basis of assignment in the disposability of the right of property (in this case, referred to a claim). During the late nineteenth century, which was a period of intensive reception of Roman law, the assignment of claims, mainly thanks to the work of B. Windscheid, was standardised in the texts of the great European codifications.[46]

Judicial case law finds justification for this concept in the "materiality" or *in rem* nature of certain rights or obligations regulated by administrative law. The disposal of real estate is cited as an example of this. The transfer of rights or obligations relating to real estate being acquired then occurs automatically, irrespective of the intention or reservations of the parties to the contract transferring ownership. Such materially entangled public law rights or obligations include, for example, the development right resulting from a building permit, the shape of which remains independent of the qualities of the holder. Instead, these rights and obligations are legitimised by the subject matter of the indicated entitlement.

Critics of this view, however, point out that every public law right or obligation belongs to a specific entity. Severing the link with the subject of the right or obligation hardly lends itself to harmonisation with the formal requirements of administrative procedure law. After all, among the structural elements of an administrative decision is the indication of its addressee. The decision is therefore not materially relativised, but remains always addressed to an individual subject. It is emphasised that the unity of the fate of a thing and the materially determined rights or obligations understood in this way may at most constitute a consequence, and not a basis for legal succession.[47] It should be noted that the postulate of the auxiliary use of the appropriate application of the provisions of civil law is also formulated in the judicial decisions of those European countries that have a significant heritage of development of administrative law, such as the Spanish system. In the jurisprudence of the Supreme Court, there has been a dispute on this very subject for

43 D Zacharias (2001) 721 et seq.

44 See F Aspe Figueroa, *La recepción del Derecho Común y las Siete Partidas* (script of the academic year 2019/2020) 3; See also W Wołodkiewicz in W Wołodkiewicz, M Zabłocka, *Prawo rzymskie. Instytucje* [Roman Law. Institutions] (CH Beck 2014) 3; M Kuryłowicz, 'Prawo rzymskie jako element rzymskiej kultury prawnej' [Roman Law as an Element of Roman Legal Culture] (2001) Zeszyty Prawnicze vol. 1, 11; Ł Marzec, 'Wizja powszechnego prawa europejskiego według Artura Ducka' [Artur Duck's Vision of Universal European Law] (2007) Studia prawnoustrojowe vol. 7, 255–261.

45 C Kunderewicz, *Rzymskie prawo prywatne* [Roman Private Law] (Wydawnictwo Uniwersytetu Łódzkiego 1995) 124; W Dajczak in W Dajczak, T Giaro, F Longchamps de Bérier (eds), *Prawo rzymskie. U podstaw prawa prywatnego* [Roman Law. The Foundations of Private Law] (Wydawnictwo Naukowe PWN 2018) 474–476; K Zawada, *Umowa przelewu wierzytelności* [Receivables Transfer Agreement] (Nakład Uniwersytetu Jagiellońskiego 1990) 8 et seq.

46 B Windscheid, *Die Actio des römischen Civilrechts vom Standpunkte des heutigen Rechts* (Buddeus 1856) 119 et seq.; B Windscheid, *Lehrbuch des Pandektenrechts* (Literarische Anstalt Rütten & Loening 1887) 267–300.

47 D. Zacharias, (2001) 722 et seq.

years. The position expressed in the Supreme Court judgment of 19 November 1991, RJ 1991, or represented by Judge Ángel Ramón Arozamen Laso, the author of the dissenting opinion to the Supreme Court judgment of 22 January 2020, STS 124/2020, appears as convincing.

Spanish literature has drawn attention to the need to apply the relevant provisions of civil law in the relations of the individual with the administration in those cases where a civil institution has to be used and there is no separate regulation in administrative law. As noted by J. Mas Villarroel, the absence of the necessary administrative law regulation justifies the application of Article 1112 of the Spanish Civil Code, which establishes the principle that the limitation of transfer must result from a provision of the law.[48]

The thoughts of S. Kasznica were presented in the work *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze*.[49] Admittedly, the author declared his belief in the inalienability of public rights and duties, writing that, "In principle, they are non-transferable and extinguish together with death and there is no legal succession to them."[50] Further on, however, this seemingly categorical view is considerably softened, as he points out exceptions to this principle. As he explains, "The most important exception, however, is in the area of property rights. Namely, claims and liabilities that have a monetary value and are realised by monetary repayment form part of a person's estate and can therefore be subject to legal succession."[51]

In the Polish system, the principle of the transferability of subjective rights is established in Article 57 of the Civil Code, with the legislator stipulating from the outset that it applies only to those rights characterised by transferability, i.e. those transferred by *inter vivos* acts.[52] This attribute is among the key features distinguishing the categories of subjective rights. The transferable ones include property rights, while the non-material ones are not transferable.

The feature of transferability was assigned to property rights by a norm – a rule of *ius cogens* nature that cannot be changed without an appropriate standardisation by the will of the parties to a legal transaction. The provision of Article 57 § 1 of the Civil Code prohibits the exclusion or restriction of the right to transfer, encumber, modify or cancel a right, if this right is transferable under the law. It is assumed in the civil law doctrine that a legal act introducing a limitation on the transferability of a right is invalid, and the assessment as to whether or not a contractual reservation introduced pursuant to Article 57 § 2 of the Civil Code violates the prohibition must be carried out against the background of the circumstances of a specific case.[53] This is because the exception introduced in Article 57 § 2 of the Civil Code refers only to the obligation of a specific entity that the entitled person will not make specified dispositions of the right. In the judgment of the Court of Appeal in Łódź of 15 October 2014, ref. No I ACa 696/14,[54] it was explained that the indicated exception to the transferability of a property right "means that an entitled person may undertake towards another entity not to perform certain dispositions of the right vested in

48 J Mas Villarroel, 'Requisitos de la cesión de créditos. Cesión de créditos correspondientes a la indemnización expropiatoria' (2002) Dirección del Servicio Jurídico del Estado vol. 200, 353–370.

49 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946).

50 Ibid., 119.

51 Ibid., 120.

52 See P Nazaruk in J Ciszewski, P Nazaruk (eds), *Kodeks cywilny. Komentarz aktualizowany* [Civil Code. Comment Updated] (Wolters Kluwer 2023) teza 2 do art. 57.

53 See M Pyziak-Szafnicka in M Pyziak-Szafnicka, P Księżak (eds), *Kodeks cywilny. Komentarz. Część ogólna* [Civil Code. Comment. General Part] (Wolters Kluwer 2014) teza 4 do art. 57.

54 Judgment of the Court of Appeal in Łódź I ACa 696/14 [2014] Lex 1554762.

them, e.g. that they will not transfer, encumber or abolish the acquired property right. Such an obligation produces effects only between the parties to that obligational relationship and does not stop the subjective right from being traded, if the right is transferable under the law. Such an obligation does not have any effect towards third parties, but it may lead to liability for damages caused by non-performance of that obligation (Article 471 of the Civil Code). In this way, it may justify the obligation to redress any damage caused, e.g. by the disposal of the right – contrary to the obligation assumed". Transferable rights mainly include the right of ownership, right of perpetual usufruct and the ownership right to premises and receivables. Property rights whose transferability is excluded include usufruct, personal easements, life tenure and claims for damages.[55] The literature points out that the transferability of a right may be excluded by a provision of the law, but also by the nature of the law or the contractual relationship. If the right is strictly bound to the correlating obligation, this may exclude the freedom to trade it.[56] For these reasons, H. de Wall rightly excluded the transferability of property rights in the area of social assistance and property obligations in the form of fines, while also noting the existence of non-property rights, which should be considered transferable.[57]

The civil law doctrine distinguishes – depending on the title of the acquisition of the right – between general and singular succession. The former implies the transfer of all the rights or obligations, amounting to the accession of a new entity to the legal situation of an existing one. This is a consequence of either certain legally significant events, an example of which is inheritance, or of certain legal acts, for instance the acquisition of an enterprise pursuant to Article 55^1 of the Civil Code. Singular succession, on the other hand, refers to a chosen right, obligation or a bundle of them on the basis of a legal action, such as the sale or donation of an item.

Both categories of succession can constitute the acquisition of a right in an administrative relationship. If the right is transferable, it may be transferred either by a single legal act or by substitution for a predecessor. In addition, there is a certain category of rights that are subject to universal succession, or merely to inheritance (or otherwise acquired as a result of opening the succession), which cannot be transferred *inter vivos*. Such a conclusion would have to be based on a rule of law or on the nature of the obligation. For this reason, thesis 1 of the resolution of seven judges of the Supreme Administrative Court of 22 February 2021 ref. No I OPS 1/20,[58] which states that: "The compensation referred to in Article 36, paragraph 1 of the Act on the Principles and Procedure of the Expropriation of Real Estate of 12 March 1958 may, from 1 January 1998, be determined on the basis of Article 129, paragraph. 5(3) of the Act on Real Estate Management of 21 August 1997 for the heir of the owner of the real estate listed in Article 35(1) of the Act on the Principles and Procedure of the Expropriation of Real Estate of 12 March 1958". On the other hand, thesis 2 of the same resolution already advocated the non-transferability of this claim. Indeed, the Supreme Administrative Court indicated that: "The compensation referred to in Article 36(1) of the Act on the Principles and Procedure of the Expropriation of Real Estate of 12 March 1958 may not be established under Article 129(5)

55 See on this subject e.g. Z Radwański, *Prawo cywilne – część ogólna* [Civil law – general part] (CH Beck 1993) 79 et seq.

56 Resolution of the PSC III CZP 3/01 [2001] OSNC 11, 159 determining the inadmissibility of trading in the claim for compensation for property left on territories occupied by Soviets due to the limited catalogue of persons entitled to exercise the right to have the value of the property left behind counted towards the price of the property purchased from the State Treasury.

57 H de Wall (1999) 497–598.

58 Resolution of seven judges in case I OPS 1/20 [2021] Lex 3122840.

(3) of the Act on Real Estate Management of 21 August 1997 (Journal of Laws of 2020, item 65, as amended) in favour of the purchaser of real estate by means of a contract concluded after the date of a temporary seizure of that real estate in accordance with the procedure set out in Article 35(1) of the Act on the Principles and Procedure of the Expropriation of Real Estate of 12 March 1958". The property nature of the right to compensation is not in doubt. Therefore, the non-transferability of such a right should be based on the law or the nature of the obligation. The resolution mentioned above does not refer to such circumstances.

The concept of the formula for the appropriate application of civil law appears attractive in the practice of applying the law as it systematises and unifies the effects of civil law events. There are also systemic reasons for a uniform understanding of the concept of transferability of rights in both private and public law. Therefore, I believe that – unless a statutory provision expressly provides – a right cannot be deemed non-transferable if, under private law provisions and the nature of the obligation, the right is transferable. It is, however, a different matter to verify the effectiveness of such a transfer for the legal situation of the transferor and the transferee in public law relations. This is because a provision of law or – in our system – the characteristics of a public-law obligation, may prevent such an effect. There can be no question of automatism here.

The development of uniform yardsticks in this respect would, I believe, be difficult, not least due to the variety of relationships established under administrative law provisions. This proves to be much more difficult than in private law. It has been argued in academia that if the provisions of civil law were to be directly applicable, it would be unnecessary to standardise – as in tax law – the rules of general succession.[59] These considerations cannot escape the conventionality of the adopted division of law into branches. The referral of certain material civil law claims to administrative proceedings is the decision of the legislator. In this way, however, the essence of the claim is neither modified nor even nullified.

It is worth noting that S. Kasznica's reflections, published almost 70 years ago and in completely different political conditions, appear extremely up to date today. Without taking such sources into account, as well as a comparative analysis, grasping the mechanisms of contemporary administrative law proves difficult, and sometimes even impossible. From this perspective, the thesis presented in Polish jurisprudence on the non-transferability through a legal action of a right exercised in jurisdictional administrative proceedings appears completely unconvincing. Instead of arguing whether such a transfer can take place, one should rather consider how the principle of transferability of a property right in administrative proceedings can be sensibly implemented. It can also be anticipated that, if the idea postulated in the literature to return to the concept of *ius commune* were to be achieved, the problems raised here would be considered at a completely different level.[60]

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59 B Frye (2009) 140.

60 See e.g. J Ciszewski, K Kopka, 'Ius commune europaeum novum – budowa europejskiego systemu kompozytowego prawa prywatnego (cz. II)' [Ius Commune Europaeum Novum – Building a European Composite Private Law System (Part II) (2012) Pieniądze i Więź 1(54), 103 et seq.; M Kuryłowicz (2001) 11 and the literature cited therein.

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