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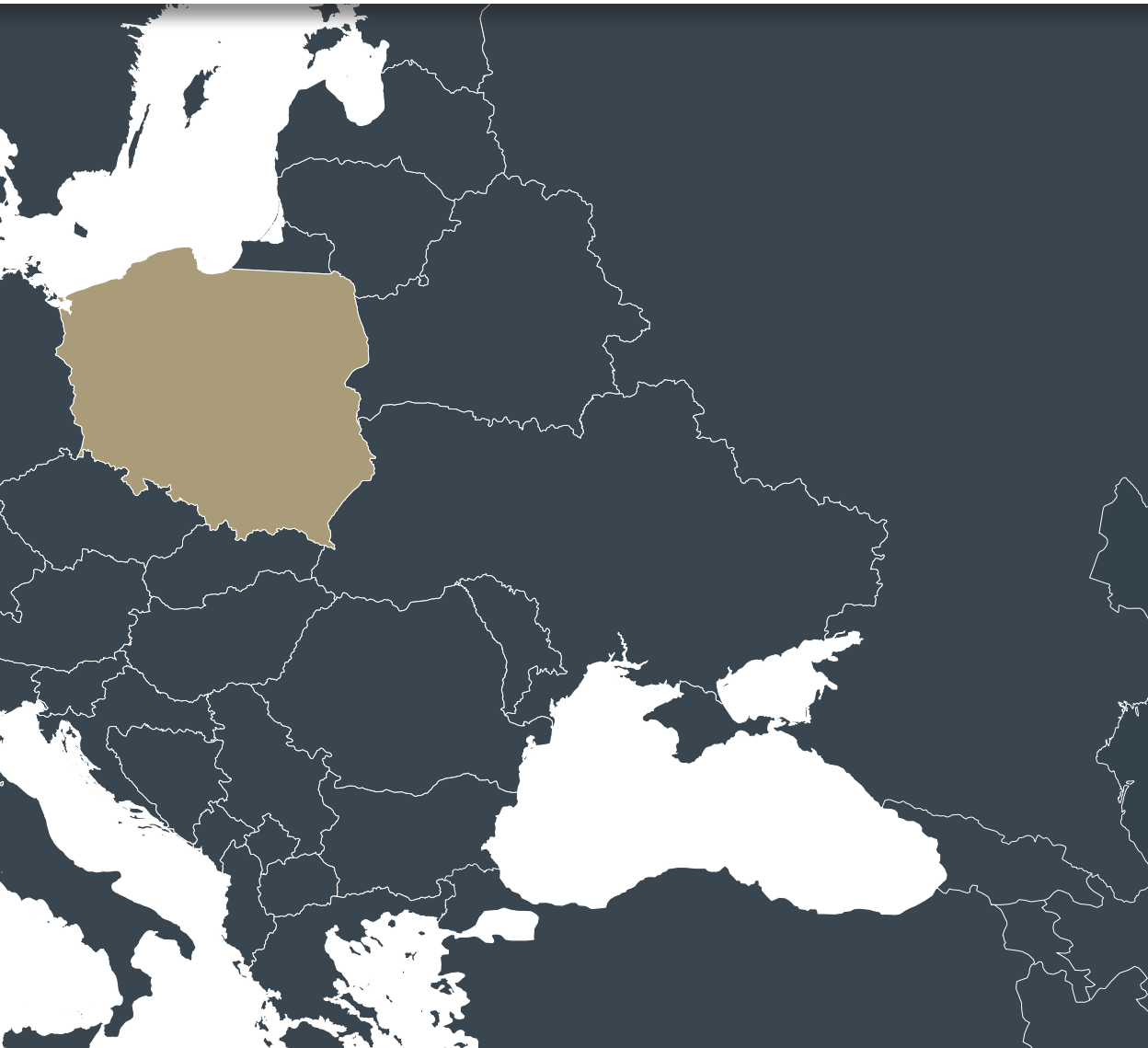

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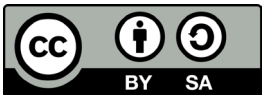

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ABBREVIATIONS

A.G.N. ..... Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami [Act of 21 August 1997 on Real Estate Management]
ADM ..... Algorithmic Decision-making
AFM ..... Uniwersytet Andrzeja Frycza Modrzewskiego w Krakowie [Andrzej Frycz Modrzewski Krakow University]
APA ..... Administrative Procedure Act
APC ..... Administrative Procedure Code
API ..... Interfejs programowania aplikacji [Application Programming Interface]
BB ..... Betriebs-Berater
BGB ..... Bürgerliches Gesetzbuch
BUJ ..... Biblioteka Uniwersytetu Jagiellońskiego [Jagiellonian University Library]
CAO ..... Urząd Lotnictwa Cywilnego [Civil Aviation Office]
CC ..... Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [The Act of 23 April 1964 – Civil Code]
CC&EEL ..... Contemporary Central & East European Law
CCP ..... Polish Code of Criminal Procedure
CFR ..... Charter of Fundamental Rights
CJEU ..... Court of Justice of European Union
CSC ..... Ustawa z dnia 28 listopada 2014 r. Prawo o aktach stanu cywilnego [The Act of 28 November 2014 on Civil Status Certificates]
CSR ..... Społeczna odpowiedzialność przedsiębiorstw [Corporate Social Responsibility]
DŹS ..... Sekcja Dokumentów Życia Społecznego [Social Life Documents Section]
EC ..... European Commission
ECtHR ..... European Court on Human Rights
EDA ..... Ustawa z dnia 18 listopada 2020 r. o doręczeniach elektronicznych [Act of 18 November 2020 on Electronic Delivery]
eIDAS .... Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC
EP Act ..... Ustawa z dnia 10 kwietnia 1997 r. – Prawo energetyczne [Act of 10 April 1997 – Energy Law]
ePUAP ..... Elektroniczna Platforma Usług Administracji Publicznej [Electronic Platform of Public Administration Services]
ERO ..... Urząd Regulacji Energetyki [Energy Regulatory Office]
EU ..... European Union
FGC ..... Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy [The Act of 25 February 1964 – Family and Guardianship Code]
FSA ..... Financial Supervision Authority
FSC ..... Financial Supervision Commission
GDPR... Regulation (EU) 2016/679 of the EP and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on thefree movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation)
GG ..... Basic Law of the Federal Republic of Germany of 23 May 1949
GmbH ..... Gesellschaft mit beschränkter Haftung [Limited liability company]
HIC ..... human-in-command principle
HITL ..... human-in-the-loop principle
HOTL ..... human-on-the-loop principle
ICT ..... Technologie informacyjno-komunikacyjne [Information and Communication Technologies]

ILS PAS ..... Institute of Law Studies of the Polish Academy of Sciences
IT ..... Technologia informatyczna [information technology]
JoL ..... Journal of Law [Dziennik Ustaw]
NBP ..... Narodowy Bank Polski [National Bank of Poland]
NGO ..... Non Governmental Organisation
NRA ..... Naczelna Rada Adwokacka [Supreme Bar Council]
NSAU ..... Ustawa z dnia 11 maja 1995 r. o Naczelnym Sądzie Administracyjnym
[Act of 11 May 1995 on the Supreme Administrative Court]
NTA ..... Najwyższy Trybunał Administracyjny [Supreme Administrative Tribunal]
OCCP ..... Office of Competition and Consumer Protection
OEC ..... Urząd komunikacji Elektronicznej [Office of Electronic Communications]
OECD ..... Organisation for Economic Cooperation and Development
OJ ..... Official Journal (of the European Communities)
OSNC ..... Orzecznictwo Sądu Najwyższego. Izba Cywilna
OSP ..... Orzecznictwo Sądów Polskich
OTK ..... Orzecznictwo Trybunału Konstytucyjnego
[Judgment of the Constitutional Tribunal]
OTK-A ..... Orzecznictwo Trybunału Konstytucyjnego. Seria A
[Judgment of the Constitutional Tribunal. Series A]
p.p.s.a. ..... Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi
[Act of 25 July 2002, Law on the System of Administrative Courts]
p.u.s.a. ..... Ustawa z dnia 25 lipca 2002 r. Prawo o ustroju sądów administracyjnych
[Law on the System of Administrative Courts]
PAST ..... Polska Akcyjna Spółka Telefoniczna [Polish Telephone Joint-stock Company]
PBAC ..... Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi
[Act of 30 August 2002 on Proceedings Before Administrative Courts]
PFSA ..... Polska Komisja Nadzoru Finansowego [Polish Financial Supervision Authority]
PIA ..... Act on Access to Public Information
PIL ..... Ustawa z dnia 4 lutego 2011 r. Prawo prywatne międzynarodowe
[The Act of 4 February 2011 – Private International Law]
PSC ..... Polish Supreme Court
PT Act ..... Ustawa z dnia 16 lipca 2004 r. Prawo telekomunikacyjne
[Act of 16 July 2004 Telecommunications Law]
PWN ..... Polskie Wydawnictwo Naukowe [Polish Scientific Publishing House]
RTO ..... Urząd Transportu Kolejowego [Railway Transport Office]
SOAC ..... Ustawa z dnia 25 lipca 2002 r. Prawo o ustroju sądów administracyjnych
[Act of 25 July 2002 on the System of Administrative Courts]
SOKiK ..... Sąd Ochrony Konkurencji i Konsumentów
[Office of Competition and Consumer Protection]
TNOiK ..... Towarzystwo Naukowe Organizacji i Kierownictwa
[Scientific Society of Organization and Management]
u.o.k.ik. ..... Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów
[Act of 16 February 2007 on the Protection of Competition and Consumers]
u.o.p. ..... Ustawa z dnia 16 kwietnia 2004 r. o ochronie przyrody
[Act of 16 April 2004 on Nature Protection]
u.P.w. ..... Ustawa z dnia 20 lipca 2017 r. Prawo wodne [Act of 20 July 2017 Water Law]
u.p.z.p. ..... Ustawa z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym
[Act of 27 March 2003 on Spatial Planning and Development]
u.t.k. ..... Ustawa z dnia 28 marca 2003 r. o transporcie kolejowym
[Act of 28 March 2003 on Railway Transport]

UAM ..... Uniwersytet im. Adama Mickiewicza w Poznaniu
[Adam Mickiewicz University in Poznań]
UJK..... Uniwersytet Jana Kochanowskiego w Kielcach [Jan Kochanowski University in Kielce]
UMCS ..... Uczelnia Medyczna im. Marii Skłodowskiej-Curie w Warszawie
[Medical College Maria Sklodowska-Curie in Warsaw]
UNF..... Ustawa z dnia 21 lipca 2006 r. o nadzorze nad rynkiem finansowym
[Act of 21 July 2006 on Financial Market Supervision]
US ..... United Station
W1 ..... World War I
W2 ..... World War II

FOREWORD

We are happy to present to the third issue of the journal Contemporary Central & East European Law (CC&EEL), issued by the Institute of Law Studies of the Polish Academy of Sciences. Our journal aims at proliferation of the research concerning important topics in legal doctrine, in particular those adopting comparative and interdisciplinary approaches.

Encouraged by the success of the previous two volumes, it's my pleasure to introduce you to a new volume of the journal. The purpose of this volume is to present the most current issues in the formation of administrative jurisdiction in Poland. The issue shows the development of administrative procedures not only in Polish law, but also European trends related to increasing the freedom of authorities in shaping the administration policy.

To provide a comprehensive overview the experts from leading Polish universities and Polish Academy of Sciences have been invited to contribute to this volume. The authors of this volume have undertaken the task of identifying what they consider to be the most important challenges that affect the shape of administrative jurisdiction in Poland in the context of the Europeanisation of administrative procedure and substantive law standards. At the same time, it was assumed that each selected topic would be shown as the result of a certain process. As a point of reference, the work of an outstanding Polish academic expert in administrative law – Professor Stanislaw Kasznica – was chosen. His textbook, published just after the 2nd World War, was an excellent summary of the period of the formation of Polish administrative law in 1918–1939. This liberal and democratic tradition of administrative law, as well as research of Professor Stanislaw Kasznica, was condemned to oblivion by Marxist legal theory which dominated Polish legal discourse not to mention the state regime. It was only after 1989 that the Polish science of administrative law was able to develop freely again without ideological restrictions drawing on the achievements of pre-war science. However, the intention of the authors is not only a historical analysis, but first and foremost the presentation of the most current issues in the field of Polish administrative jurisdiction and the identification of the challenges facing this jurisdiction. The result of the research undertaken is a multifaceted in-depth analysis of issues in the theory of administrative law, the organization of public administration, administrative decisions and sanctions, and the liability and accountability of public administration. It was also the intention of the authors of the volume to show the results of their research in a broader international perspective. Therefore, the individual articles presented offer, in addition to historical and doctrinal analysis, a comparative angle of the issues studied. For a foreign Readers, familiarization with Polish doctrinal research will have not only a comparative value, but also an interpretative value of own legal regulations.

Wishing you an interesting and inspiring read,
Dr hab. Mateusz Błachucki
Dr hab. Lucyna Staniszewska
Guests Editor
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Access to Administrative Files and Access to Public Information: At the Crossroads of Information Rights

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Abstract
The course of administrative proceedings is documented in the files of an administrative case. Over the development of administrative law, the legislator has established various legal regimes to guarantee that entitled persons have access to all or part of the procedural materials collected in these case files. This article aims to present the two basic regimes of access to case files and analyze their interrelationship. The research demonstrates that, although the regulatory scope of these regimes partially overlaps, there are significant differences in terms of their subject and object. Nevertheless, mutual interaction between these regimes is evident, particularly in how they have evolved over time. The paper concludes with a negative answer to the question of whether the right to public information can substitute a party's information rights under the Administrative Procedure Code. Each of the two access regimes serves a distinct purpose and is governed by specific regulations tailored to that purpose.

Keywords
case files; information rights; administrative proceedings; Administrative Procedure Code; public information

1. Introduction

The enactment of the Act on Access to Public Information (hereinafter the "PIA")[1] was a major breakthrough in the functioning of public administration in Poland. It led to an unprecedented expansion in the openness of the bodies' activities and created a real basis for social control. The PIA also created one of the basic mechanisms for achieving accountability of public administration. The twenty years of applying the PIA has certainly not seen a string of successes alone, but

1 Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej [Act of 6 September 2001 on Access to Public Information] [2001] JoL 2176.

the overall balance seems very positive. Therefore, it is worth reflecting on the further development of the right to information in Poland and the construction of information rights resulting from the PIA, and confronting them with similar rights resulting from the Administrative Procedure Code (APC).[2] The analysis of these rights will be set in the context of access to case files.

The administrative case files document the course of administrative proceedings, while at the same time providing the basis for establishing the facts of the case on the evidence gathered in it. The special importance of the case file becomes apparent precisely in the administrative proceedings, which in their basic form take place in the form of cabinet proceedings, while the publicity of the proceedings is limited to its participants. This means that access to the case file plays a very important role in a number of areas. On the one hand, it is crucial to ensure a party's right of active participation in administrative proceedings. On the other hand, the administrative file may contain public information, so access to it may serve to expand the sphere of openness of the authorities' action, which may make social control of the authorities' action a reality. Guided by this observation, the Polish legislator created legal bases on the basis of which it is possible to have access to case files, as well as to public information contained in the case files. The first regulation is contained in Articles 73 and 74 of the APC (also referred to in the text as the procedural regulation). The second regulation is contained in the PIA (also referred to in the text as the systemic regulation).

The importance of openness in administrative proceedings, including the need to guarantee access to files, was emphasised by Professor Stanisław Kasznica.[3] Administrative law sets the limits in this case for the administrative body, which cannot freely shape the legal situation of a third party without providing it with basic guarantees.[4] These guarantees, nowadays obvious, were often illusory in the period of the People's Republic of Poland, and the communist state often honoured secrecy and the lack of transparency of the proceedings conducted. It is only now that one can again speak of transparency in the operation of public administration and openness in the conduct of administrative proceedings in Poland. This justifies all the more an extensive analysis of access to administrative files, as a key mechanism for controlling administration and ensuring protection of the rights of entitled parties.

The subject of this article is a comparison of the subject and object scope of the rights of access to the case file resulting from the APC and the PIA. At first glance, it may seem that the scope of application of these acts overlaps and that there may be a problem of their parallel and competitive application in a given case. However, a closer analysis will show that such competition does not generally occur. Similarly, the problem of the parallel application of the procedural and systemic regulations appears to be apparent. On the basis of the analysis carried out, some *de lege ferenda* conclusions will be formulated with regard to the optimal regulation of the accessibility of administrative case files. The article focuses on the most problematic issues from the scope of the subject under consideration, hence the issues of the subjective scope of the rights arising from the APC and the PIA have only been generally characterised.

2 Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [Act of 14 June 1960 Code of Administrative Procedure] [1960] JoL 735 as amended.

3 S Kasznica, *Polskie prawo administracyjne. Pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Księgarnia Akademicka 1947) 107.

4 Ibid., 10.

2. ADMINISTRATIVE FILES VERSUS PUBLIC INFORMATION

The APC does not contain a definition of the concept of an administrative case file. Therefore, when defining the concept of case files, it is necessary to refer to a doctrinal analysis. In the earlier doctrine of administrative law, the concept of a case file was understood as a written record of a case. The case file included the petitioner's application, as well as its subsequent supplements, statements, official records of witness testimony, inspection, expert opinions, letters, opinions and notes of administrative bodies, submitted to the case, etc. – in a nutshell, everything that concerns the case being settled.[5] As emphasised in the more recent literature on the subject, the notion of case files encompasses all of the materials of the proceedings that are in the possession of the administration relating to a party, its procedural position and the course of the proceedings, and which may affect the content of the decision. Therefore, the notion of a case file cannot be limited only to documents and other materials collected in a specific case that has just been conducted.[6] Hence, I assume that a case file is a record of an administrative case recorded in any form.

The concept of public information is contained in Article 1 (1) API. According to this provision, any information on public matters constitutes public information and must be made available in accordance with the rules and procedures set out in the API. In clarifying this provision, Article 6(1)(4) indicates that public information is public data, i.e. a) the content and form of official documents, in particular: the content of administrative acts and other decisions, documentation of the course and effects of inspections and the speeches, positions, conclusions and opinions of the entities carrying them out, the content of decisions of common courts, the Supreme Court, administrative courts, military courts, the Constitutional Court and the State Tribunal, b) positions on public matters taken by public authorities and by public officials within the meaning of the provisions of the Criminal Code, c) the content of other speeches and assessments made by public authorities, d) information on the condition of the state, local governments and their organisational units. On the other hand, the API considers an official document to be the content of a statement of intent or knowledge, recorded and signed in any form by a public official within the meaning of the provisions of the Criminal Code, within the scope of the official's authority, addressed to another entity or submitted to the case file.

Now, it is necessary to consider whether and when an administrative case file can be treated as public information. At the outset, it should be pointed out that the API does not contain a definition of administrative files, either. The subject of controversy in court jurisprudence is, therefore, whether administrative files constitute public information, in particular an official document, and therefore whether they are subject to access.

The case law is not consistent with regard to the issue in question. In a judgment of 5 December 2001, the Supreme Administrative Court stated that "administrative files are not official documents and, for this reason alone, a request for access to them is unjustified. However, the files may contain official documents – access to these documents would be possible provided that they relate to the sphere of public life."[7] Consequently, it must be assumed that the inclusion of a document in an administrative file does not prejudge the fact that it contains public

5 B Graczyk, *Postępowanie administracyjne. Zarys systemu z dodaniem tekstów podstawowych przepisów prawnych* [Administrative Proceedings. Outline of the System with the Addition of Texts of Basic Legal Provisions] (Wydawnictwo Prawnicze 1953) 35.

6 W Taras, 'Udostępnianie akt sprawy w postępowaniu administracyjnym' [Sharing Case Files in Administrative Proceedings] (1992) Annales UMCS 39(7), 286.

7 Judgment of the Supreme Administrative Court II SA 155/01 [2002] OSP 6, item 78.

information, just as the lack of its inclusion in an administrative file does not mean it does not contain public information. As the administrative court emphasises, "whether a document contains public information is not determined by its placement in the administrative file, but by its content. Otherwise, this would mean that important documents of great significance to citizens would be excluded from access to information if they were not in the administrative file of the case. Such a solution would undermine the intention of the legislator, who wanted citizens to have the broadest possible access to information produced by public authorities."[8]

Among the materials included in the administrative case file, internal documents may raise particular doubts as to their qualification as public information. This category, undefined and unregulated by Polish law, is somehow regulated in case law. For example, the administrative court assumed that a party's request for access to information with regard to "all internal telecom regulator correspondence" is "very broad and includes official documents, as well as letters without this value (e.g. positions, opinions), however, in accordance with the principle of written information expressed in Article 14 of the APC, placed in the proceedings file. It also includes a range of information of a working nature, which has been recorded in traditional or electronic form and is a certain thought process, a process of deliberation, a stage in the development of a final concept, the adoption of a final position by an individual employee or a team. In the court's view, this type of information does not constitute public information within the meaning of the Access to Public Information Act. In light of that act, the administrative body is obliged to provide public information based on its knowledge as of the date of the response, and this knowledge must result from existing, formally verifiable sources: developed and adopted assumptions, enacted programmes or official speeches and positions. Such verifiable sources are not, however, the thought process itself, preceding the clarification of a set position, even if it has been recorded."[9] The position deserves to be accepted. Access to unstructured and non-finalised positions of office employees cannot be treated as a statement of knowledge or intent of the authority, and only in such a situation can one speak of the existence of public information. Besides, the access to internal documents could lead to dangerous consequences. Either it would paralyse the process of the internal fleshing out of the authority's position, or it would lead to a runaway recording of this process in the case file.

3. Access to files under the Administrative Procedure Code (APC)

The scope of rights on the subject of access to the files of proceedings of the APC depends on the nature in which a given subject participates in the proceedings. Such a regulation is, in its intention, a rational choice of the legislator, who decides that the scope of rights of a given entity is derived from the interest (factual or legal) that it has in the pending case.[10] The basic category of subjects who are served by the right of access to the file is the party to the administrative proceedings. Pursuant to Article 28 of the APC, a party to administrative proceedings "is anyone whose legal interest or duty is affected by the proceedings, or who demands an action of the authority on account of their legal interest or duty".

8 Resolution of the Regional Administrative Court II SA/Wa 783/06 [2007] Lex 348275.

9 Resolution of the Regional Administrative Court II SAB/Wa 148/08 [2008] Lex 1042304.

10 S Kasznica, *Polskie prawo administracyjne. Notatki z wykładów Prof. Dr. St. Kasznicy r. akad. 1928/1929* [Polish Administrative Law. Lecture Notes by Prof. Dr. St. Kasznicy, Academic 1928/1929] (Koło Prawników i Ekonomistów 1933) 18.

However, in addition to a party, it is possible to identify other categories of entities that have access to the administrative file. Firstly, these are entities with the rights of a party. This category includes social organisations, the public prosecutor and the ombudsman. It is worth noting an interesting issue related to access to files by the prosecutor and the ombudsman. When participating in administrative proceedings, the public prosecutor and the ombudsman will be entitled to exercise rights under Article 73 of the Code of Administrative Proceedings without any restrictions. Moreover, the public administration body may not restrict their right to access the files, other than in the situation specified in the Act on the Protection of Classified Information. Moreover, in the course of the evidentiary proceedings, the public administration body may order that the case file be shown to an expert. The expert is granted access to the case file only to the extent that this is necessary for their opinion. It should be emphasised that the expert is obliged to preserve business secrets and other legally protected secrets to which they have gained access in the course of performing their function. Finally, it is worth pointing out that specific substantive laws may provide for access to administrative files by other parties. For example, the Competition Protection Act of 2000[11] provided for limited access to the file for interested entities.

The scope of a party's rights regarding access to the file comes from the APC. It should be emphasised that, from a formal point of view, Articles 73 and 74 of the APC exhaustively regulate the rights of a party concerning access to files. The APC directly indicates only four groups of rights: a) reviewing the case file, b) taking notes and copies from the case file, c) requesting authentication of previously made notes and copies from the case file, d) requesting certified copies from the case file. However, these powers do not exhaust all the issues relating to access to the file by authorised parties. Adopting a different position would not take into account the needs of administrative practice and the degree of technological development. For example, at present there is no doubt about the possibility of the party photographing case files.[12] Adopting this thesis does not, of course, mean that it is possible to arbitrarily create new rights that do not have their source in the APC or other acts of administrative law. For example, it can be pointed out that, from the general right to find out about the course of the case that was mentioned earlier, one cannot derive the right to know the position of the office before the case is decided.[13] This means the entitled party does not have access, for example, to drafts or different versions of a decision before it is finalised. Nor can a party demand that they be given the originals of the file or the individual documents contained therein, even after the proceedings have been concluded.

A party has access to the file at any time. This means that they can exercise this right both during and after the administrative proceedings. The public administration body is obliged to provide access to the file until it is compulsorily archived and transferred to the National Archives. Access to the file is free of charge.

Two more complex issues require additional discussion: the possibility of requesting the copying and transfer of the entire case file, and the issue of remote access to the case file.

As regards the first issue, the resolution of the Supreme Administrative Court should be quoted, according to which making files available to a party pursuant to Article 73 § 1 of the

11 Ustawa z dnia 15 grudnia 2000 r. o ochronie konkurencji i konsumentów [Act of 15 December 2000 on Competition and Consumer Protection] [2000] JoL 804 as amended.

12 B Adamiak, 'Glosa do wyroku WSA w Białymstoku z dnia 29 marca 2012 r., II SA/Bk 122/12' [Glossary to the Judgment of the Provincial Administrative Court in Białystok of 29 March 2012, II SA/Bk 122/12] (2013) Orzecznictwo Sądów Polskich vol. 12, 893.

13 J Pokrzywnicki, *Postępowanie administracyjne. Komentarz – Podręcznik* [Administrative Proceedings. Comment – Manual] (Gospodarcze Zrzeszenie Samorządu Terytorialnego 1948) 84.

APC includes making a copy of documentation gathered in the case file by the body, in a manner resulting from its technical and organisational possibilities, at the request of a party.[14] Although from the point of view of a party to administrative proceedings this resolution undoubtedly strengthens its informative rights, it can hardly be regarded as correct on the basis of the wording of Article 73 of the APC, but rather as an example of far-reaching judicial law making. Dogmatic and systemic analysis shows that the Supreme Administrative Court's resolution should not be approved.[15] However, a broader development of this issue goes beyond the subject of this work.

In the case of the second issue, reference should be made to Article 73 § 3 of the Code of Administrative Proceedings, according to which a public administration body may provide a party with an action (make a case file available) in its ICT system, after authenticating the party in a manner specified in Article 20a, paragraph 1 or 2 of the Act on the Informatisation of the Activity of Entities Performing Public Tasks of 17 February 2005. Undoubtedly, this method of access to case files requires some preparation from the authority. In addition, it will not always be possible to make them available, especially if they exist only in paper form. As the NSA emphasises, the content of Article 73 § 3 of the APC does not impose an obligation on an administrative body to convert administrative case files or parts thereof (individual documents) maintained in paper form into digital form in order to make them available to a party in this form, nor does it impose an obligation to make them available at all by means of any electronic communication means (e.g. email), but only by means of its own ICT system. This does not mean, however, that an authority may deny a party the means of access to the case file without sufficiently justifying its position in this respect.[16] A certain deviation from the requirements set out in Article 73 § 3 of the APC was the provision contained in Article 15 to the Act on Special Solutions Related to the Prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them of 2 March 2020.[17] This provision indicated that the authority may provide a party with access to the case file or individual documents constituting the case file, also by means of electronic communication within the meaning of Article 2(5) of the Act on the Provision of Services by Electronic Means of 18 July 2002 to the address indicated in the register of contact data referred to in Article 20j(1)(3) of the PIA or another electronic address indicated by the party. The legislator was undoubtedly motivated by the desire to make the way in which files are made available more flexible. However, the lack of adequate safeguards was rightly emphasised, as access to files does not require the authentication of a party to the proceedings or entities on the rights of a party.[18] Although this solution was sometimes evaluated positively,[19] it does not seem to be acceptable after the state of emergency to have such a system of access to files that does not meet basic security principles. In this respect, there is a clear difference with the PIA, where the information made available is not restricted in terms of subjects, so even the use of less secure forms of electronic communication does not give rise to the problem of making files available to

14 Resolution of the Supreme Administrative Court I OPS 1/18 [2019] OSP 5, item 54.

15 J Wegner, 'Glosa do uchwały NSA z dnia 8 października 2018 r., I OPS 1/18' [Glossary to the Resolution of the Supreme Administrative Court of 8 October 2018, I OPS 1/18] (2019) Orzecznictwo Sądów Polskich vol. 5, 145 et seq.

16 Resolution of the Supreme Administrative Court I OSK 2552/19 [2020] Lex 3054548.

17 Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych [Act of 2 March 2020 on Special Solutions Related to the Prevention, Counteracting and Combating of COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them] [2020] JoL 1842 as amended.

18 T Kosicki, *Dostęp do akt w postępowaniu KPA* [Access to Files in KPA Proceedings] (Lex/el. 2021).

19 E Szewczyk, 'Modyfikacje postępowań administracyjnych prowadzonych w okresie stanu zagrożenia epidemicznego lub stanu epidemii' [Modifications to Administrative Proceedings Conducted During the State of Epidemic Threat or State of Epidemic] (2020) Samorząd Terytorialny vol. 6, 25.

unauthorised entities. On the other hand, the aim should be to develop a remote form of access to the case file, although it is unlikely to ever be exclusive.

4. Access to files under the Act on Access to Public Information (PIA)

The PIA provides that this right is available to "everyone". As emphasised, this means that any person, whether a Polish citizen or a foreigner, may demand access to public information without justifying their demand in any way. Thus, the act has extended, in relation to the Constitution, the range of subjects who are entitled to the right to public information.[20] The subjects of this right may be individuals or legal entities, Polish or foreign. The controversial issue is whether the subject of this right may be other public administration bodies. In my view, the answer is negative. Firstly, arguments of a formal nature should be indicated. According to the principle of legalism, public administration bodies may only act on the basis and within the framework of the law. For this reason, the ability of one public administration body to obtain information from another public administration body is always contingent on the existence of a provision establishing the authority of that administration body. If the legislator recognises that a public administration body should have the authority, he equips the body in question with it. An example of this may be the Competition Act, in which Article 72 directly provides that "public administration bodies are obliged to provide the President of the Office with access to files held by them and to information relevant to proceedings pending before the President of the Office". Second, axiological considerations support this view. Since the right of access to files is intended to increase openness in the activities of administrative authorities and to improve public control of their actions, there is no justification for this right to be exercised by the public administration authorities themselves. In this context, the view of the Supreme Administrative Court that the president of the National Bank of Poland (NBP) may request public information from the minister of finance appears to be completely incomprehensible.[21] Another thing that is quite peculiar is the explanation of the court, which concluded that, since no regulation deprives the president of the NBP of the right to obtain public information, it means that he is entitled to this right. This reasoning of the court implies that it has departed from the traditional understanding of the principle of legalism, which dictated the existence of an explicit competence standard for the action of a public administration body, in favour of a kind of "presumption of competence" of a public administration body, unless this competence is excluded by an explicit provision of the law. It appears, however, that the Supreme Administrative Court's view is incidental, as it is contrary to the principle of legalism as well as common sense. Therefore, the position expressed earlier remains fully valid.

The API applies more broadly than just to jurisdictional administrative proceedings. For this reason, the right of access to public information includes various rights, such as: a) the right to obtain public information, including the right to obtain processed information to the extent that it is particularly relevant to the public interest; b) access to official documents, c) access to the meetings of collegial bodies of public authorities coming from universal elections. These rights may be exercised through: a) publishing public information, including official documents,

20 K Tarnacka, 'Prawo do informacji w polskim prawie konstytucyjnym' [The Right to Information in Polish Constitutional Law] (2011) Państwo i Prawo vol. 3, 108–111.

21 Order of the Supreme Administrative Court I OSK 509/09 [2009] Lex 612789.

in the Public Information Bulletin; b) providing access on the basis of an individual request; c) access to meetings of bodies and providing access to materials, including audiovisual and ICT, documenting such meetings.

The fundamental principle of the provision of public information is that there is no need for the person exercising this right to demonstrate a factual or legal interest. Public information should be made available upon request without undue delay, but no later than within 14 days from the date of the request. Importantly, the form in which information is made available is indicated in the request, unless the obliged entity does not have the technical means to satisfy the request. The entity making public information available is obliged to ensure the possibility of copying public information or printing it out and sending or transferring it to a commonly used information carrier. It should be emphasised that the provision of public information is generally free of charge.

5. At the crossroads of access regimes

The relationship between the rights under the APC and PIA raises some doubts. As indicated at the beginning of the chapter, it is necessary to distinguish access to administrative files on the basis of the APC from access to public information contained in administrative files. Both rights have been regulated separately and, as the conducted analysis has shown, their subject and object scopes are partly different. From a formal point of view, however, it is possible to indicate situations when, theoretically, the provisions of the APC and the PIA could apply in one case. This raises the question on procedural grounds as to the relationship between the two powers? Can they be applied in parallel, is there competition between them or do they complement each other?

Firstly, as indicated earlier and confirmed by the court case law, "the modes regulated by the Act on Access to Public Information and the Code of Administrative Procedure cannot be equated."[22]

Secondly, Article 1(2) of the PIA will be of key importance when determining the mutual relations between the APC and the PIA. According to the jurisprudence, the norms of the PIA do not infringe the provisions of other acts specifying different rules and procedures for access to public information. This means that, despite the PIA entering into force, the provisions of Articles 73 and 74 of the APC, as far as they regulate a party's access to administrative proceedings to the files of these proceedings, still apply.[23] Consequently, to the extent to which Articles 73 and 74 of the APC apply, by virtue of Article 1(2) of the PIA, the application of the provisions of the PIA is excluded.[24]

On this basis, it should be considered that the parallel application of the provisions of the APC and the PIA would be excluded with regard to entities to which the provisions of Articles 73 and 74 of the APC apply. Therefore, "access to the files of administrative proceedings, under the provisions of the Act on Access to Public Information, is limited to entities that are not parties to the administrative proceedings. Access to the files of administrative proceedings for the parties to these proceedings is regulated by the provision of Article 73 of the Code."[25]

Similarly, there will be no competition between the indicated provisions. Indeed, a party to administrative proceedings does not have a choice as to whether it wants to obtain access to the administrative file on the basis of Article 73 of the APC, or to achieve the same result on the basis

22 Judgment of the Supreme Administrative Court II OSK 1523/06 [2007] Lex 1613246.
23 Judgment of the Regional Administrative Court II SA/Wa 1487/07 [2007] Lex 971616.
24 Judgment of the Supreme Administrative Court I OSK 194/08 [2008] Lex 516808.
25 Ibid.

of the PIA. On procedural grounds, this means that a request addressed to the authority by a party to an administrative proceeding for access to public information contained in the case file should be treated as a request under Article 73 of the APC. This is confirmed by the case law of the courts. The administrative court held that "since the applicant was a party to the pending administrative proceedings and was requesting access to information the source of which was the documents in the administrative proceedings file, access to the administrative files and the documents contained therein should take place in accordance with the procedure set out in the Administrative Procedure Code and not the Act on Access to Public Information. It should be emphasised that the right of a party to request inspection of the files of proceedings and making notes and copies from them stems from Article 73 of the Code of Administrative Procedure, and not from the legal constructions contained in the Act on Access to Public Information. The legislator, in Article 1(2) of the Act on Access to Public Information, decided to give primacy to the laws already in force, in this case the Code of Administrative Procedure, which, in Chapter 3, Articles 73 and 74, regulates access to files in pending administrative proceedings. In view of the mode of access to files and copies contained in the case file explicitly set out in these provisions, there is no doubt that a party to a given administrative proceedings is provided with access to information under procedural rules."[26] For this reason, as the court further states, "in light of the regulation of Article 1(2) of the Act on Access to Public Information, it is unacceptable to apply the provisions of the Act on Access to Public Information when the requested information, having the nature of public information, is available through another mode". At the same time, some postulate that the priority of applying the provisions of the APC in the scope of access to case files over the provisions of the PIA should be explicitly determined, which would constitute a codification of the hitherto jurisprudence.[27]

6. EU CONTEXT

Before moving on to the conclusion, it is worth pointing out the European context of information rights. Indeed, under EU law, it is clear that information rights from different access regimes cannot be equated or used interchangeably. At the outset, it should be noted that the right of access to the case file has undergone a significant evolution in EU law. Despite the absence of an explicit regulation in EU primary law, the Community courts have taken the position that in all proceedings where sanctions may be imposed, the rights of defence should be guaranteed, including the right of access to the file.[28] However, it was not until the landmark ruling of the Alkali Cartel[29] that the court of first instance recognised that the right of access to the file arose not from the Commission's internal procedural rules, but was an intrinsic right that was part of the right of defence.[30] Today, the right to good administration is recognised in Article 41 of the Charter of Fundamental Rights.[31]

26 Judgment of the Regional Administrative Court II SAB/Wa 148/08 [2008].

27 D Nowicki, 'Dostęp do akt sprawy w ogólnym postępowaniu administracyjnym – w praktyce działania organów administracji i orzecznictwie sądów administracyjnych' [Access to Case Files in General Administrative Proceedings – in Practice, the Operation of Administrative Bodies and the Jurisprudence of Administrative Courts in M Błachucki, G Sibiga (eds), *Kodeks postępowania administracyjnego po zmianach w latach 2017–2019* [Code of Administrative Procedure after Changes in 2017–2019] (INP PAN 2020) 320.

28 K Lenaerts, J Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) Common Market Law Review 34(3) 534.

29 Judgment of the Court of First Instance T 36/91 EU:T:1995:119.

30 CD Ehlerman, BJ Drijber, 'Legal Protection of Enterprises: Administrative Procedure, In Particular Access to Files and Confidentiality' (1996) European Competition Law Review 17(7), 382.

31 Charter of Fundamental Rights OJ UE C 303/01 [2007].

Under European law, a distinction is made between the right of access to administrative files as part of the right to good administration and the right of access to public documents. This distinction is important and needs to be briefly discussed, all the more so because it is sometimes possible in the doctrine to equate the two rights, or to derive the right of access to administrative files from the right of access to public documents.[32]

The first formal argument in favour of treating the rights in question separately is the text of the CFR itself. The Charter clearly separates the two rights, with separate provisions devoted to them – Article 41(2)(b) on the right of access to administrative records and Article 42 defining the right of access to public documents. However, this argument is not conclusive. The most relevant, in my view, is the axiological argument. Indeed, the axiology of the two rights is different. The right of access to administrative records serves to guarantee the protection of the rights of the individual in the course of administrative proceedings concerning their rights and obligations. The right of access to public documents aims to protect the public interest by increasing transparency in the operation of public institutions. This is also supported by historical interpretation. The right of access to administrative records was created as part of the procedural guarantees of a party in administrative proceedings stemming from the principle of procedural fairness originating from Article 6 of the European Convention on Human Rights and the concept of the rule of law. In contrast, the right of access to public documents is a general right derived from the democratic principle and even from Article 10 ECHR.[33] The specific nature and distinctiveness of both rights is also evident in primary and secondary Community law developing and specifying both rights. In the case of access to public documents, Article 255 TEC, which provides that "any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has a right of access to documents of the European Parliament, the Council and the Commission", has so far been of fundamental importance. The development of this provision in secondary law is Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.[34] In the case of the right of access to administrative files, the development of this power will be the specific rules set by Community bodies when dealing with categories of cases – an example being the rules on access to administrative files held by the Commission in Community competition law, discussed earlier.

Despite their differences, the two powers exist in parallel under European law. Harmonisation of their application should therefore be sought in order to avoid conflict between them.[35] A potential area of conflict arises from the fact that the scope of application of the two powers is different. Indeed, the right of access to public documents concerns an unspecified number of people who may not be affected by the proceedings at all. Meanwhile, the right of access to the files of proceedings covers only the circle of entities that have a legal interest in the proceedings (which are directly affected by the proceedings). Meanwhile, in administrative proceedings, documents

32 AJG Ibanez, *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits* (Hart Publishing 1999) 242. In my view, however, such a position is ahistorical and fails to take into account the different purposes served by the powers in question.

33 HP Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing 1999) 60. However, this view is not universally accepted and has caused some controversy.

34 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145, 43.

35 S Ohlhoff, O Fleischmann in G Hirsch F Montag, FJ Saecker (eds), *Competition Law: European Community Practices and Procedure. Article-by-Article Commentary* (Sweet & Maxwell 2008) 2406–2407.

containing legally protected secrets may constitute an important part of the file. For this reason, there is a postulate that when applying the rights resulting from secondary European law, e.g. Regulation 1049/2001, they should be applied in such a way that they do not hinder or render ineffective the exercise of rights resulting from the regulations on access to administrative files.[36]

7. Concluding remarks

The analysis carried out has shown that the provisions on access to administrative case files resulting from the APC and the PIA are complementary. They function side by side complementing each other. This situation is a conscious choice of the Parliament, who, guided by different premises, regulated both rights separately. Such shaping of rights resulting from the indicated regulations is supported by the different axiology of the right of active participation of a party in the proceedings and the right of access to public information – in this scope. We are dealing with a similar situation on the grounds of EU law.

The undertaken analysis suggests there should be a general regulation of the notion of administrative files and a general definition of the scope of the subject (party, third parties, etc.), the object (official, internal, private documents, etc.), their form (traditional, digital, hybrid) and time (during or after the proceedings) of their availability and the availability of the public information contained in them, as well as the harmonisation of the regulations of the APC and the PIA in this respect. Currently, these issues are supposed to be regulated by case law, e.g. with regard to the concept of a private or internal document, but these attempts are marked by a great deal of judicial activism that cannot replace the intervention of the legislator in a state of law. It is therefore necessary to consider what typical documents we can find in the files of administrative proceedings and to whom and on what terms and when we should allow access to them. This access should be differentiated and adjusted to such things as the purpose of a given regulation, the legal interest of a given subject, the subject of a regulation or the efficiency of an administrative proceedings. The obverse of this problem is also the manner of documenting procedural actions. Reflection would also be required in this respect. Both the doctrine and practice treat the issues of official notes and annotations somewhat neglectfully. Meanwhile, their practical significance may be very high and in part determine the content of the case file.

The definition of the file will also allow for a new approach to the implementation of access to the file. In particular, it should be considered in what form and to what extent the file should be accessible. Similarly, it would be necessary to clearly and realistically define the obligations of the state administration body. Given the development of technology, to a certain extent access could be fully automated and would not require additional interaction between the right holder and the authority. Of course, this must not lead to digital exclusion or force anyone to use remote forms of access. In this context, the way in which the limits to access to the file are defined and how the code regulation is urgently supplemented needs to be rethought, as raised earlier.

The main thesis of the chapter is the observation that only in the case of a procedural regulation (APC) can we speak of a fully formed and direct right of access to administrative files. The PIA does not create such a direct right, but only allows access to public information that may be contained in the administrative case file. In particular, this access is possible if the administrative case file contains official documents that are subject to access. For this reason, access to the administrative file is referred to only in the context of the rights under the APC, while in the case of the PIA, it refers to access to public information contained in the file.

36 Ibid., 2407.

We should conclude with a remark that may be considered paradoxical. Over the twenty years of applying the PIA, it has undoubtedly been possible to broaden the sphere of openness of the activity of state administration bodies, which has been accompanied by the development of information rights of entitled entities. On the other hand, there is a noticeable lack of reflection on the definition of the internal sphere of administrative action. It has still not been possible to work out a coherent normative concept of the internal sphere of activity of administrative authorities in Poland. In fact, each of the discussed normative regulations creates its own sphere of openness. While recognising the transparency of state administrative authorities as an important value, it should not be forgotten that there should be a clearly and legally defined sphere of *res internae,* which is necessary in any organisation to function efficiently. The alternative is the expansion of the grey internal sphere and the lack of documentation of the activities undertaken therein, which may negatively affect the scope of exercising the information rights of authorised entities. Therefore, clearly defining the internal sphere, making the definition of public information more flexible and strengthening access to it may be the first challenges to be regulated in the PIA. It may look like a paradox, but to regulate openness and the accountability of public administration, we first need to define what should remain secret or internal information, and why.

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Scientific Contributions and Legacy of Prof. Stanisław Kasznica in the Memories of Prof. Józef Filipek and Prof. Janusz Homplewicz

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Abstract
The article presents unknown or little-known aspects of the life of prof. Stanisław Kasznica and his family. In particular, Krakow threads were presented, including the memories of prof. Józef Filipek and prof. Janusz Hoplewicz.

Keywords
Stanisław Kasznica; Józef Filipek; Janusz Homplewicz

1. Introduction

During the ceremonial promotion within the historic walls of the Jagiellonian University in Cracow, doctoral candidates pledge several commitments, including: "vos huius Universitatis, in qua summum in scientiis vel litteris gradum ascenderitis, píam perpetuo memoriam habituros eiusque negotia, opera, rationes, quoad possitis, semper adiuturos." This oath signifies the profound and enduring connection between the doctorate recipient and the University. The relationship is one of mutual respect and lifelong dedication.

In my opinion, this commitment carries an implicit and unspoken responsibility. While it might seem so evident that it does not necessitate articulation, the Jagiellonian University itself is bound by a reciprocal, timeless obligation. This obligation entails upholding and reinforcing the University's relationship with its alumni, the "Nurturing Mother", whenever and wherever appropriate and feasible. This can be achieved either through an institutional, top-down approach or through a grassroots effort via the works and statements of its scholars at various venues, such as scientific conferences.

As a scientific and didactic employee of the Jagiellonian University, I am compelled to present a brief account of the life and work of Prof. Stanisław Kasznica, as well as to highlight some of his connections with the Jagiellonian University and the city of Cracow. This statement is made in a de-formalized manner and adheres to the principles of honesty, truth, and objectivity.

2. The Cracow connections of Prof. Stanisław Wincenty Antoni Kasznica[1] and his family

Prof. Stanisław Wincenty Antoni Kasznica (23 II 1874 – 17 XIU 1958), Rector of the University of Poznań, an eminent scientist and distinguished political and social activist, is a person with multiple ties to Cracow. One can mention, for example, that he lived in Cracow and attended secondary school there, and it was in the "City of Krak", at St Anne's Gymnasium on 3 June 1893 – to use the Old Polish, he "matriculated"[2] and at the Jagiellonian University in Kraków, on 23 April 1904, he was awarded the degree of Doctor of Laws[3] . At the Jagiellonian University, his academic supervisor was Professor Fryderyk Zoll (1834-1917)[4]. He did his studies at the Jagiellonian University: "Faculty of Medicine, ordinary student 1893/94 sem. I. Faculty of Law, ordinary student 1901/02; graduation 2 III 1903. (...) Samuel Głowiński scholarship 1893/94 sem. I."[5] . It should be added that within his legal competence he took the state law exam: "judicial exam 27 III 1903; political science exam 7 III 1904."[6] .

Józef Kasznica (20 May 1834 – 7 October 1887), father of Stanisław Wincenty Antoni Kasznica, was also a lawyer, a professor at the Warsaw Main School, who attended St Anne's Gymnasium in Kraków, where he took his baccalaureate in 1850.[7] Józef Kasznica studied at the Jagiellonian University, Faculty of Law, "as an ordinary student" in the academic years 1852/53 and 1853/54[8] . Documents preserved in the Archives of the Jagiellonian University show that he resided in Podgórze, at that time a town separate from Cracow, although very close to it[9]. "After taking the First Examination in Cracow" he continued his legal studies in Vienna[10].

Also Wincenty Kasznica (1798–1867)[11] or (1801–1868)[12], grandfather of Prof. Stanisław Wincenty Antoni Kasznica, was associated with Kraków as a lawyer and activist[13] – official[14] in the Republic of Kraków.

1 Z Janowicz, 'Kasznica Stanisław Wincent Antoni (1874–1958)' [Kasznica Stanisław Wincent Antoni (1874–1958)] in E. Rostworowski (ed), *Polski Słownik Biograficzny Kapostas Andrzej – Klobassa Zręcki Karol* [Polish Biographical Dictionary Kapostas Andrzej – Klobassa Zręcki Karol] (Ossolineum 1966–1967) 206–208.

2 *Wykaz maturzystów* [List of High School Graduates] in H Sędziwy (ed), *Z dziejów Liceum Nowodworskiego w Polsce Ludowej* [From the History of the Nowodworski Secondary School in People's Poland] (Komitet Organizacyjny Jubileuszu 375-lecia Liceum im. Bartłomieja Nowodworskiego 1963) 26.

3 K Stopka (ed), *Corpus studiosorum Universitatis Jagellonicae in sacculis XVIII – XX. Tomus III: K – Ł* (Księgarnia Akademicka Kraków 2009) 128.

4 Ibid.

5 Ibid.

6 Ibid.

7 Ibid.

8 Ibid.

9 Ibid., 127.

10 B Leśnodorski, 'Kasznica Józef (1834–1887)' [Kasznica Józef (1834–1887)] in E. Rostworowski (ed), *Polski Słownik Biograficzny Kapostas Andrzej – Klobassa Zręcki Karol* [Polish Biographical Dictionary Kapostas Andrzej – Klobassa Zręcki Karol] (Ossolineum 1966–1967) 204 .

11 'Wincenty Kasznica (ID: sw.18192)' [Wincenty Kasznica (ID: sw.18192)] in MJ Minakowski (ed), *Genealogia Potomków Sejmu Wielkiego* [Genealogy of the Descendants of the Great Sejm], <https://www.sejm-wielki.pl/b/sw.18192> accessed 22 Mar 2023. See also M Szczesiak-Ślusarek, 'Historia rodu Kaszniców' [The History of the Kasznic Family] in SW Kasznica (ed), *Druga wojna światowa wspomnienia spisane na podstawie codziennych notatek* [World War II. Memories Written Based on Daily Notes] (Instytut Pamięci Narodowej 2013) 11.

12 So S Cyrankiewicz. See S Cyrankiewicz, *Przewodnik po cmentarzach* [Cemetery Guide] (Krajowa Agencja Wydawnicza 1986) 160.

13 B Leśnodorski (1966–1967) 204.

14 S Cyrankiewicz (1986) op. cit.

Both Wincenty Kasznica and Józef Kasznica were interred in the Rakowicki Cemetery in Kraków. However, contrary to the press information published in 1887, which announced that Józef Kasznica would be laid to rest in the family grave next to his father, this did not occur.[15] They were buried in two different graves[16] and the grave of Wincenty Kasznica has not survived to this day. His wife Izabella (née Trębicka) Kasznica (1844–1911) is also buried in the grave where Józef Kasznica was buried[17] .

Stanisław Wincenty Antoni's siblings, that is Izabela Kasznicówna and Kazimierz Kasznica, also had connections with Kraków. Izabela Kasznicówna (1875–1915)[18] matriculated externally at St Anne's Gymnasium in Kraków in 1901[19]. She studied at the Jagiellonian University: "Faculty of Philosophy, extraordinary student 1899/1900-1900/01; ordinary student 1901/02-1903/04 sem. I, 1904/05 sem. I, 1905/06 sem. I; certificate of departure:17 XII 1908"[20].

Kazimierz Kasznica (1879–1925[21]), studied at the Faculty of Law of the Jagiellonian University as an ordinary student 1899/1900, Doctor of Laws of the Jagiellonian University, scientific supervisor Prof. Fryderyk Zoll[22].

3. Three Levels of the Author's Encounters with Prof. Stanisław Wincenty Antoni Kasznica

I have encountered the figure of Professor Stanisław Wincenty Antoni Kasznica at three distinct levels of cognition, which I have organized chronologically and subjectively categorized.

The first level relates to my early academic career and my burgeoning interest in law and administration. During my studies, as I began to delve deeper into administrative law, I found it to be a field of intense didactic and scientific intrigue. It was during this period that I familiarized myself with both contemporary and historical works on the science of administrative law. Among these, I encountered Professor Stanisław Wincenty Antoni Kasznica's textbook, which was originally published under a pseudonym during World War II and subsequently reissued post-war. Understanding the German actions against Polish academics – particularly the "Sonderaktion Krakau" and the murders in the Wuleckie Hills in Lviv – highlighted the personal courage of Prof. Kasznica in publishing this textbook. The potential consequences he faced if the Germans had discovered the textbook's publication and his identity are not difficult to imagine.

During my studies, in addition to the curriculum provided in lectures, exercises, proseminars, and seminars on administrative law, we relied on an academic script from Cracow. This script, over a decade old and edited by Professor Wacław Brzeziński, was available in a limited edition and not easily accessible, and was commonly referred to as the "Filipek script". Professor Józef Filipek, who co-authored this script, was a lecturer in administrative law at the Faculty of Law and head of the research unit in administrative law at the Jagiellonian University in Cracow, hence the nickname used by students.

15 BUJ DŻS 224649 V Ka 188, <https://jbc.bj.uj.edu.pl/dlibra/doccontent?id=865198> accessed 22 Aug 2024.
16 Stanisław Cyrankiewicz (1986) op. cit.
17 'Izabella Kasznica (ID: psb.11141.10)' [Izabella Kasznica (ID: psb.11141.10)] in MJ Minakowski (ed), *Genealogia Potomków Sejmu Wielkiego* [Genealogy of the Descendants of the Great Sejm], <https://www.sejm-wielki.pl/b/psb.11141.10> accessed 22 Mar 2023.
18 M Szczesiak-Ślusarek (2013) 17.
19 *Wykaz maturzystów* (1963) 30.
20 K Stopka (2009) 128.
21 M Szczesiak-Ślusarek (2013) 17 et seq.
22 Ibid.

Beyond the opportunity to use Prof. Kasznica's textbook in the faculty library, I was fortunate enough to acquire a copy of his book from a Cracow antiquarian bookshop during my student days. The content of this book was as enriching and satisfying as the textbooks by historical authors such as Władysław Leopold Jaworski, Jerzy Stefan Langrod, Szczęsny Wachholz, Kazimierz Władysław Kumaniecki, Tadeusz Hilarowicz, Jerzy Panejko, Feliks Ochimowski, and Emanuel Izerson.

The second level of encounter pertains to my broader historical understanding of both Polish and global history. My studies commenced in the academic year immediately following the watershed events of August 1980, a period characterized by newfound access to previously restricted books and periodicals, as well as the rise of second-circulation publishing. It was through these avenues that I first learned about Prof. Kasznica's son, also named Stanisław (1908–1948), a Polish professional soldier who held the rank of lieutenant-colonel. He was the last commander of the National Armed Forces and was executed by the communist regime. I was certain that the heroic stance of Prof. Kasznica's son had a profound impact on his life. It seemed evident that the arrest of Stanisław Kasznica, the commander of the National Armed Forces, in February 1947, and his role in the underground resistance, likely led to the retirement of Professor Kasznica from Adam Mickiewicz University in Poznań that same year. This assumption was later confirmed by Prof. Zbigniew Janowicz (1921–2011), who wrote about these circumstances:

> The Professor's university activities were interrupted by his transfer by decision of the Minister of Education on September 9, 1947. Despite the efforts of the Faculty Council and Senate, he was retired on December 31 of that year. The reason for this decision was not only the entirety of Professor Warmus's activities – scientific, political, and religious – but also the arrest of his son, Stanisław Józef, who had been very active in pro-independence work during the occupation and was one of the leaders of the National Armed Forces. S. Kasznica rejected the proposal to continue employing him as a contract professor, as it did not align with the dignity of a university professor. He did, however, continue to teach administrative law at the Academy of Commerce until that subject was abolished with its transformation into the Higher School of Economics in 1950.[23]

In my student years, my understanding of the figure of Prof. Stanisław Wincenty Antoni Kasznica was primarily developed through his textbook and various publications. These sources offered fragmented pieces of his family history which, in the pre-internet era and without full, unrestricted access to the relevant literature, could not provide a complete or sufficiently in-depth picture.

The third level of my encounter with Prof. Stanisław Wincenty Antoni Kasznica came through intergenerational transmission within the field of administrative law. This occurred when I had the honor and pleasure of working with Prof. Józef Filipek (1931–2020)[24] and Prof. Janusz Homplewicz (1931–2006), who generously shared their extensive knowledge and insights into administrative law and the science of administration. These esteemed professors, whom I regard

23 Z Janowicz, 'Stanisław Kasznica (1874–1958)' [Stanisław Kasznica (1874–1958)] (1995) Analecta 4/1(7), 180.

24 I Niżnik-Dobosz, P Dobosz, 'Wspomnienie o prof. dr hab. Józef Filipek (1931–2020)' [Memories of prof. dr hab. Józef Filipek (1931–2020)] (2020) Przegląd Prawa Publicznego vol. 12, 169–173; I Niżnik-Dobosz, P Dobosz, 'Prof. dr hab. Józef Filipek (1931–2020). Wybitny przedstawiciel krakowskiej szkoły prawa administracyjnego i jego związki z samorządowymi kolegiami odwoławczymi' [Prof. dr hab. Józef Filipek (1931–2020). An Outstanding Representative of the Krakow School of Administrative Law and his Connections with Local Government Appeal Boards] (2020) Casus vol. 98–99, 149–154.

as my incomparable mentors, imparted their knowledge to me through direct discussions about the historiography of Polish administrative law. Prof. Janusz Homplewicz continued to provide his insights even after his tenure at the Jagiellonian University had ended[25].

The most significant of the three levels outlined is the one that conveys the insights of the noted Kraków professors who were contemporaries of Prof. Stanisław Kasznica. Professor Józef Filipek was at the threshold of his academic career when Professor Stanisław Kasznica was approaching the culmination of his scientific and didactic journey.

Years ago, in room 110 of the Wróblewski Collegium at 2 Olszewskiego Street – then the office of the Head of the Chair of Administrative Law, Prof. Józef Filipek – I was engaged in a conversation with Prof. Iwona Niżnik-Dobosz (then Iwona Skrzydło-Niżnik), Prof. Józef Filipek, and myself. During this discussion, I inquired about Prof. Stanisław Wincenty Antoni Kasznica. Addressing this question to Prof. Józef Filipek was entirely appropriate, considering his educational background. Prof. Filipek studied in Kraków from 1949 to 1952, where he earned his bachelor's degree in law from the Faculty of Law at the Jagiellonian University. He then continued his studies in Poznań from 1953 to 1954, completing his degree at Adam Mickiewicz University. Furthermore, Prof. Józef Filipek maintained connections with Poznań in later years, particularly with Prof. Marian Zimmermann (1901–1969). Prof. Filipek was instrumental in hiring Prof. Jan Zimmermann, a graduate of the Faculty of Law and Administration at Adam Mickiewicz University, for the department he headed at the Jagiellonian University. Beginning in 1970, Prof. Józef Filipek served as the head of the Department, and later the Chair, of Administrative Law at the Jagiellonian University.

Prof. Józef Filipek's remarks on the life of Prof. Stanisław Wincenty Antoni Kasznica focused particularly on the latter years of his teaching and scholarly activities. Prof. Filipek recollected the image of Prof. Kasznica in the late 1950s, following the "October Thaw" of 1956, as a person of such advanced age that his visits to Adam Mickiewicz University in Poznań – specifically, to meet with students – required substantial physical effort on his part. To quote Prof. Filipek, Prof. Kasznica, then the erstwhile rector of the university, was a man with significant health challenges. Prof. Filipek recalled that Dr. Zbigniew Janowicz, later a professor associated with Adam Mickiewicz University, frequently assisted Prof. Kasznica in attending these student meetings. He also mentioned that not everyone was pleased with Prof. Kasznica's visits to Adam Mickiewicz University in the final years of his life.

Both Prof. Józef Filipek and Prof. Janusz Homplewicz emphasized the valuable contributions of Prof. Stanisław Wincenty Antoni Kasznica to the field of administrative law, particularly highlighting his textbook.

25 P Dobosz, 'Niepublikowane aspekty życia oraz działalności naukowej i literackiej Profesora Szczęsnego Wilhelma Wachholza – pseudonim "Tomasz Strażyc" (1897–1957) we wspomnieniach Profesora Janusza Homplewicza (1931–2006)' [Unpublished Aspects of the Life and Scientific and Literary Activities of Professor Szczęsny Wilhelm Wachholz – Pseudonym "Tomasz Strazyc" (1897–1957) in the Memories of Professor Janusz Homplewicz (1931–2006)] in B Jaworska-Dębska, Z Duniewska, M Kasiński, E Olejniczak-Szałowska, R Michalska-Badziak, P Korzeniowski (eds), *O prawie administracyjnym i administracji: refleksje: księga jubileuszowa dedykowana profesor Małgorzacie Stahl* [On Administrative Law and Administration: Reflections: an Anniversary Book Dedicated to Professor Małgorzata Stahl] (Wydawnictwo Uniwersytetu Łódzkiego 2017) 149–155; P Dobosz, 'Profesor Szczęsny Wachholz we wspomnieniach Profesora Janusza Homplewicza' [Professor Szczęsny Wachholz in the Memories of Professor Janusz Homplewicz] (2018) Alma Mater vol. 199, 118–121.

4. Conclusion

I am convinced that the information presented in this article supplements, in a modest yet significant way, the existing knowledge about the life and family of Prof. Stanisław Wincenty Antoni Kasznica.

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Contemporary Central & East European Law

Reflections on What Modern Administrative Law has Lost from Professor Stanisław Kasznica's Views on Public Service

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Abstract
The interwar period marked the golden age of Polish administrative law, during which many of its key institutions were established or developed. One such institution was the model of public service, which – rooted in public law principles – comprehensively and logically shaped administrative law. Among the foremost figures shaping administrative law during that time was Professor Stanisław Kasznica. This article juxtaposes his thoughts and proposals with the current state of this field of Polish law, providing an assessment of the present condition of Polish administrative law.

Keywords
administrative law; public service; civil servant law

1. Introductory remarks

In the darkness of the conflagration of war and occupation, Professor Stanisław Kasznica's work, *Polskie prawo administracyjne. Pojęcia i instytucje zasadnicze* (*Polish Administrative Law: Basic Concepts and Institutions*),[1] took on a special character. Although the book was intended as a practical textbook for the secret sets of the University of Warsaw and the University of the Western Territories, at the same time it confirmed the unwavering hope for a return to pre-war statehood, understood not only as independence or in systemic terms, but above all – far from the Warsaw reality of 1943 – in axiological terms, realised also by administrative law with its elementary principles. Drawing on the outstanding achievements of pre-war administrative law experts, Professor Kasznica outlined an interpretation of administrative law in which the state,

1 The first edition of the book was published during the German occupation of Warsaw in 1943. Its author was in Warsaw from 1942 to 1944, and from 1943 onwards taught in clandestine classes.

its organs and public administration respect the principle of legalism and the rule of law.[2]

In the third chapter of the nearly 200-page textbook, which is called *Bodies of Public Administration*, the author presents the issue of the public service alongside considerations on the concepts of office (authority), government and local government and public establishments and enterprises. Although all the areas covered in this book are extremely valuable, the conception of the public service, its system and principles of operation and the status of its functionaries is particularly important in modern times. Today, civil service law in Poland is experiencing an identity crisis and a conceptual crisis in general.[3] The golden era of this institution of law, as indeed of administrative law in general, dates back to interwar legislation. This resonated perfectly in last year's public discussion in the context of the centenary of the enactment of the first Civil Service Act.[4] It was then that the civil service was established in a complete, well-thought-out version,[5] which in practical terms was capable of performing public tasks efficiently. The post-war period was a time of degradation of this concept and the de facto instrumentalisation of the regulations governing it. The analysis of Professor Kasznica's reflections on the model of public service at that time may therefore be more than a purely historical study – also a tool for assessing the direction of changes in these regulations, and even the basis for *de lege ferenda* postulates in future.

2. The Nature and Legal Sources of the Public Service

In addressing the issue of the overriding essence and meaning of the public service, Professor Kasznica does not stop at merely describing the statutorily assigned tasks. He formulates a definition of the term "public service" in practical terms by indicating that it means "anyone's acting on behalf of and for the benefit of a public law association, fulfilling tasks belonging to it in the capacity of its organ",[6] and even goes so far as to specify that when the association is the state, then "acting in the capacity of its organ is called state service".[7] However, he also indirectly expresses a view on the momentous status of the individual in the public service. Indeed, he states that "with the eradication of the word 'servant' from colloquial speech, there is now no term that encompasses all who perform any kind of public service".[8] The above quote only refers to the problem of terminological nomenclature in the interwar legislation on its surface. This issue is clarified at once, as the author points out that:

> the broadest concept yet is contained in the term "functionary" and in this broad sense it is used in legislation. But all types of public service, such as military service, cannot be squeezed into its framework. And therefore we are forced to use the phrase "performing public service" to cover all types of this service without exception.[9]

2 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 9.

3 T Górzyńska, W Drobny (eds), *Polskie prawo urzędnicze – kryzys tożsamości* [Polish Clerical Law – Identity Crisis?] (CH Beck 2016) 7.

4 A Radwan, 'Służba cywilna wymaga reformy na wzór tej sprzed 100 lat' [The Civil Service Requires Reform Along the Lines of the One 100 Years Ago] (2022) Dziennik Gazeta Prawna no. 33, B7.

5 J Kopczyński, *Przepisy normujące stosunek państwowej służby cywilnej* [Provisions Regulating the Relationship between the State Civil Service] (Drukarnia Techniczna 1925) 9 et seq.

6 S Kasznica (1946) 87.

7 Ibid.

8 Ibid.

9 Ibid.

In a deeper layer, however, there is a thesis more important than the legislative inaccuracies of the time: that the issue of public service in the theory and system of law belongs to public, administrative law and not to private law.

Particular attention should be paid to the sentence cited above about the eradication of the notion of *servant*, which was inserted in the textbook as if in passing. The author, after all, by formulating the thought in this way, *de facto* acknowledges its substantive correctness, although he makes a veiled reservation about the reasons why it cannot be used. Nonetheless, the word logically and strictly fits into the scope of the term "public service" and accurately reflects the legal status of an officer in this service. This is, after all, a key attribute of the administrative law relationship arising from the theory of administrative law, which "manifests itself [...] above all in the imbalance of interests represented by the participants in this relationship. The state represents the public interest [...]. It prevails over the private interests represented by individuals."[10]

Indeed, Professor Kasznica has no doubt that the relationship linking an officer with the state is a public-law relationship regulated by administrative law. Of course, it is not of an absolute nature, as certain justified departures from these assumptions are permissible, and the private interest itself, placed in a weaker position in the administrative-law relationship, is subject to legal protection.[11] Nevertheless, this position of an officer is in line with the dogma of this branch of law, which has been singled out in the legal system due to, *inter alia*, an extremely practical criterion: "grasping the state from a dynamic position – the state in motion, in action".[12] Undoubtedly, an indispensable element complementing administrative law understood in this way is the set of its provisions which regulate the legal status and official relations of the persons applying this law.

Today, the problem of the lack of understanding, in both Polish law and public debate, of the essence of the public service and its nature is compounded many times over. The complete lack of vision of this legal institution is easily discernible. One of its manifestations is the legislature's inability to consistently build the status of this legal institution within one proper branch of law. This is because the legislature acts reactively, creating provisions that implement the demands of the direct addressees of these norms, as well as copying Western European law, and thus introducing into the legal order solutions that are alien to official law. The current dominance of labour law in the area of public service and the further dynamic appropriation by this law of not even the bordering administrative law, but of its traditional institutions,[13] stems from here. The post-constitutional legislative practice, on the other hand, is all the more reprehensible because in the 1997 Basic Law in force, the legislature explicitly formulated a reasonable framework and guidelines for the construction of the public service. The expected model was never implemented in law.

There is a certain echo in the Polish civil service law of the issue so enigmatically signalled by Professor Kasznica concerning the understanding of an official as a servant. Referring to the Order of the President of the Council of Ministers, issued on the basis of Article 15(10) of the

10 Ibid., 119.

11 In Kasznica's view, public interests "prevail over them up to the limit set by statutes, beyond which certain private interests are considered legitimate on the same obtain legal protection". See ibid., 119.

12 Ibid., 20.

13 W Drobny, 'Przenikanie się prawa konstytucyjnego, prawa pracy i prawa administracyjnego na przykładzie polskiego prawa urzędniczego w świetle orzecznictwa (zagadnienia wybrane)' [The Interpenetration of Constitutional Law, Labor Law and Administrative Law Using the Example of Polish Civil Service Law in the Light of Jurisprudence (Selected Issues)] (2018) Studia Prawnicze no. 5 spec, 214 et seq.

Civil Service Act,[14] on the guidelines for observing the principles of the civil service and on the principles of ethics of the civil service corps,[15] in §15 we find a thesis according to which the principle of public service is expressed in "the servile character of work towards citizens, aimed at the realisation of the values underlying the law of the Republic of Poland" and "service to the state, the basic element of which is the protection of its interests and development".[16]

3. The essence and characteristics of the civil servant relationship

I consider the reflections on the essence and characteristics of the "civil servant relationship" to be fundamental. In fact, Professor Kasznica made a complete and accurate reconstruction of the model of the public service through a detailed description of its structural elements. This model refers fully and consistently to the public-law dimension of this institution, strictly determined by administrative law. In an orderly, thoughtful and complete manner, he indicated those elements and features which build the public service. In the Polish legal literature, this part of the work is unique and extremely valuable.

The catalogue of elements constituting the civil servant relationship, which is the basic relationship of public service (voluntary and professional[17]), is a closed set containing as many as ten parts. Firstly, it is a public-law relationship, which means that its establishment, modification and termination, as well as its elements, are regulated by mandatory rules, "and the administrative authority has only a very limited discretion in applying them, and cannot adapt them to individual situations."[18]

Secondly, the clerical relationship is voluntary, meaning that the choice of a career as a civil servant is left to the citizen's discretion, in contrast to the compulsory public service of the time, which included such segments of the state's personnel as the military service, the service of sanitary personnel called upon to fight epidemics or the service of magistrates.[19] Professor Kasznica notes – a noteworthy view reflecting the social conditions of the time – that "this career is apparently sufficiently attractive due to the benefits it provides: assurance of subsistence, security of old age, a serious social position, participation in the exercise of state power, and so on."[20]

A momentous further attribute of the official relationship was its moral dimension. In this aspect, the author identified two overarching elements: "the duty of loyalty to the State" and "putting one's whole person at the disposal of the State". These are the issues that justify the civil servant's unique role in the structure of the state and society. These issues establish that their

14 Ustawa z dnia 21 listopada 2008 r. o służbie cywilnej [Act of 21 November 2008 on the civil service] [2022] JoL 1691.

15 Zarządzenie nr 70 Prezesa Rady Ministrów z dnia 6 października 2011 r. w sprawie wytycznych w zakresie przestrzegania zasad służby cywilnej oraz w sprawie zasad etyki korpusu służby cywilnej [Order No. 70 of the President of the Council of Ministers of 6 October 2011 on guidelines for observance of the principles of civil service and on the principles of ethics of the civil service corps] [2011] MP 93, 953).

16 D Długosz, 'Podstawowe zasady etyki urzędniczej' [Basic Principles of Official Ethics] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Etyka urzędnicza i etyka służby publicznej* System prawa administracyjnego [Official Ethics and Ethics of Public Service, Administrative Law System] (CH Beck 2016) 267–268.

17 In addition to voluntary and professional public service, Kasznica also distinguishes between honorary, compulsory and private law (contract) service – S Kasznica (1946) 93–95.

18 Ibid., 88.

19 Ibid., 94.

20 Ibid., 88.

action is one of service and not of work, and that their legal status is governed by administrative law and not by private labour law. From the "moral" dimension of the civil servant relationship, the author derives the conclusions that a civil servant can only be a Polish citizen whose extent of loyalty to the state should be further strengthened by the service oath they take, and that a civil servant is obliged to perform service during office hours and, in an emergency, "at any time without any limitation".[21] State service was thus to be the civil servant's life profession and the basis of their material existence.

The ability to act for and on behalf of the state as its organ is another attribute of the official relationship. The author points out that acting as an official in such a capacity is tantamount to acting as a state. At the same time, he cautions that "the holding of an office, the exercise of official functions, is not a necessary component of the concept of an official: while inactive or in a state of retirement, an official does not occupy an office, but nevertheless does not lose the character of an official".[22]

Further elements of the civil servant relationship of a pragmatic nature were that the civil servant was subject to official authority and disciplinary responsibility,[23] had special professional training, carried out special duties and was subject to "restrictions on freedom not known to the general public (choice of residence, pursuit of side activities, expression of opinion, etc.)".[24] These were compensated for by the civil servant's claim to the state, e.g. the right to special protection, to a salary or to a pension.

This public service model, characterised by its ten nodal elements, is not only complete, but also based on logical assumptions. The starting point for its construction was a deep understanding of the essence of administrative law, as a branch of law of a public law nature. Its rules with general binding force permanently determined the legal situation of the official and thus guaranteed a certain independence from politics. This law was therefore not reactive; it did not respond to the demands of the civil servant community, nor to the harmful expectations of the political elite environment of enabling flexible changes in civil servant positions.

The public service model within administrative law has consistently adopted the attributes of this branch of law. The moral dimension of the civil servant relationship indicated by Kasznica directly fits into the catalogue of attributes of administrative law.[25] The inequality of the parties to the civil servant relationship alludes to the classical understanding of the administrative-law relationship,[26] and the compensations for civil servant limitations logically rewarded these issues.

Under current Polish law, elements from this catalogue have been preserved to the greatest extent in the uniformed services. In the day-to-day aspects of the civil servant corps, only completely unrelated, incidental fragments of the original model remain. Doctrinally, there has been a major paradigm shift, so that civil servant law has been appropriated by labour law. This has thus rendered meaningless, or unjustifiable, the retention in law of public law institutions such as appointment or disciplinary responsibility. Such a situation is unacceptable.

This is all the more true as, again, some echoes of the interwar model nevertheless shine through

21 Ibid., 89.

22 Ibid.

23 In the legal environment of the time, they were taken out of the control of the ordinary and administrative courts.

24 S Kasznica (1946) 89.

25 J Zimmermann, *Prawo administracyjne* [Administrative Law] (Wolters Kluwer 2018) 59–72, 547 et seq.

26 R Hauser, 'Stosunek Administracyjno Prawny' [Administrative and Legal Relationship] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Instytucje prawa administracyjnego* System Prawa Administracyjnego [Administrative Law Institutions, Administrative Law System] (CH Beck 2015) 199 et seq.

in the current constitutional guidelines. Article 153 of the Fundamental Law,[27] indicates four elements as objectives for creating a civil service corps: professionalism, reliability, impartiality and political neutrality. By superimposing these attributes on the set formulated by Professor Kasznica describing the civil servant relationship, a distant convergence is discernible. The post-constitutional legislation has unfortunately not implemented these guidelines.

4. The problem of the private-law basis of employment in the public service

Professor Kasznica's reflections on the reasons and principles for engaging contract staff in the public service have remained remarkably relevant. Today, this problem is a knotty issue with which the legislature, the executive and those directly managing human resources in the public service are grappling. A glaring contemporary illustration of these problems is the issue of recruiting and adequately remunerating professionals in the field of information technology and new technologies,[28] substantive specialists of services, inspectors or guards[29] or highly qualified law or economy specialists. This problem concerns the public service in a broad sense, i.e. covering both service relations *sensu stricto* (including the military) and employee service relations.[30] The system of emoluments or the multiplicative or even still fragmentary system of remuneration on the basis of a post-company or company collective agreement, which is present in the practice of public administration, prevents the guaranteeing of market-based remuneration for these experts.

The public service of the interwar period faced similar problems. Professor Kasznica points this out straightforwardly, presenting a sub-type of the public service of the time, which he calls "private-law contractual service".[31] He delves into the problem of the motives behind the state's decision to engage employees in this form and the types of employees who are recruited in this mode.[32] In formulating a response to these issues, the author identifies two categories of people: those who are less qualified, engaged for short-term and seasonal work, and those who are "outstanding professionals with high professional qualifications".[33]

27 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 78, 483: "Article 153 (1) In order to ensure professional, reliable, impartial and politically neutral performance of the tasks of the State, a civil service corps shall operate in the offices of government administration. (2) The Prime Minister shall be the head of the civil service corps."

28 T Zdzikot, 'Inwestycja, nie koszt' [An Investment, Not a Cost] (2022) Polska Zbrojna vol. 9, 89; see ustawa z dnia 2 grudnia 2021 r. o szczególnych zasadach wynagradzania osób realizujących zadania z zakresu cyberbezpieczeństwa [Act of 2 December 2021 on special rules of remuneration for persons performing tasks in the field of cyber security] [2021] JoL 2333 and rozporządzenie Rady Ministrów z dnia 19 stycznia 2022 r. w sprawie wysokości świadczenia teleinformatycznego dla osób realizujących zadania z zakresu cyberbezpieczeństwa [Regulation of the Council of Ministers of 19 January 2022 on the amount of ICT benefit for persons performing tasks in the field of cyber security] [2022] JoL 131.

29 This thesis is confirmed by the introduction of point and episodic legal solutions in the area of sanitary/epidemiological services: ustawa z dnia 16 kwietnia 2020 r. o szczególnych instrumentach wsparcia w związku z rozprzestrzenianiem się wirusa SARS-CoV-2 [Act of 16 April 2020 on specific support instruments in connection with the spread of the SARS-CoV-2 virus] [2020] JoL 689.

30 T Kuczyński, J Stelina, 'Stosunki służbowe i stosunki pracy z elementami służby w latach 1944–1989' [Service Relations and Labor Relations with Elements of Service in the Years 1944–1989] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Stosunek służbowy* System Prawa Administracyjnego [Service Relationship, Administrative Law System] (CH Beck 2011) 78 et seq.

31 S Kasznica (1946) 94.

32 Ibid.

33 Ibid.

The justification provided for the state's motives in involving these categories of persons requires particular attention, as they are twofold. On a practical level, they are underpinned by financial arguments and common sense. The author points out that "a private-law contract opens the way for the relationship with the individual in question to be arranged in such a way as the specific circumstances in this case require",[34] and at the same time he relates this issue to highly skilled workers and the problem of providing them with an adequate salary, as well as to "completely unskilled workers, disposing only of their physical strength [with whom] it would not be advisable to establish [...] a public-law relationship due to the fact that on the basis of this relationship they would obtain a whole series of claims against the state, which would not be counterbalanced by the value of the services they provide to the state."[35]

In the doctrinal, i.e. purely theoretical dimension, Professor Kasznica refers to the system of law and the branch order. He unequivocally excludes the possibility of using a private-law contract for those positions to which the application of state authority is linked. He emphatically points out that "it is impermissible to use this route when it comes to filling an office connected with the exercise of public authority".[36] In such a case, he rules out the possibility of higher rates of remuneration for professionals, as the nature of administrative law precludes such differentiation. Indeed, the author notes that this would be ruled out because "the norms of civil servant law are absolute, rigid, allowing no exceptions or deviations".[37] Today, in an era of widespread instrumentalisation of administrative law, in particular clerical law, it is worth repeating this view as an excellent example of a serious treatment of legislation, i.e. based on a deep understanding of the essence of this branch of law, in terms of legal guarantees of a stable public service.

5. The idea of a single public service corps

Today, Professor Kasznica's pertinent thought seems to have been forgotten, that "the whole mass of civil servants – irrespective of their hierarchical ranking and distribution in various authorities – constitutes one compact corps, one body (bureaucracy), animated by a sense of solidarity, professional commonality, the important role it plays in society, – the spirit of corporate connectivity (*esprit de corps*)."[38] The idea of a single corps is not only a postulate from the field of public administration personnel management, but also from legal theory. It is pertinent on these theoretical grounds, since in its essence it touches upon the institution of the administrative-law relationship. In the case of the public service (in the sense of its model version), the parties to this relationship are the state and the individual. The rights and obligations of this individual are determined by the force of universally binding provisions of administrative law and thus the law characterised by the attributes of this branch of law.[39] The scope of these rights should in principle be analogous to the individual, regardless of the place of public service. An obvious distinction in this respect, resulting from the specificity of tasks, official position or responsibility held or knowledge and experience required, should also be regulated by the provisions of the law.[40]

34 Ibid., 95.
35 Ibid.
36 Ibid.
37 Ibid., 94.
38 Ibid., 165.
39 J Zimmermann (2018) 59–72, 547 et seq.
40 Rozporządzenie Prezesa Rady Ministrów z dnia 29 stycznia 2016 r. w sprawie określenia stanowisk urzędniczych, wymaganych kwalifikacji zawodowych, stopni służbowych urzędników służby cywilnej, mnożników do ustalania

The clerical law of the interwar period came very close to fully implementing this theoretical assumption. As Professor Kasznica writes, in addition to official pragmatics, this law was complemented by the law on providing pensions[41] (to which professors, public school teachers, judges, prosecutors, professional military officers, state police and border guards and postal officers were also subject), regulations on disciplinary proceedings, on associations of state employees and on emoluments.[42] In spite of the existence of formally different types of public service, different names of persons performing this service[43] and different places where official tasks are performed, the author had no doubt about the fact that the official law of that time was "completely almost educated, in a large part of its provisions stabilized"[44] or about the existence of one common official corps.

In contemporary public discourse, the topic of a civil servants' code for a wider range of subjects than just the civil service returns regularly.[45] The authors of these postulates float visions of merging selected segments of public administration personnel under a single act – most often by extending the regulations on civil service to local government employees as well as employees of state offices. The argumentation usually boils down to a desire to increase the prestige of the remaining clerical groups by increasing their rank in the state and providing increased guarantees of apoliticality or mechanisms for valorisation of clerical salaries. It is difficult to find a justification for such changes that would be anchored in legal theory and doctrine, let alone one that would be the result of correct legal inference from the assumptions of the legal system and the branch of administrative law. This area is today an example of the total instrumentalisation of law and its reactivity, devoid of deeper legal reflection.

6. Concluding remarks

Complementing the above attempt to look at the pre-war dogmatics of clerical law through the lens of today's legal solutions, it is worth quoting an excerpt from Professor Kasznica's reflections, confirming this time not only his in-depth understanding of the theory of administrative law, but his full awareness of the practical, everyday problems and obstacles in applying these provisions. As he noted:

wynagrodzenia oraz szczegółowych zasad ustalania i wypłacania innych świadczeń przysługujących członkom korpusu służby cywilnej [Regulation of the President of the Council of Ministers of 29 January 2016 on the determination of official positions, required professional qualifications, official ranks of civil servants, multipliers for determining remuneration and detailed rules for determining and paying other benefits to which members of the civil service corps are entitled] [2021] JoL 689.

41 Ustawa z dnia 11 grudnia 1923 r. o zaopatrzeniu emerytalnem funkcjonarjuszów państwowych i zawodowych wojskowych [Act of 11 December 1923 on the provision of pensions for state functionaries and professional military officers] [1924] JoL 6, 46.

42 S Kasznica (1946) 90.

43 E.g. "civil servant", "officer" or "contractual employee".

44 S Kasznica (1946) 90.

45 H Szewczyk, 'Propozycja samorządowej służby cywilnej' [Proposal for Local Government Civil Service] in M Stec (ed), *Stosunki pracy pracowników samorządowych* [Labor Relations of Local Government Employees] (Wolters Kluwer 2008) 141 et seq.; G Grosse, 'Czy w Polsce powinna powstać samorządowa służba cywilna?' [Should a Local Government Civil Service be Established in Poland?] (2000) Samorząd Terytorialny vol. 7–8, 62 et seq.; T Mordel, 'Samorządowa służba cywilna. O potrzebie normatywnych gwarancji profesjonalizmu pracowników urzędów samorządowych' [Local Government Civil Service. On the Need for Normative Guarantees of Professionalism of Employees of Local Government Offices] (2004/2005) Służba Cywilna vol. 9, 93 et seq.

> the law, by the very fact of its existence, does not protect the citizen against lawlessness; it does not enable administrative bodies to commit unlawful acts. And the reason for this is simple and clear: the law is put into practice by officials, and they – as people usually do – all too often make mistakes, are sometimes careless, act arbitrarily, are not always disinterested, and – worst of all – succumb to political influence, bending the law to party requirements.[46]

In attempting to answer the question of what contemporary administrative law has lost from Prof. Stanislaw Kasznica's views on public service, it must first be stated that his views referred to a complete, well-thought-out model of public service, whose legal context was determined by the provisions of the then complete and consistent civil service law. This law had an unambiguously public-law identity and such legal institutions. The civil servant's role and place in the public service and in the state determined the administrative-law relationship. Restrictions on rights and freedoms were compensated for by adequate benefits, including a special pension emolument. Supervision of the civil servant's actions and attitude was carried out by internal public administration bodies or an administrative tribunal. This system was complete, logical and consistent. Professor Kasznica, in faithfully reconstructing this model, perfectly enriched his considerations by illustrating them with additional references to the practice of the day-to-day operation of the pre-war administration and civil servant corps.

However, the post-war edition of Professor Kasznica's book was published at a time that marked the beginning of the end of this institution of law. In fact, the whole post-war history of Polish civil service law up to the political transformation was a history of the degradation of civil service law and of the civil servant ethos. The repeal of the 1922 State Civil Service Act by the Labour Code in 1974 was only a formal elimination of this act from legal circulation.[47] Also in post-transformation legislation, after a tentative attempt to rebuild the civil service in the public-law model in 1996, each successive act made a breach of the public-law model. This occurred, *inter alia*, through the elimination of civil service bodies from the legal order by the 1998 Act, the decapitation of the civil service corps through the establishment of the state personnel pool in 2006 and, finally, the absolute approximation of civil servant status to employee status by the 2008 Act (exacerbated by a momentous amendment in 2015, by which the "appointment", alien to civil servant law, was introduced as a basis for employment).[48]

Today it is difficult to speak of Polish civil service law. The laws in force regulating the legal status of members of the civil service corps, local government employees or employees of state offices are a set of legal norms that do not form any meaningful model in which the essence of the public service could be found. Fragmentary public-law elements, even if they have not yet been eliminated from these laws, are in practice applied contrary to their spirit. Point of view of labour law also encroach on the area of service relations *sensu stricto*, including even military relations. The dominance of these optics distorts the sense of public service, negatively affects

46 S Kasznica (1946) 155.

47 This paradigm shift, initiated immediately after the war and conditioned by ideological assumptions, was called the current "from clerical law as public law to labour law as common law". The new principles boiled down to arrangements for immediate hiring and firing, civil servant pay at the level of a worker's wage and rotation in administrative positions.

48 Each time, the drafters' interventions were justified by the need to "make more flexible" the operation of the civil service corps, the declared search for savings and the need to return to solutions changed by predecessors. However, the justifications for the drafts of the aforementioned acts were devoid of the most important reflection, namely a coherent, far-reaching concept of the target model of the civil service, detached from the current political dispute.

the awareness of those subject to these laws as to their role and duties in the state and influences the dysfunctions of the practical operation of public administration, which is particularly noticeable in crisis situations. In the face of recent global and geopolitical crises, it is high time, in my opinion, to direct public attention to the issue of the correct model of public service. Then, perhaps, the moment will come when the views presented by Professor Kasznica will become a treasury of ready recipes for a perfect restoration of this institution of law.

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Model of Adjudicatory Powers of Polish Administrative Courts

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Abstract
The issue of the shape of adjudicatory powers of administrative courts (cassation or substantive) is currently one of the most important research areas of the European doctrine devoted to judicial control of administration. These issues are currently being discussed in Poland, which translates into changes in the legislation regulating judicial-administrative procedure. The purpose of this article is to present, to a foreign reader, what the Polish model of judicial control of public administration currently looks like in terms of adjudicatory competences of administrative courts, with particular emphasis on the power to rule on the merits by administrative courts. In order to synthesise the issue in question, firstly the process of development of these competences is presented against the background of regulations of individual procedural acts. It is followed by a presentation of the reasons why the Polish adjudication model is supplemented with competences which make it possible for administrative courts to adjudicate on the merits. Then practical and doctrinal problems linked to a given adjudication model are dealt with. The conclusion of the article contains a summary of the above considerations, coupled with an attempt to fit the Polish adjudication model into the author's scheme of models currently found in Europe. The discussion ends with a forecast of further development of the presented model.

Keywords
judicial review of public administration; adjudicatory powers of administrative courts; cassation adjudication; substantive adjudication; proceedings before administrative courts

1. Introduction

The judicial review of public administration, developed over the course of the 19th century, was essentially (with a few exceptions) related to cassation rulings by administrative courts. These courts typically issued rulings that rendered administrative acts or administrative-legal actions invalid or ineffective, leaving the final adjudication of administrative matters to public administration bodies.[1]

1 On the systematics of cassation and substantive judgments see in D Gut, *Merytoryczne rozstrzygnięcia sądów administracyjnych jako przejaw ewolucji sądowej ochrony praw człowieka* [Substantive Decisions of Administrative Courts as a Manifestation of the Evolution of Judicial Protection of Human Rights] (CH Beck 2024) 51–53.

Thus, in a system of adjudication of this kind, courts did not adjudicate administrative cases in the sense of applying the law to establish or determine the legal situations of the parties to the administrative court proceedings. Currently, in many European countries, the cassation adjudication model remains predominant, although there is a clear trend towards adjudication on the merits. In the broadest sense, substantive adjudication can be described as any type of adjudication that differs from typical cassation adjudication by containing an element of independent (direct or indirect) settlement of an administrative case by an administrative court.

Most often, this involves either the administrative court resolving the administrative case on the merits, thereby independently shaping the substantive (or procedural) rights or obligations of the applicant (which can be described as a judgment directly on the merits), or the administrative court issuing injunctive judgments in which it obliges the public administration body to make a decision with the content indicated in the judgment, or in accordance with the manner indicated therein (which can be described as an indirect judgment on the merits). A ruling of this kind does not replace an administrative act, which is only issued by the public administration body. However, it does have substantive value in the sense that it limits the scope of discretion of the public administration body more significantly than a cassation ruling. This is particularly evident when the court indicates the resolution of the administrative case, as it is then, in effect, the court, rather than the body, that fixes the rights or obligations of the applicant.

The tendency to move away from a model of purely cassation adjudication is due to several reasons, which are partly specific to the respective legal systems and partly common to all. Among the latter, one can certainly mention the general desire of democratic states to strengthen the protection of individual rights and freedoms. This desire also influences the understanding of the function of administrative courts, which are now primarily seen as guardians of individual rights.[2]

2 B Adamiak, 'Model sądownictwa administracyjnego a funkcje sądownictwa administracyjnego' [The Model of Administrative Justice and the Functions of Administrative Justice] in J Stelmasiak, J Niczyporuk, S Fundowicz (eds), *Polski model sądownictwa administracyjnego* [The Polish Model of Administrative Justice] (Oficyna Wydawnicza VERBA 2003) 21–22; AJ Bok, 'Judicial Review of Administrative Decisions by the Dutch Administrative Courts. Recours Objectif or Recours Subjectif? A Survey, including French and German law' in F Stroink, E van der Linden (eds), *Judicial Lawmaking and Administrative Law* (Intersentia 2005) 153–161; J Trzciński, 'Sądownictwo administracyjne jako gwarant ochrony wolności i praw jednostek' [Administrative Justice as a Guarantor of Protection of Individual Freedoms and Rights] in A Szmyt (ed), *Trzecia władza Sądy i trybunały w Polsce. Materiały Jubileuszowego I Ogólnopolskiego Zjazdu Katedr i Zakładów Prawa Konstytucyjnego. Gdynia, 24–26 kwietnia 2008 r.* [Third Power Courts and Tribunals in Poland. Materials of the 1st Jubilee National Congress of Chairs and Departments of Constitutional Law. Gdynia, April 24–26, 2008] (Wydawnictwo Uniwersytetu Gdańskiego 2008) 127; M Masternak-Kubiak in M Masternak-Kubiak, T Kuczyński (eds), *Prawo o ustroju sądów administracyjnych. Komentarz* [Law on the System of Administrative Courts. Comment] (Wolters Kluwer 2009) 12; W Sawczyn, 'Konstytucyjne podstawy sądownictwa administracyjnego' [Constitutional Foundations of Administrative Justice] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Sądowa kontrola administracji publicznej* System Prawa Administracyjnego [Judicial Control of Public Administration, Administrative Law System] (CH Beck 2016) 84; Ch Backes, M Eliantonio, 'Administrative Law' in J Hage, A Waltermann, B Akkermans (eds), *Intrudiction to Law* (Springer 2017) 217–219; Z Szente, 'Conceptualising the Principle of Effective Legal Protection in Administrative Law' in Z Szente, K Lachmayer (eds), *The Principle of Effective Legal Protection in Administrative Law* (Routledge 2017) 9; L van den Berge, 'The Relational Turn in Dutch Administrative Law' (2017) Utrecht Law Review 13(1), 99; K Wysocka, 'Kompetencje orzecznicze sądów administracyjnych a realizacja funkcji ochronnej praw jednostki w postępowaniu' [Judicial Competences of Administrative Courts and the Implementation of the Protective Function of Individual Rights in Proceedings (2017) Ruch Prawniczy, Ekonomiczny i Socjologiczny 79(1), 151; G Sydow, 'Die deutsche Verwaltungsgerichtsbarkeit im europäischen Recht- svergleich' in A Krawczyk (ed), *Reformen der Verwaltungsgerichtsbark eit in den Ländern der jungen Demokratie* (CH Beck 2022) 15.

Indeed, over the years, there has been a growing realisation that the role of administrative courts as guarantors of individual rights and freedoms can be fulfilled to varying degrees, and that this depends not only on factors such as the scope of cognition of administrative courts, the shape of procedural instruments available to parties, regulations aimed at speeding up and simplifying proceedings, but also on the way in which the adjudicatory powers available to administrative courts are shaped, and therefore on the form – cassation or substantive – in which administrative courts make decisions. It was therefore realised that the form of the judgment has a close bearing on the effectiveness of the implementation of the right to an administrative court and on the performance by these courts of their guarantee functions with respect to individual rights. This was largely due to the fact that the ills of the cassation model, which were increasingly perceptible and difficult to reconcile with the values mentioned above, related in particular to problems with the efficiency of the proceedings in an administrative case and the impossibility of preventing the phenomenon of non-execution or incorrect execution of an administrative court judgment by public administration bodies.[3]

These findings increasingly determine the approach towards judicial review of administration by international human rights organisations (in particular: the Council of Europe and the European Union), which are beginning to link the effectiveness of the right to an administrative court with the adjudicatory competences of these courts. Although none of these systems has, as yet, developed a clear position on the preferred model of the adjudicatory competence of administrative courts, the cassation model is being subjected to increasingly new requirements in order to meet the standards relating to the right to an administrative court. In fact, these requirements often boil down to declaring the need for administrative courts to have, in various cases and forms, the power to decide on the merits. In the Council of Europe system, according to the recommendations of the Committee of Ministers of the Council of Europe, the correct and timely execution of a judgment should be secured by appropriate sanctions, notably in the form of the court's power to impose a coercive fine on the authority and the possibility for the court to take a prescriptive judgment by indicating to the authority the decision it will be obliged to take in post-judgment administrative proceedings.[4] In the European Union system, according to the judgment of the CJEU of 29 July 2019 in the case of Alekshiy Torubarov,[5] a more far-reaching requirement has been introduced, whereby a national administrative court is obliged to take a decision on the merits directly resolving an administrative case in the event that a public administration body has incorrectly implemented a prior judgment of an administrative court (and this obligation remains valid even if national law does not provide for this possibility).[6]

All of the above means that the issue concerning the nature of the adjudicatory powers of administrative courts is becoming one of the most important research areas of the European doctrine dealing with judicial control of administration, which is reflected in the positive law

3 On the efficiency of administrative judiciary in the context of Polish and European regulations see, among other things, Z Kmieciak, 'The Efficiency of Administrative Courts (in the Light of European and Polish Experiences)' (2013) Comparative Law Review vol. 15, 135–150.

4 See in particular: Recommendation R(2003)16 in the execution of administrative and judicial decisions in the field of administrative law and Recommendation Vol. R(2004)20 on judicial review of administrative acts.

5 Judgment CJEU C-556/17 EU:C:2019:626.

6 For more on this judgment and its implications, see: D Gut, 'Merytoryczne orzekanie sądów administracyjnych w systemie unijnym (uwagi na tle wyroku TSUE w sprawie Torubarov)' [Substantive Rulings of Administrative Courts in the EU System (Comments in the Context of the CJEU Judgment in the Torubarov Case)] in M Szewczyk, L Staniszewska, M Kruś (eds), *Kierunki rozwoju jurysdykcji administracyjnej* [Directions of Development of Administrative Jurisdiction] (Wolters Kluwer 2022) 653–684.

of individual European countries. As signalled above, the observation of the European systems of judicial review of administration unambiguously shows that there is currently a tendency to move away from the cassation model of adjudication by administrative courts to adjudication on the merits. The pure cassation model, where these courts have no power to rule on the merits at all, is disappearing altogether.[7] Systems where the law does not provide, more than exceptionally, for situations where administrative courts can rule on the merits[8] also belong to a minority. On the other hand, a numerous group is formed by mixed systems – cassation and substantive – in which the courts, depending on the circumstances, can make both types of judgments.[9] There is also a growing group of predominantly substantive systems, where the rule is that administrative courts decide on the merits.[10]

A similar development trend can also be observed in Poland, where the once exclusively cassation system of adjudication has been gradually supplemented by the possibility for courts to make indirect or direct judgements on the merits. However, the changes in this respect have not taken place without controversy, which has carried over to their reception by administrative courts, which use the new forms of adjudication with a great deal of caution. The processes taking place in this respect are interesting as, in part, they are in line with the phenomena taking place in other European countries, and in part, they are peculiar only to the Polish legal system.

This article aims, firstly, to outline the current shape of the adjudicatory powers of Polish administrative courts, together with showing the reasons why these powers are being supplemented by substantive adjudication powers. Secondly, its aim is to demonstrate the practical and doctrinal problems associated with substantive adjudication by Polish administrative courts.

7 It currently operates in a small number of countries, including Turkey and Malta, see more details: D Gut (2024) 85.

8 Marginal powers to make judgments on the merits are provided for by the English and Welsh, Irish, Norwegian and Estonian systems, for example. Other predominantly cassation systems allow for broader powers in this regard. These include: (1) systems in which substantive rulings are possible in certain statutory categories of cases, for example Cyprus, the Czech Republic, Lithuania, Slovakia, Spain and Italy; (2) systems in which administrative courts may rule on the merits of certain types of action, for example Germany and Portugal, see more details: ibid., 87–96.

9 Among the systems of this type, we can distinguish those where the type of decision is determined by either a) the nature of the dispute, which is the case, for example, in the French system, where the administrative courts decide on the merits in what is known as "contentieux de pleine jurisdiction" and in the Greek and Belgian systems. or b) evaluative factors, depending on the court's decision (which is related to the existence of the "nature of the dispute" premise in the case), which is the case in the Hungarian, Slovenian, Polish and, to some extent, the Serbian and Finnish systems, see more details: ibid., 96–102.

10 Systems of this kind are currently in place in Switzerland, Sweden, Bulgaria and Austria. It seems that the Dutch system, in which the tendency to adjudicate on the merits is more and more visible, and the Croatian system should also be included (albeit only formally, as the administrative courts in that country, despite different statutory regulations, very rarely adjudicate on the merits), see more details: ibid., 102–114.

2. Judicial control of public administration in Poland – general remarks

Judicial control of administration has a long tradition in Poland,[11] and its history is, to some extent, a reflection of the turbulent history of this country.[12] Leaving aside considerations going back further in the past, in a certain simplification, it can be assumed that the first Polish administrative court was the Supreme Administrative Tribunal, established after regaining independence, in 1922.[13] It was a court set up on the model of Austrian solutions at that time, i.e. a single-instance court with jurisdiction defined by a general clause (with some exceptions), ruling on the basis of administrative case files and with cassation powers only. After the Second World War, the administrative judiciary was not reactivated in Poland. This situation changed only in 1980, when the Supreme Administrative Court was established.[14] It was a court created to the extent possible under that political system. The scope of its jurisdiction was defined by the method of positive enumeration and its adjudicatory competence was exclusively cassation. After the collapse of the People's Republic of Poland, a new law on the Supreme Administrative Court was passed in 1995,[15] under which the court continued to be a single-instance special court with jurisdiction defined in an enumerative manner. It ruled on the basis of the administrative case file and in an essentially cassation manner, although the law provided for exceptions in this respect and was subsequently transposed into the act currently in force.

The current model of judicial control of administration in Poland was created on the basis of the Constitution of the Republic of Poland adopted on 2 July 1997[16] and was further shaped by the Law on the System of Administrative Courts of 25 July 2002[17] and the Law

11 Some researchers point out that the beginnings of judicial control of administration on Polish soil can be traced as far back as the 17th century, when general assemblies appointed non-permanent commissions for the control of the state treasury, from their seat, jointly called the Radom Commission, later transformed into the permanent Treasury Tribunal, cf J Borkowski, 'Wykład prof. dr hab. Janusza Borkowskiego – Sądownictwo administracyjne na ziemiach polskich' [Lecture by prof. dr hab. Janusz Borkowski – Administrative Judiciary in Polish Lands] (2006) Zeszyty Naukowe Sądownictwa Administracyjnego vol. 1, 13–14. For more on the history of administrative judiciary in Poland see: S Kasznica, *Polskie Prawo Administracyjne: pojęcie i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 164–181.

12 This is particularly evident in the history of judicial control of administration on Polish territories during the Partitions and in the post-Partition period. At that time, depending on the partitioned area, a judiciary specific to the partitioned state functioned on the Polish lands (in the Prussian partition the North German model functioned, in the Austrian partition the South German model, while in the Russian partition judicial control, in principle, did not exist). In the Duchy of Warsaw, on the other hand, an administrative judiciary on the French model was established. Synthetically, the history of administrative judiciary in Poland is presented by: W Piątek, A Skoczylas, 'Geneza, rozwój i model sądownictwa administracyjnego w Polsce' [Origin, Development and Model of Administrative Justice in Poland] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Sądowa kontrola administracji publicznej* System Prawa Administracyjnego [Judicial Control of Public Administration, Administrative Law System] (CH Beck 2016) 10–11.

13 Ustawa z dnia 3 sierpnia 1922 r. o Najwyższym Trybunale Administracyjnym [Act of 3 August 1922 on the Supreme Administrative Tribunal] [1922] JoL 600 as amended.

14 Ustawa z dnia 31 stycznia 1980 r. o Naczelnym Sądzie Administracyjnym oraz o zmianie ustawy – Kodeks postępowania administracyjnego [Act of 31 January 1980 on the Supreme Administrative Court and amending the Act – Code of Administrative Procedure] [1980] JoL 8 as amended.

15 Ustawa z dnia 11 maja 1995 r. o Naczelnym Sądzie Administracyjnym [Act of 11 May 1995 on the Supreme Administrative Court] [1995] JoL 368 as amended, hereinafter: "NSAU".

16 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483 as amended, hereinafter: "Constitution of the Republic of Poland".

17 Ustawa z dnia 25 lipca 2002 r. Prawo o ustroju sądów administracyjnych [Law on the System of Administrative Courts] [2002] JoL 2492 as amended, hereinafter: "p.u.s.a.".

on Proceedings before Administrative Courts of 30 August 2002.[18] Pursuant to the provisions of these acts, judicial control of administration in Poland is exercised by special administrative courts, independent from the general judiciary and not remaining in any way within the structures of the executive power. It is supplemented by the control exercised by common courts, which – by virtue of the authorisation resulting from the act – are authorised to rule on certain administrative matters.[19] Adjudication by the ordinary judiciary in administrative disputes is, however, an exception to the rule that administrative courts exercise control in such matters. As it is argued in the doctrine, the broadly defined jurisdiction of administrative courts in Poland means there is a presumption of jurisdiction of administrative courts in every case where the legal form of public activity is subject to control.[20] The following remarks will concern only specialised administrative courts, as the issue taken up does not concern common courts at all, which in the Polish system adjudicate on the merits in administrative cases, as a rule.

The subject-matter scope of judicial-administrative control is defined in positive aspects by Article 3 §§ 2 and 2a of p.p.s.a. and Article 4 of p.p.s.a. and special provisions (pursuant to Article 3 § 2 of p.p.s.a.), and in the negative aspects by Article 5 of p.p.s.a. It covers a number of forms of public administration activity that cannot be discussed in detail here due to the synthetic nature of this publication. It is only worth pointing out that they include various manifestations of public administration activity, in particular decisions in individual cases (decisions, resolutions); acts and actions other than decisions and resolutions taken by public administration bodies, concerning rights arising from the provisions of law; inactivity of public administration bodies and the protraction of proceedings by them; as well as acts passed by bodies of local government units, with acts of local law at the forefront.

The instance structure of the Polish administrative judiciary comprises two instances. The courts of first instance are the voivodship administrative courts functioning in each voivodship and adjudicating all administrative court cases not reserved for the exclusive jurisdiction of the Supreme Administrative Court. The court of second instance, in turn, is the Supreme Administrative Court with its seat in Warsaw, whose cognition includes the recognition of ordinary and extraordinary means of appeal, but also caring for the uniformity of jurisprudence, exercising supervision over the speed of proceedings before administrative courts and resolving disputes over jurisdiction and competence disputes between public administration bodies.

The judicial-administrative control, as a rule, is opened by a complaint being filed to the provincial administrative court. As a rule, the court issues a verdict on the basis of the case file, which includes both administrative files transferred to the court by the public administration body and court files. However, the facts of the case are generally established on the basis of the former, as Polish administrative courts do not generally conduct evidence proceedings on their own. Therefore, apart from taking into account facts that are generally known, administrative courts may only conduct supplementary evidence from documents *ex officio* or upon request, where this is necessary

18 Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi [Act of 25 July 2002, Law on the System of Administrative Courts] [2002] JoL 935, hereinafter: "p.p.s.a.".

19 For example, in cases involving social insurance, competition and consumer protection, rail transport, or cases arising from the Electoral Code (this issue is broadly described by K Małysa-Ptak, *Kontrola działalności administracji publicznej sprawowana przez sądy powszechne* [Control of Public Administration Activities by Common Courts] (Wolters Kluwer 2019) 306–477).

20 M Jaśkowska, 'Właściwość sądów administracyjnych (zagadnienia wybrane)' [Jurisdiction of Administrative Courts (Selected Issues)] in J Zimmermann (ed) *Koncepcja systemu prawa administracyjnego* [The Concept of the Administrative Law System] (Wolters Kluwer 2007) 571.

to clarify significant doubts and will not unduly prolong the proceedings in the case (Article 106 § 3 p.p.s.a.). However, such evidence is not intended to fill gaps in the investigation proceedings, but only to establish the legality of the established facts.

Judicial decisions are made in the form of judgments and orders. The court upholds the complaint or dismisses all or part of it in a judgment. Dismissal occurs, in principle, if the contested act or action does not infringe the law and means that the act or action is upheld. If the action is upheld, this leads to a number of different decisions depending on the subject of the action, as described in more detail below. Orders are issued in all other cases in which the law does not provide for the form of a judgment.

There are two ordinary legal remedies against non-final decisions of administrative courts: a cassation appeal, available against judgments and certain orders, and an appel-against order, available against the orders and ordinances specified in the p.p.s.a. As a result of examining the case, the Supreme Administrative Court may dismiss or uphold the cassation appeal (appel-against order). Dismissal takes place if the appeal has no justified grounds or if the ruling, despite an erroneous justification, is in conformity with the law. If the appeal is upheld, it may in turn result in two rulings – a classic cassation ruling, overturning all or part of the ruling and referring the case for re-examination to the court that issued the ruling, or a reformatory ruling, i.e. one in which the court overturns the appealed ruling and examines the complaint, thus ruling in the same manner as the court of first instance.

3. The jurisprudence model of Polish administrative courts

As can be seen from the above, the Polish model of judicial review of public administration grew out of the assumptions of cassation adjudication by administrative courts. Exceptions in this respect, consisting in the introduction of elements of substantive adjudication, were implemented for the first time only in 1995 in the NSAU. However, they were not significant and were rather a supplementary function of the adjudication system, which still remained decidedly cassation-based. A similar method was originally chosen in the p.p.s.a. currently in force, into which the previously existing powers of substantive adjudication were transposed, leaving cassation adjudication as the rule. It was not until the April 2015 amendment of the p.p.s.a.,[21] which significantly expanded the powers of Polish administrative courts to make substantive rulings, that a major change was made in this respect. As indicated in the explanatory memorandum of the amending act, the purpose of the amendment was to streamline, simplify and speed up proceedings before the administrative court and to guarantee higher standards of civil liberties and rights.[22]

Currently, administrative courts can rule on the merits (directly or indirectly) in many cases and the shape of these powers depends on the subject of the complaint. Indeed, it should be noted that the Polish administrative court system does not provide for a uniform structure of judgments upholding complaints. The decisions contained therein depend on the type of complaint, which in turn is determined by the form of administrative action challenged by the complainant. The operative part of a judgment upholding a complaint thus has a different form depending on the subject of the complaint. For these reasons, the competence of administrative courts to rule on the merits will be discussed precisely from the perspective of the subject of the complaint.

21 Ustawa z dnia 9 kwietnia 2015 r. o zmianie ustawy – Prawo o postępowaniu przed sądami administracyjnymi [Act of 9 April 2015 amending the Act – Law on proceedings before administrative courts] [2015] JoL 658.

22 Seventh Chamber of Parliament, Parliamentary Paper No 166, 2–4.

Firstly, in cases of complaints against decisions and orders, administrative courts can make three types of judgements on the merits, each different by nature and function. To begin with, these powers include the possibility to discontinue administrative proceedings. Namely, pursuant to Article 145 § 3 p.p.s.a., if the court, when revoking all or part of a decision or declaring it invalid, observes that there are grounds to discontinue administrative proceedings in the case, it may discontinue the proceedings. Then the court judgment has the same function as a decision to discontinue proceedings taken by a public administration body. Futhermore, the competence to rule on the merits of complaints against decisions and orders includes two other possibilities. The first is the power to rule indirectly on the merits. Pursuant to Article 145a § 1 p.p.s.a., the administrative court may issue a judgment obliging the body to issue a decision in accordance with the decision indicated by the court,[23] or in accordance with the manner of settling the case indicated by the court.[24] This is possible as long as three conditions are met jointly: a) the decision or decision is overturned due to a violation of substantive law, or is found to be invalid; b) the substantive ruling is justified by the "circumstances of the case"; c) the decision in the case is not left to the discretion of the authority. The second possibility, established in Article 145a § 3 p.p.s.a., includes the competence to issue a direct substantive ruling (which the Polish legislator defines not as "ruling on the merits"[25] but as a "statement on the existence or non-existence of an entitlement or obligation"). This takes place if, in a given case, the following conditions are met jointly: a) an injunction judgment under Article 145a § 1 p.p.s.a. has been issued; b) the public administration body, contrary to its obligation, has not complied with the injunction judgment; c) a party has filed a complaint requesting that the court resolve its case on the merits; d) the "circumstances of the case" allow for the issuance of a judgment on the merits.

Secondly, administrative courts may take substantive judgments in cases concerning complaints against other acts and actions, i.e. acts or actions that are not decisions or rulings, but are taken in individual cases and concern rights or obligations arising from the provisions of law. Namely, pursuant to Article 146 § 2 in conjunction with Article 146 §1 p.p.s.a., when repealing such an act or declaring such an action ineffective, the court may recognise an entitlement or obligation arising from the provisions of law. A judgment of this type fulfils a specific function, as the court indicates in it what right or obligation the applicant is entitled to. However, this does not replace the act or action of the public administration body in the form of a directly substantive judgment under Article 145a § 3 p.p.s.a. and action by the public administration body is always necessary. For example, in a case concerning the return of part of the fee for a vehicle card, the court's ruling that appellant is entitled to the return will only by realized once the authority has made the return.

Thirdly, administrative courts can issue judgments on the merits in cases of complaints for inaction or protracted conduct of proceedings. This matter, largely due to the volume of complaints of this kind, which may concern many forms of action by public administration bodies, the imprecision of the legislator, as well as the multiplicity of views expressed in this respect in the doctrine and case law, is complicated. Thus, applying certain simplifications, it may be assumed that the administrative court may rule on the merits:

23 By which is meant an indication by the court of the content of the decision.

24 By which is meant the indication by the court of a direction to settle the case, without indicating all the elements of the decision.

25 Thus, the term by which many European laws describe judgments of this kind (cf e.g. Article 61(1) of the Swiss Verwaltungsverfahrensgesetz [1968] BBl 1965 II 1348 as amended, and Article 130(4) of the Austrian Verwaltungsgerichtsverfahrensgesetz [2013] BGBl. I Vol. 33/2013 as amended.

(a) in the case of accepting a complaint for inaction or protraction, as long as the "nature of the case" allows it and the factual and legal circumstances do not raise any doubts (Article 149 § 1b p.p.s.a.);
(b) when the court upholds a complaint for a failure to comply with a judgment upholding a omplaint for inaction or protracted conduct of proceedings (from Article 149 § 1 p.p.s.a.), if the nature of the case and its factual and legal circumstances are beyond reasonable doubt. A judgment of this kind, similarly to the judgment under Article 145a § 3 p.p.s.a. directly shapes the legal situation of the complainant[26].

Thus, Polish law extensively delimits the competence of administrative courts to make judgements on the merits and *prima facie* it might seem that the jurisprudential model of administrative courts in this country is in fact cassation and substantive. In practice, however, the administrative courts make judgments on the merits very rarely, to the extent that some of the provisions mentioned above have never been applied in practice.[27]

4. Dilemmas related to substantive adjudication by Polish administrative courts

The reasons behind the scant use by Polish administrative courts of the power to make substantive decisions in adjudicatory practice are varied. They include both momentous dilemmas of a systemic nature as well as, sometimes very nuanced, practical considerations.

The basic issue around which the problem of systemic dilemmas centres concerns the interpretation of the principle of separation of powers. Concerning the judicial control of administration, the Polish doctrine is firmly behind the view that the term "control" used in the first sentence of Article 184 of the Constitution of the Republic of Poland ("the Supreme Administrative Court and other administrative courts shall, within the scope specified by statute, control the activity of public administration") should be understood in a narrow sense. This is based on the conviction that, since administrative courts are to "control" the activity of public administration, it means that they cannot substitute such activity, as no control, including that exercised by administrative courts, should lead to the substitution of the subject to control.[28] This position results in two views as to the admissibility of substantive adjudication in the Polish legal system. Historically, the first one (which is currently difficult to defend in view of the existence in the p.p.s.a. of the competence to adjudicate on the merits by administrative courts), assumes that substantive adjudication by these courts, regardless of its form, would lead to the blurring of the boundary between administration and administration of justice, which would directly contradict the constitutional principle of the division of powers.[29] The second one states, in turn,

26 See more about the adjudicative competence described above: D Gut (2024) 119–239.
27 For example Article 145a § 3 p.p.s.a.
28 R Hauser, M Masternak-Kubiak, 'Konstytucyjne podstawy kontroli działalności administracji publicznej' [Constitutional Bases for Controlling the Activities of Public Administration] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Konstytucyjne podstawy funkcjonowania administracji publicznej* System Prawa Administracyjnego [Constitutional Foundations for the Functioning of Public Administration, Administrative Law System] (CH Beck 2012), 403.
29 See *inter alia* Z Janowicz, 'Głos w dyskusji o reformie sądownictwa administracyjnego' [A Voice in the Discussion on the Reform of Administrative Justice] in J Stelmasiak, J Niczyporuk, S Fundowicz (eds), *Polski model sądownictwa administracyjnego* [The Polish Model of Administrative Justice] (Oficyna Wydawnicza VERBA 2003) 155; W Chróścielewski, JP Tarno, 'Trójszczeblowy model sądownictwa administracyjnego a jednoinstancyjne postępowanie administracyjne' [The Three-tier Model of Administrative Justice and Single-instance

that adjudication on the merits, due to the control framework of the first sentence of Article 184 of the Constitution of the Republic of Poland and the principle of the separation of powers, should be limited by nature. Therefore, it should either include only the possibility of indirect adjudication on the merits,[30] or be exceptional by nature, limited to specific situations strictly defined by the legislator.[31]

Although there are views in the doctrine to the contrary, expressing the conviction of the admissibility of substantive rulings in any form (indirect and direct) on the grounds of the Constitution of the Republic of Poland,[32] the views indicated above about the exceptional nature of these

Administrative Proceedings] (1999) Państwo i Prawo vol. 5, 29; M Bogusz, 'Problem konstytucyjności przepisu art. 145 § 3 i art. 145a prawa o postępowaniu przed sądami administracyjnymi' [The Problem of the Constitutionality of the Provision of Art. 145 § 3 and Art. 145a of the Law on Proceedings before Administrative Courts] (2016) Gdańskie Studia Prawnicze vol. 36, 73–76; B Banaszak, J Michalska, 'Artykuł 145a ustawy – Prawo o postępowaniu przed sądami administracyjnymi w świetle Konstytucji RP' [Article 145a of the Act – Law on Proceedings before Administrative courts in the Light of the Constitution of the Republic of Poland] (2016) Zeszyty Naukowe Sądownictwa Administracyjnego vol. 4, 9–20; M Chmaj, 'Opinia w przedmiocie zgodności z konstytucją i systemem prawnym art. 145a przedstawionego przez Prezydenta RP projektu ustawy o zmianie ustawy – prawo o postępowaniu przez sądami administracyjnymi (druk nr 1633)' [Opinion on Compliance with the Constitution and Legal System of Art. 145a of the Draft Act Presented by the President of the Republic of Poland Amending the Act – Law on Proceedings before Administrative Courts (Form Vol. 1633)] (2013), <https://www.sejm.gov.pl/sejm7.nsf/opinieBAS.xsp?nr=1633> accessed 20 Mar 2023.

30 See *inter alia* B Szmulik, 'Opinia do projektu ustawy o zmianie ustawy – Prawo o postępowaniu przed sądami administracyjnymi (druk nr 1633)' [Opinion on the Draft Act Amending the Act – Law on Proceedings before Administrative Courts (Form Vol. 1633)] (2013) 12, <https://www.sejm.gov.pl/sejm7.nsf/opinieBAS.xsp?nr=1633> accessed 6 Nov 2022.

31 See *inter alia* J Chlebny, W Piątek, 'Ewolucja ustrojowa i kompetencyjna sądownictwa administracyjnego' [The Systemic and Competence Evolution of the Administrative Judiciary] (2021) Zeszyty Naukowe Sądownictwa Administracyjnego vol. 1–2, 24.

32 See *inter alia* M Szydło, 'Opinia prawna na temat projektu ustawy o zmianie ustawy – Prawo o postępowaniu przed sądami administracyjnymi (druk sejmowy nr 1633)' [Legal Opinion on the Draft Act amending the Act – Law on Proceedings before Administrative Courts (Parliament Paper Vol. 1633)] (2013) 1–25, <https://www.sejm.gov.pl/sejm7.nsf/opinieBAS.xsp?nr=1633> accessed 20 Mar 2023; views of Z Kmieciak (including, Z Kmieciak, 'Merytoryczne orzekanie przez sądy administracyjne w świetle konstytucyjnej zasady podziału władz'[Substantive Adjudication by Administrative Courts in the Light of the Constitutional Principle of Separation of Powers] (2015) Przegląd Legislacyjny 2(92), 9–22; J Paśnik, 'O niektórych aspektach nowelizacji prawa o postępowaniu przed sądami administracyjnymi' [On Some Aspects of the Amendment to the Law on Proceedings before Administrative Courts (2016) Przegląd Prawa Publicznego 2016, vol. 2, 31–45; J Jakimowicz, 'O tzw. merytorycznych kompetencjach orzeczniczych sądów administracyjnych określonych w art. 145a § 1 prawa o postępowaniu przed sądami administracyjnymi' [About the so-called Substantive Judicial Competences of Administrative Courts Specified in Art. 145a § 1 of the Law on Proceedings before Administrative Courts (2017) Casus vol. 85, 5–13; K Flisek, 'Merytoryczne orzekanie sądów administracyjnych a zasada trójpodziału władz' [Substantive Rulings of Administrative Courts and the Principle of Separation of Powers] (2018) Przegląd Prawa Publicznego vol. 4, 83–94; D Gut, 'Merytoryczne orzekanie polskich sądów administracyjnych w świetle Konstytucji RP' [Substantive Rulings of Polish Administrative Courts in the Light of the Constitution of the Republic of Poland] in W Piątek (ed), *Aktualne problemy sądowej kontroli administracji publicznej* [Current Problems of Judicial Control of Public Administration] (Wolters Kluwer 2019) 11–25; M Kłopocka-Jasińska, 'Kilka uwag o poszerzaniu zakresu merytorycznych kompetencji sądów administracyjnych w świetle art. 184 Konstytucji i konstytucyjnej zasady podziału władz' [A Few Comments on Expanding the Scope of Substantive Competences of Administrative Courts in the Light of Art. 184 of the Constitution and the Constitutional Principle of Separation of Powers] (2020) Acta Universitatis Wratislaviensis vol. 120, 175–185; R Siuciński, 'Between Judicial Review and the Executive – the Problem of the Separation of Powers in Comparative Perspective' (2020) Perspectives of Law and Public Administration 9(2), 137–146; J Szczepkowski, 'Konstytucyjność zmian wprowadzonych ustawą z dnia 9 kwietnia 2015 r. o zmianie ustawy – Prawo o postępowaniu przed sądami administracyjnymi w zakresie

powers have a much stronger impact on the jurisprudence of administrative courts. This influence is very visible in the narrow and restrictive interpretation adopted by the courts of the provisions authorising them to make substantive judgements, the application of which, in the overwhelming majority, results in constatation of the inability to make a substantive judgement in a given case.[33]

The above points are further supported by practical considerations related primarily to the construction of provisions authorising administrative courts to adjudicate on the merits. The most significant limitations include: the narrow scope dictated by the wording of these provisions (a prime example being Article 145a § 1 p.p.s.a., applicable only when a decision or order is revoked due to substantive law violations or conditions necessitating annulment, which rarely occurs independently); the ambiguity of these provisions, leading to numerous uncertainties regarding their scope and conditions for application (such as the actual extent of competence on the merits in cases of complaints about delays and inactivity); the need for various conditions to be met in order to render judgments on the merits, including evaluative criteria (e.g. "circumstances of the case" in Article 145a § 1 and 3 p.p.s.a.); and the discretionary nature of many provisions authorising judgments on the merits (cf Article 146 § 2, Article 149 § 1b, Article 154 § 2 p.p.s.a.).

Secondly, the practical insignificance of the competence to render judgments on the merits is reinforced by regulations governing the evidence procedure before administrative courts. As previously noted, under Article 106 § 3 p.p.s.a., these courts can only gather supplementary evidence from documents, which effectively prevents them from independently establishing facts in cases where the public administration has failed to do so correctly. Consequently, this often necessitates issuing a cassation judgment.

5. Summary

Grown on the assumption of cassation-only adjudication, the Polish adjudicatory model of administrative courts has, over the years, been supplemented with the ability to make substantive decisions. The most significant amendment in this regard, which took place in April 2015, did not achieve the intended result, despite the legislator's intent. Thus, despite the current p.p.s.a. providing for a relatively broad catalogue of powers to issue substantive judgments by administrative courts, in practice these courts primarily issue cassation judgments. For these reasons, the Polish adjudicatory model of administrative courts can only formally be classified as a mixed (cassation and substantive) model. Poland, therefore, shares this experience with other European countries, including Croatia, where, despite the statutory introduction of the substantive adjudication model as a rule in 2010, courts still typically make cassation judgments.[34]

This peculiarity arises for two reasons. Firstly, it stems from an error by the legislator, who, on one hand, intended to give administrative courts the power to adjudicate on the merits, but, on the other hand, limited this power by setting prerequisites that are rarely fulfilled and did not provide these courts with the competence to conduct more extensive evidentiary proceedings. Secondly, it stems from the still very strong attachment in the Polish judicature and doctrine to the cassation

merytorycznego orzekania przez sądy administracyjne' [Constitutionality of the Changes Introduced by the Act of April 9, 2015 Amending the Act – Law on Proceedings before Administrative Courts in the Scope of Substantive Adjudication by Administrative Courts] (2021) Acta Iuris Stetinensis vol. 36, 117–142; D Gut (2024) 261–293.

33 Which is particularly evident especially in cases concerning inaction or protraction (cf the judgments of the Supreme Administrative Court of: 25 April 2008, I SA/Wa 204/08 [2008]; 8 February 2018, I OSK 1996/17 [2018]; 16 March 2018, I OSK 2742/17 [2018] and others).

34 S Banić, 'Reformy Sądownictwa Administracyjnego w Chorwacji' [Reforms of the Administrative Courts in Croatia] (2011) Acta Universitatis Lodziensis vol. 98, 87.

formula of adjudication in administrative courts. This is a result of the narrow interpretation of the term "control" in Article 184, sentence 1, of the Constitution of the Republic of Poland and the restrictive understanding of the delimitation of competences between the executive and the judiciary.

The intentions of the Polish legislator to extend the competence of administrative courts to rule on the merits have not had the intended result. However, this does not mean that the direction taken by the legislator was not correct. On the contrary, as is clear from the views presented by the Council of Europe and the European Union, as well as from the observation of systems of judicial control of administration in other European countries, adjudication on the merits by administrative courts is, in many situations, able to guarantee a better level of protection of an individual's rights and freedoms. However, changes to the adjudication model are a long drawn-out process that, as the Polish experience shows, must be carried out in a more thoughtful manner in order to be effective.[35] In particular, it requires a new approach to basic constitutional principles, with the principle of the separation of powers at the forefront, along with prudent changes concerning the entire system of judicial and administrative proceedings. Certainly, deeper transformations in the adjudicatory model cannot be achieved by merely introducing unitary powers to adjudicate on the merits in a system designed for cassation adjudication.

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35 As was the case in Austria (see P Chvosta, 'Die "Jahrhundert-Reform" der Verwaltungsgerichtsbarkeit in Österreich – ein <<neues Zeitalter>> auch für die Verwaltungsgerichtsbarkeit in den Ländern der jungen Demokratie in Europa?' in A Krawczyk (ed), *Reformen der Verwaltungsgerichtsbarkeit in den Ländern der jungen Demokratie* (CH Beck 2022) 21.

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The Public Establishment as an Example of an Institution of Administrative Law in Constant Evolution

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Abstract
The functioning of public establishments has been a topic of significant interest in administrative law doctrine for several decades. This institution of administrative law is typical of continental systems and is rooted in both Western traditions (such as French and German law) and the legal systems of former communist countries. This study presents the basic issues related to public establishments, including a historical and comparative legal outline and their characteristics. Particular attention will be paid to the contemporary understanding of the concepts of establishment relationship and establishment authority. Additionally, the basic research dilemmas in this area will be examined from the perspective of the 2020s. The article concludes with a summary.

Keywords
administrative law; public establishment; public service establishment; establishment relationship; establishment authority

1. Introduction

The public establishment, as an institution of administrative law, has undoubtedly been the subject of extensive interest in administrative law doctrine and theory for several decades. Explaining the essence of this legal institution to a reader unfamiliar with continental law, particularly those rooted in the French or German systems, is extremely challenging. Therefore, it is necessary to succinctly define what a public establishment is. On the one hand, it is a specific, separate organisational structure to which the broadly understood state has delegated the performance of public tasks within the sphere of welfare administration, an element of the welfare state. On the other hand, it is a systemic form through which public administration performs these tasks.

The purpose of this paper is to briefly present this legal institution. Firstly, its nature is discussed, including historical and comparative legal perspectives, and some pressing terminological

issues will be clarified. Subsequently, the essence of a public establishment (or public service establishment) is presented, and the establishment relationship – which encompasses the entirety of factual and legal relations linking the establishment's bodies with its users – is analysed. Finally, the basic research dilemmas in this field of administrative law and the prospects for development as we enter the third decade of the 21st century are presented.

This paper does not aim to resolve all research doubts, as these issues have been the subject of many separate monographs, and some cannot be resolved here due to the topicality of the presented problems. Nevertheless, it is worth at least briefly presenting these issues to illustrate the basic structural elements and features of the institution of a public establishment.

2. Public establishment – nature of the legal institution and terminological issues

2.1. Historical and comparative overview

An introductory element to the broader topic is the genesis of the institution of the public (administrative) establishment, i.e. a historical outline from the perspective of the achievements of legal scholars from the "leading" countries, as far as the doctrine of administrative law is concerned – i.e. French and German law – as well as, obviously, Polish law of the inter-war and post-war periods and contemporary law. This will make it possible to signal and, to some extent, resolve certain terminological doubts in this respect[1].

In France, institutions described as public establishments have been operating since the 18th century. However, the status of those establishments was far from the current understanding of the nature of administrative (public) establishments. In the second half of the 19th century, the concept of a public establishment in the modern sense, i.e. a public institution performing the tasks of the state, took shape. French law distinguished the category of public establishments, i.e. a private institution that performs certain public tasks. A characteristic feature of the positions of French scholars is the departure from the concept of a public service in the broadest sense. This has resulted in less importance than in the case of Germany being attached to the strict definition of the systemic and organisational features of administrative establishments and their legal nature. However, the "ease" of encompassing (in the light of the public service doctrine) the concept of public establishments in various organisational and legal forms prompted the search for elements that distinguish administrative establishments from other public institutions. In general, French scholars viewed public establishments as organisational units with legal personality and treated them as part of the public service. Among French authors, the scientific works and views of Léon Duguit, Maurice Yauthier, Michel Dendias, Maurice Hauriou, Louis Rolland, André de Laubadère, Henry Nezard, René Connois, Jean Rivero[2] deserve attention.

1 See the broader considerations on this subject in M Hadel, *Koncepcje zakładu publicznego w nauce prawa administracyjnego* [Concepts of a Public Establishment in the Study of Administrative Law] (Uniwersytet Jagielloński. Wydział Prawa i Administracji. Katedra Prawa Administracyjnego 2019) and M Hadel, *Zakład usług publicznych. Studium administracyjnoprawne* [Public Services Facility. Administrative and Legal Study] (Instytut wydawniczy EuroPrawo 2020). The findings in this article are an abridged version of the theses in both these publications.

2 M Vauthier, *Precis du droit administratif de la Belgieue* (Maison Ferdinand Larcier 1928); M Dendias, *Le gouvernement local. La centralisation et la decentralisation administratives* (Les Presses Modernes 1930); M Hauriou, *Precis de droit administratif et de droit public* (Société anonyme du Recueil Sirey 1921); L Rolland,

Analysing the output of the German doctrine in this matter, it is necessary to point out the classic definition of an administrative establishment by O. Mayer[3], according to which an establishment is a set of personal and material means in the hands of the state or another subject of public administration that is permanently assigned to fulfil specific public purposes. The definition of W. Jellinek[4] actually corresponds to Mayer's position, he considered a public establishment to be a set of material and personal means which the state or another subject of public authority uses to fulfil its public-law tasks; he considered that a feature of establishments is the combination of a material basis and a planned activity for the benefit of the user, who is a "third" person, i.e. outside the organisational structure of the establishment. Other scholars of the countries of this cultural area who have dealt with this concept include A. Merkl, R.H. Hermritt, F. Giese, E. Neuwiem, E. Cahn, A. Köttgen[5].

Referring to the Polish administrative law literature of the interwar period, several leading figures should be pointed out. First of all, it is necessary to mention T. Bigo[6], according to whom a public establishment is a complex of personal and material resources belonging to the state or another subject of public administration (e.g. local governments) and separated in organisational terms into a single technical whole. He emphasised that an establishment is always characterised by a certain degree of autonomy, which falls within the framework of deconcentration. Administrative establishments are created in order to make a certain branch of administration more efficient, and this can only be achieved with a certain degree of autonomy on the part of the bodies that expertly manage the department in question. The difference between a company and a publicly owned establishment is that an establishment has administrative authority, whereas a company does not. The most in-depth monograph on the subject from the interwar period is that by W. Klonowiecki[7]. According to him, a public establishment is a group of persons, things and rights, organised by a public administration entity and permanently connected with it, intended for individual use by entitled (or obliged) persons, for which the court route is excluded in disputes between the establishment and the user, at least as regards the possibility of using the establishment. The constitutive elements of the concept of a public establishment, according to this author, were the separation of a set of persons, things and rights, the fact that the establishment was vested with a certain range of powers in relation to the users (the authority of the establishment) and the exclusion of legal proceedings in relations between the public establishment and its users.

When making a historical legal analysis in terms of Polish law, despite the sweeping social and political changes, socialist "colourings" should not be completely omitted. Two basic monographs

Precis de droit administratif (Librairie Dalloz 1930); A Laubadere, *Manuel de droit administrative* (Librairie Generale de Droit et de Jurispeudence 1960); H Nezard, *Elements de droit public* (Uniwersytet Wisconsin 1928); L Duguit, *Traite de droit constitutionnel* (Editions Cujas 1928); R Connois, *La notion d'etablissementpublic en droit administratif francais* (Librairie générale de droit et de jurisprudence 1959); J. Rivero, *Droit administrative* (Dalloz 1962).

3 O Mayer, *Deutsches Verwaltungsrecht* (Duncker & Humblot 1924).

4 W Jellinek, *Verwaltungsrecht* (Springer 1929).

5 A Köttgen, F Fleiner, J Lukas, L Richter, *Bundesstaatliche und gliedstaatliche Rechtsordnung. Verwaltungsrecht der öffentlichen Anstalt: Verhandlungen der Tagung der Deutschen Staatsrechtslehrer zu Frankfurt a. M. am 25. und 26. April 1929. Mit einem Auszug aus der Aussprache* (De Gruyter 1929); F Giese, E Neuwiem, E Cahn, *Deutsches Verwaltungsrecht* (Mohr Siebeck 1930); R.H Herrnritt, *Grundlehren des Verwaltungsrechts* (Mohr Siebeck 1921).

6 T Bigo, *Związki publiczno-prawne w* świetle *ustawodawstwa polskiego* [Public-law Relationships in the Light of Polish Legislation] (Wydawnictwo Kasy im. Mianowskiego 1928) 178–179, 200.

7 W Klonowiecki, *Zakład publiczny w prawie polskiem. Studium prawno-administracyjne* [Public Institution under Polish Law. Legal and Administrative Studies] (Drukarnia Wydawnictwa "Głos Lubelski" 1933) 55.

from the era of the People's Republic of Poland concerning the issue of administrative establishments (at that time the term "state" was preferred for *de facto* political reasons), by M. Elżanowski[8] and E. Ochendowski[9], presented this issue in detail from the point of view of the Soviet, Yugoslav, Czechoslovak legal scholarship of that time.

Describing the views of the scholars of the post-war period, one should point to S. Kasznica[10], author of the first post-war textbook on administrative law. According to this author, a public institution (i.e. both an establishment and a public enterprise) is a group of persons and material means created by the state or another public-law association that constitutes a technical organisational unity and is intended to serve permanently a certain specific, strictly defined public purpose. In order to distinguish establishments from public enterprises, Kasznica emphasised that "establishments are governed by public law, whereas enterprises are subject to private law in their relations; they do not dispose of administrative authority".

Elżanowski understood the administrative establishment (or in his terms, state-owned) as each relatively independent state organisational unit equipped with permanently separate material and personal means whose basic (statutory) aim is the direct provision of social and cultural services of a continuous, specialised character in the field specified in the act on its establishment, taking into account certain criteria which distinguish a state-owned establishment from a state enterprise: the forms of financing and the nature of the legal relationship of use (the relationship between the bodies of the establishment and the users who benefit from its services is in principle an administrative/legal relationship)[11].

In his monograph Ochendowski pointed out that "an administrative establishment in the formal sense is a state organisational unit which is neither a state organ (office) nor a state enterprise (union)". Thus, if it followed from the law or the act on the establishment of a given organisational unit that it was a state organ or a state enterprise, he did not consider such a unit to be an administrative establishment in the formal sense. On the other hand, "an administrative establishment in the material sense is a state organisational unit which is not an organ of the state and which, in order to perform its basic tasks, has the right to enter into administrative/legal relations"[12].

Moving on to modern law, J. Zimmermann[13] understands a public establishment as a "separate organisational unit which receives for the performance of a certain set of public tasks from the body of public administration which creates it and which for this reason remains under the constant supervision of this body [...] Establishments, while not being bodies of public administration, carry out the tasks of the administration, especially in the field of broadly understood intangible services, of particular importance in such areas as education, culture and health care. The bodies of these establishments are administrative bodies [...]. The performance of the above tasks falls within the broadly conceived closed organisation that is the establishment, while administrative bodies perform their functions outside their organisational structure. For this reason, the operation of the establishment requires different legal instruments, as well as

8 M Elżanowski, *Zakład państwowy w polskim prawie administracyjnym* [State Enterprise in Polish Administrative Law] (Wydawnictwo Naukowe PWN 1970).

9 E Ochendowski, *Zakład administracyjny jako podmiot administracji państwowej* [Administrative Institution as a State Administration Entity] (Wydawnictwo Naukowe UAM 1969).

10 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 80.

11 M Elżanowski (1970) 66–67.

12 E Ochendowski (1969) 105, 107.

13 J Zimmermann, *Prawo administracyjne* [Administrative Law] (Wolters Kluwer 2016) 199 et seq.

different qualifications of the employees. The types of authority distinguished correspond to the categories of supervision of establishments, which can be administrative (legal, financial etc.) and professional (pedagogical supervision). The supervision of establishments is carried out by authorised public administration bodies [...]." The feature that distinguishes public establishments from enterprises is their financing from the state or local government budget. As a rule, the activities of public establishments are not profit-orientated and public establishments can operate without having legal personality within the meaning of civil law.

To recapitulate to some extent the above positions and to present my own view in this regard, "an establishment" – as such – is a separate organisational unit that performs statutorily defined functions. The nature of these tasks/functions, the way in which the establishment is distinguished, depends on its location in a particular normative space – whether we are dealing with labour law, financial law, tax law or administrative law. In the contemporary science of administrative law, three tendencies can be distinguished in describing the concept of an establishment: the first one still refers exclusively to the structural/organisational aspect of the definition of an establishment; the second tendency combines the structural/organisational aspect with the material aspect; and the third, new tendency, comes down to describing an establishment exclusively from the perspective of the material aspect. It should be stressed that the institution of an establishment under administrative law has evolved over the course of history; its characteristics and the hallmarks of the concept have varied depending on the historical epoch and the current political and economic system. This has implications if only in terms of the terminology being used. Currently, the term *state-owned establishment* certainly does not reflect the reality, due to completely different legal, social and economic conditions in Poland since 1989. It may be misleading to use the term *administrative establishment*, as not only the public administration (broadly understood as "the state") may be the entity creating and running an establishment. Moreover, within the framework of establishments we are dealing not only with relations of a sovereign, administrative/legal nature, but also with civil-law relations; it seems the most appropriate to return to the classic terminology, namely *public establishment*, due to the nature of the tasks they carry out and the variety of entities running them, or to propose a new concept, namely *public service establishment*, which indicates its fulfilment of public tasks or provision of essential services – from the point of view of the state. Such an approach corresponds to the notion of providing administration, shifts the definition of this notion from distinguishing those entities which create and run the establishment to the public services which the establishment provides and allows for a new approach to the role of the establishment authority and establishment relations within the issue of establishments in administrative law.

2.2. The nature of the publicly owned establishment as an administrative entity

Reflecting on the role of a public service establishment as an entity performing public tasks and situating it among the complex entity structure of public administration (or even, to use an artistic term, a mosaic of entities performing public administration) requires that administration must first be defined. It should be assumed that public administration is an abstract structural entity, independent of staffing, acting monopolistically on behalf of the state on the basis of and within the limits of the law, with the aim of realising public tasks for the common good (with respect for the rights of particular individuals); in realising this aim, it may use the administrative authority granted to it by the legislature in the provisions of the law. As a rule, the activities of

the administration will be executive in nature (although this does not, of course, exclude creative activities). Public administration is carried out by professional staff in an organised, continuous, stable manner.

A public service establishment will thus be a material (in the sense of being singled out as a permanent set of persons and things constituting an organised whole) form of the performance of public tasks by administrative entities – both born of the state and having the character of non-public entities. The performance of these tasks consists in the provision of public services in a specific area of state activity (e.g. in the field of education, health care or culture), which makes a public establishment immanently connected with the notion of providing administration. An establishment should be distinguished from a body and an enterprise, both for structural/organisational reasons and when analysing the relationship between the establishment and its users.

3. The public establishment relationship as the totality of the factual and legal relations linking the public establishment to its users

3.1. Public establishment authorities and its users

It should be pointed out that the internal structure of the establishment is very diverse: it consists of all intra-departmental organisational units of a different nature, but also of establishment bodies. In this context, a distinction can be made between monocratic bodies (establishment manager, deputy establishment manager and other monocratic bodies) and collegiate bodies. Most of the powers and responsibilities belonging to the establishment bodies are concentrated and lie with the establishment manager. They take overall responsibility for its work and take part in its external relations. Collegiate bodies, on the other hand, can have cooperative or consultative decision-making. The criterion of composition allows several types of establishments to be distinguished. Firstly, there are bodies with a purely professional composition, formed from among persons with appropriate professional training who perform activities directly related to the provision of services. This type of body is usually equipped with the power of co-determination on many important matters concerning the functioning of the establishment. Next are mixed bodies, partly composed of the professional staff of the establishment and partly of other persons, e.g. representatives of the founding bodies, the users etc. Thirdly, there are bodies with a purely social composition, i.e. formed only from the users of the establishment or their representatives.

In "controlling" its users in order to achieve certain objectives (for the realisation of which the establishment was set up), establishment bodies make use of a variety of control instruments: of an administrative law nature (primarily using establishment authority), of a civil law nature, of a material/technical nature, as well as extra-legal factors.

In the case of a public service establishment of the corporate type, the legal position of the users (recipients of the services it provides) and the users' influence on the creation of the general acts of the establishment (for example establishment statue) and its functioning are similar to public law corporations, in that they have an influence on the formation of the structural and organisational framework of the establishment, they have the competence to elect the establishment bodies (e.g. the rector) or their representatives can co-found the collegiate bodies of the establishment. The legal determination of the way in which the establishment services are provided is lesser in the case of public service establishments of the corporate type than in the

case of classic establishments. The destinators of corporate-type establishments, i.e. voluntary, open or limited establishments, will have the strongest position, by which is meant the widest possibility to influence the establishment's provision of services and the competence to co-determine organisational issues, as well as the widest range of powers. At the other extreme, in terms of being able to co-determine the establishment's provision of services, are the users of so-called closed and compulsory establishments. Here, the establishment's authority is the greatest; the scope of rights and obligations is regulated to the greatest extent by the establishment's authorities and the possibility to use establishment police or even direct coercive measures is incomparably greater than in the case of public service establishments of the corporate type. To use a somewhat figurative and visual comparison, the legal and factual status of students as users of a university-type public service establishment differs from primary school pupils, through library users or museum visitors to prison inmates.

3.2. Public establishment authority and relationship

The public establishment authority is the most essential concept that captures the nature of the relationship between an establishment and its users (the recipients of its services). The essence of public establishment sovereignty boils down to the possibility of unilaterally shaping the legal situation of the public establishment's destinators through its bodies. According to the classical, original approaches, public establishment relations were not subject to legal protection, as pointed out by Mayer. This thesis was deepened by Klonowiecki, who claimed that the most essential feature of public establishment authority was the possibility to use administrative coercion without the control of courts. The authority was "placed in the sphere of the discretion of the organs of the establishment" and its source would be "a competence not regulated in detail by law", which allows the establishment and its functioning to be located outside the general, external legal order, and subordinates the user to the unregulated instruction to maintain order [14]. It is emphasised that establishment relations are an example of special sovereign relations by virtue of their dual subordination. Establishment relations "overlap" with any other legal relationship linking the individual and the public administration; this submission to a particular legal regime can be voluntary or coercive.

More recent scholars of administrative law distance themselves to some extent from the original understanding of authority as *de facto* unfettered freedom in shaping relations with establishment users, claiming that there is a legal basis (authorisation) for imposing obligations on establishment destinators, but that it is of a general nature (as establishment authority is a part of the state's administrative authority, which is also of a general nature) and is further specified by internal norms.

The establishment relationship is one of the "sub-types" of the administrative law relationship, the purpose of which is to describe the bond between the establishment and its user and some of its specific determinants. The essence of this bond is the possibility for the organs of the establishment to exercise over the users precisely the establishment authority in question. The concepts of public establishment authority, public establishment dependence and public establishment relations are, as it were, different aspects of the same phenomenon, namely the essence and nature of the relationship between the authority of a public (administrative) establishment

14 Similarly J Homplewicz, *Polskie prawo szkolne. Zagadnienia podstawowe* [Polish School Law. Basic Issues] (Wydawnictwa Szkolne i Pedagogiczne 1984) 178.

and the users[15]. Classically, establishment authority was seen as a conglomerate of essentially unlimited powers in relation to the user of the establishment; this follows, for example, from the above-mentioned theses that establishment relations are in the "sphere of the establishment's discretion", that it is "a competence that is not regulated in detail by law" whilst the establishment functions "outside the general, external legal order" and that the user has to submit to unregulated instructions to maintain order. It now seems clear that the establishment relationship is external and does not arise within the sphere of internal administrative activity, which would allow the establishment bodies a great deal of freedom and flexibility in shaping this relationship. One has to agree with the thesis that the concepts of public establishment relations built so far require a new interpretation, in accordance with the current constitutional system of sources of law, with regard to both the emergence and termination of the public establishment relationship[16]. The question of judicial supervision of establishment activities and – perhaps – the extension of the scope of judicial/administrative control over acts and actions taken by establishment bodies also requires remodelling. However, these theses are *strictly* postulatory at the current stage of research.

4. Public service establishments – research dilemmas and prospects for development

Changes in the surrounding (legal) reality also impact the functioning of public service establishments. Some of these establishments are more prone to change, whilst the functioning of other types of establishments is more stabile. This makes it possible to distinguish between two models of public service establishments: a dynamic model and a static model. This distinction can manifest itself at the normative level, depending on the nature of the services provided by the establishment and the performance of certain public tasks (some tasks must be characterised by greater stability, e.g. from the point of view of state security, whilst others are more dependent on the current political and socioeconomic conditions), as well as in the way that services are provided by a given type of establishment – the dynamic model of providing establishment services is more determined by technological progress.

Entering the 2020s created new research areas and prospects for developing administrative law, including its individual institutions and the area of public service establishments. Herein are highlighted only a few of those areas that appear most obvious from the perspective of an informed viewer and observer of reality – due to the limited framework of this study.

The digitisation of public administration activities and the consequent provision of services by establishments in the virtual sphere should be mentioned here. From this perspective, the conventional term "e-establishment" can be used to describe those aspects of managing an establishment or providing an establishment's services in which new technologies are used. Streamlining is observed both in open (semi-open) establishments, the use of which is voluntary, characterised by relative autonomy, implementing the principle of decentralisation (e.g. universities), and in closed, coercive, highly centralised establishments (e.g. prisons).

The years 2020–2022, i.e. the COVID-19 pandemic, have in fact accelerated the process of digitisation of public life; it is to be assumed that this will have an increasing impact on the way public administrations perform their tasks. This will, of course, also be noticeable in the services provided

15 P Chmielnicki, *Zakłady administracyjne w Polsce. Ustrój wewnętrzny* [Administrative Establishments in Poland. Internal Structure] (LexisNexis 2008) 58.

16 Z Czarnik, J Posluszny, 'Zakład publiczny' [Public Facility] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Podmioty administrujące* System Prawa Administracyjnego [Entities Administering the Administrative Law System] (CH Beck 2011) 469–470.

by public establishments. The scale and stability of this phenomenon is at this point unpredictable; therefore, it is worthwhile for scholars of administrative law to start asking how – based on the current doctrinal output and the available conceptual "instrumentarium" – to inscribe in the theory of administrative law a possible 100 percent "e-establishment", i.e. functioning entirely in the virtual sphere. This opens up a number of new fields of research, related, for example, to the definition of an establishment, how to treat the requirement for structural and organisational separation, the nature of the establishment's authority and the form and admissibility of certain authorising measures towards the users and third parties (what would be the disruption of the current functioning of the establishment in the space of the internet?). The problem of the boundaries of the legal space regulated by the norms of administrative law and the "deterritorialization" of public administration appears glaring here. Another question to be asked at this point is obvious: from the perspective of the quality of the establishment's services, is the transfer of its activities to the virtual sphere a positive phenomenon or not? Figuratively speaking, has the process of university didactics benefited from the remote mode of classes during the pandemic period, or is the opposite true? Does the lack of face-to-face contact between teacher and student cause the university (or any school) to lose some of its immanent characteristics?

The internationalisation of phenomena taking place within the framework of public administration, the problems of globalisation and Europeanisation (also in juxtaposition with the aforementioned digitisation) obviously also have an impact on the functioning of public service establishments. This makes it possible to analyse two further issues: the subjective territorial scope of the activities of public service establishments (including transnationality), as well as the subjective (structural/organisational) territorial scope of their activities.

The operations of a public service establishment do not have to be confined to a single building; at the same time, the requirement that the establishment be structurally and organisationally distinct does not determine its limitations. Thus, looking at the issue from a territorial perspective, it should be pointed out that an establishment may provide public services in various places, located within the same city (e.g. university buildings, hospital buildings etc.), or located at a considerable distance from each other, even outside the country (examples of which are branches of universities or colleges based in more than one city). Looking at the issue from a subjective perspective, the establishment relationship will still bind the establishment to its users in a situation where the users are formally ("technically") outside the establishment in the sense of a separate organisational unit; prisoners on furlough, students on a school trip, students on an international exchange (e.g. under the Erasmus programme) are still subject to the establishment's authority. In such a situation, violations of the establishment rules may lead to the application of certain establishment sanctions, up to and including removal from the establishment.

The different understanding of the notion of public establishment authority mentioned above manifests itself, for example, in public administration's increasing use of civil law forms of action. The object of the public establishment relationship is the bond between the public establishment and the user, in which the user may demand a service from the public establishment, resulting from substantive law, and the public establishment has the competence within the framework of the legally defined purposes to shape the legal relationship in an authoritative way. In turn, the mutual rights and obligations which arise within the framework of the above-mentioned relationship are the content of the public establishment relationship. The mutual rights and obligations which arise within the framework of this relationship are the content of the establishment relationship. However, the subject of the establishment relationship is not only the legally determined behaviours of the establishment bodies, which aim to unilaterally shape the

legal situation of the recipient of the establishment services, in connection with their use of the establishment services, but also legally defined situations, in which the establishment body is entitled (or obliged) to shape the mutual rights and obligations by concluding a civil law agreement. Here, too, there is a bond between the establishment and the user, whereby the user can demand a service from the establishment, but can do so by civil law, whereas the possibility for the establishment bodies to shape the legal position of the user with authority is (at least seemingly) reduced, due to the use of the form of a civil law contract. With regard to the question of corporate authority precisely within the framework of a civil law company relationship, one has to agree with the thesis that – in the case of contracts concluded by the administration – the individual is not in a position of equality vis-à-vis the administration; a deeper, "material" analysis of the essence of the legal relationship between the parties is required; in this type of case one can speak of both potential and actual administrative coercion which is undoubtedly felt by the individual. The civil law contract is a "camouflaged" form of implementing the functions of the authority, especially as this form is in fact imposed on the recipient of the establishment services.

Another important field of research that has been opening up in recent years is the question of the limits of establishment authority. Obviously, in accordance with the principle of legalism, they will be determined by the provisions of universally binding law, namely the Constitution and other legal acts. These limits must be respected both when enacting general establishment acts and individual establishment acts (undertaken in relation to specific addressees of establishment services), as well as everyday practice of providing establishment services. The above should automatically pose the problem of the consequences of exceeding the boundaries of public establishment authority, both at the intra-establishment level and within the framework of judicial review.

The above-mentioned topics also give rise to research from a sociolegal perspective: the objective of the bodies of an establishment and its employees is to *effectively* influence its users, to control them with the help of specific instruments (including legal instruments). The purpose of some types of establishments, apart from ensuring that services are provided, is to manifest certain values and promote certain attitudes (e.g. educative influence in schools, rehabilitative influence in prisons or stimulating the capacity for independent, critical thinking in universities). In this respect, it is clearly insufficient to assess the effectiveness of an establishment and the legal measures it uses based solely on a behavioural understanding of the concept. It is therefore necessary in this regard to make skilful use of the means of power. The pandemic and "remote" potential for providing establishment services raises many questions and doubts about the possibility of effectively influencing establishment users.

5. Summary

An "establishment" is a separate organisational unit performing statutorily defined functions. The concept of an establishment under administrative law has evolved throughout history, with its characteristics and hallmarks varying depending on the historical epoch and the prevailing political and economic system. Currently, it seems reasonable to revert to the classic concept of a "public establishment" or to propose a new terminological convention, such as "public service establishment", to emphasise the scope of services provided by the establishment.

A public service establishment is a material entity, distinguished as a permanent set of persons and things constituting an organised whole, and it serves as a platform for performing public tasks by administrative entities – both state and private entities. The performance of these tasks

involves providing public services in a specific area of state activity, inherently linking the public establishment to the notion of a service-providing administration.

The most relevant concept that captures the relationship between the establishment and its users (recipients of its services) is "establishment authority", which refers to the ability of establishment bodies to unilaterally shape the legal situation of the users. However, this concept has evolved and must continually adapt to current constitutional and conventional standards of rights and guarantees of freedom, including judicial supervision and administrative court control over the activities of public establishments.

The third decade of the 21st century has opened many new research areas and prospects for developing public service establishments, including the digitisation of public services (e-government or e-establishment) and the analysis of how establishment services are provided in virtual or cross-border spheres. The understanding of establishment authority is changing as establishment bodies increasingly use non-managerial, civil law forms of action, raising questions about the permissible limits of their authority. This shift also offers an opportunity to analyse the effectiveness establishment bodies' influence on the recipients of their services from a sociolegal perspective.

Undoubtedly, the coming years will bring numerous normative solutions and academic positions that will form the basis for further discussion. As previously indicated, the institution of a public establishment (public services) evolves with the changes in the social and legal reality around us, so no research findings in this area can claim to be fixed and unchangeable.

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Contemporary Central & East European Law

The Administrative Act: Yesterday and Today (Reflections on the Thoughts of Stanisław Kasznica)

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Abstract
The book of Stanisław Kasznica: *The Polish Administrative Law. Concepts and Basic Institutions,* Poznań 1947, may be treated as the synthesis of achievements related to the contemporary scientific thought but at the same time it can be a "lodestar" determining the tendencies of research. It was a serious challenge at least for the part of scientific society as regards the conditions of creating the basis of socialism. They faced a dilemma: whether and to what extend the concepts worked out in the legal systems respecting universal ideas of liberty and the Rule of Law are to be adapted in the different political and constitutional reality. Life provided a clear answer to that question. This what constitutes a product of legal culture of many countries and the truth about them have survived and they have even created solid foundations for the further development of the science of public law in Poland. The concept of the administrative act, presented by the author have undergone several modifications resulting from the transformation of administration itself, technological advancement and new tasks of the country. However, it is still a source of inspiration and reference for research conducted contemporary.

Keywords
administrative law; administrative act; physical and informal acts; codification of administrative procedure; judicial review of administrative action

The work by Stanisław Kasznica, published in 1946: *Polish Administrative Law: Basic Concepts and Institutions* (in Polish: *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze*),[1] was for many, a bridge between the concepts proper to the legal order of the independent Second Polish Republic and the regime created under real socialism. The peculiar nature of this work, being a mere

1 The first edition of the book was published during the German occupation in 1943 and was printed in a secret printing house in Warsaw. The author of the work was forced to go into hiding under the pseudonym Dr. A Łużycki.

academic textbook, is expressed in the fact that it attempted to present a picture of the law that did not really fit the new political and systemic assumptions. It was at odds with the principles that were shaped and enacted later, under the influence of a legal doctrine alien to the European tradition and, in particular, impossible to reconcile with the ideas of the "Rule of Law". In this sense, Stanisław Kasznica's work could be regarded as a description and a delineation of the standards of continental Europe in the first half of the twentieth century. At the same time, it is a synthesis of the achievements in the science of administrative law from that period. In fact, in the introduction to the book, it was mentioned that both "in the layout of this book, and in analysing and explaining individual concepts and institutions, the author often followed the arguments of the Swiss scholar, Frederick Fleiner, the author of one of the best and most widespread textbooks on administrative law". This remark was supplemented by the statement that "The concept of self-government is given by the author in accordance with the theory of self-government developed by Prof. T. Bigo in his excellent monograph titled *Public Law Corporations*"[2].

The concept of administrative act is entirely devoted to Chapter IV of the book. The arguments contained in this part of the handbook open with the observation that "every action of any administrative body, irrespective of its type and character, can be described most generally with the term – administrative act. Among them, factual and legal actions are distinguished. The purpose of the latter is to 'directly produce a certain legal effect"[3]. The group of legal actions also nowadays includes issuing public-law acts, i.e. those that are intended to satisfy the public interest, in the course of performing a public service. The author distinguished two basic categories of acts: a) general – normative (containing general norms, rules of conduct), and b) individual – concerning strictly defined, also called specific, "individual situations and accidents". In addition to certificates, notices and announcements, Stanisław Kasznica considered administrative acts labelled as decisions in the regulations on general administrative proceedings as one of the types of individual acts.[4] This typology may raise objections nowadays, as certificates, notices and announcements are certainly not a variety of act qualified as a result of taking a legal action, after all aimed directly at producing legal effects, but are more a form of factual action, indirectly producing such an effect.[5]

2 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 5.

3 Ibid., 96.

4 Ibid., 96–97.

5 More extensively Z Kmieciak, 'Czynności faktyczne administracji państwowej' [Actual Activities of State Administration] (1987) Studia Prawno-Ekonomiczne vol. 39, 77 et seq. As to the differences between a certificate and a declaratory administrative act, see M Wierzbowski, 'Zasady i tryb wydawania zaświadczeń według kodeksu postępowania administracyjnego' [Rules and Procedure for Issuing Certificates According to the Code of Administrative Procedure] (1981) Państwo i Prawo vol. 1, 43, J Lang, 'Poglądy nauki na funkcje i charakter zaświadczeń' [Views of Science on the Functions and Nature of Certificates] (1988) Organizacja – Metody – Technika vol. 1, 28 et seq. and ZR Kmiecik, 'Charakter prawny zaświadczeń a możliwość ustalenia i weryfikacji jego treści' [The Legal Nature of Certificates and the Possibility of Determining and Verifying their Content] (2004) Państwo i Prawo vol. 10, 60. The quintessence of the findings on this subject is the statement that the Supreme Administrative Court jurisprudence unequivocally resolved the dilemmas arising from the interpretation of the provisions of the of Administrative Procedure Code of 14 June 1960 (ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [Act of 14 June 1960 Code of Administrative Procedure] [2021] JoL 735, as amended; hereinafter: the APC) and "clearly separated certificates issued pursuant to Article 217 from administrative decisions provided for in Article 104" – J Borkowski, B Adamiak in M Romańska, K Klonowski, A Golęba, J Firlus, A Cebera, H Knysiak-Sudyka (eds), *Kodeks postępowania administracyjnego. Komentarz* [Code of Administrative Procedure. Commentary] (Wolters Kluwer 2019), 1058.

In the approach presented by Stanislaw Kasznica, an administrative act appears as a settlement:

- being a manifestation of the will of a public administration body;
- exercising the authority "held by that public administration body";
- which are justified by an authorisation contained in a provision of a normative act: in a law or in a regulation (for this reason, "an administrative act should always begin by referring to the legal provision that has authorised the authority concerned to issue precisely this type of act");
- addressed to an individually specified person or a certain group of persons "whose personal composition can also be precisely determined" (e.g. dissolving a public meeting, addressed to "all its participants, gathered at a given moment in a hall or square");
- referring to "a specific case, an individually defined situation in which the addressee or addressees find themselves";
- preceded by at least a "summary investigation to determine whether, in this particular case, the conditions under which the norm authorises the act are indeed present" (e.g. would "the continuation of the meeting endanger public order?");
- always producing a certain legal effect, e.g. by granting or withdrawing an entitlement from someone, denying it or changing the scope of an entitlement.[6]

Understood in this way, an act is – as Kasznica has signalled – "a normal, ordinary, constantly recurring manifestation of administrative activity". Public duties and rights "sometimes flow directly from a statutory order, so that the authority's intervention is superfluous: and without it the individual knows, or should know, what he is obliged to do or what he is entitled to". Cases of this kind are, however, as Stanislaw Kasznica added, relatively rare. Therefore, usually "an authority slips between the law and the individual, and it is only by relying on the provision of the law that the authority decides what is due to the individual or what the individual should fulfil"[7]. At the same time, the author pointed out two main reasons for operating the discussed technique of legal regulation. The author acknowledged that "in most cases, it is not possible to decide a priori, without certain investigations, whether in a particular case the factual prerequisites provided for by the law for a claim or obligation to arise in relation to a certain individual are indeed present". It must therefore "be left to the authority to determine this factual condition and, on the basis thereof, to decide on the existence or non-existence of a legal relationship". Secondly, the intervention of the authority is necessary in those frequent situations "where an obligation directly imposed by law is not fulfilled by the obligor. Then the authority must intervene, set a deadline for the fulfilment of the obligation and possibly enforce the fulfilment by means of administrative enforcement"[8].

The author also provided a general, generic characterisation of administrative acts. Firstly, he distinguished between "formal acts, issued in writing in the form prescribed by law, and informal

6 S Kasznica (1946) 97–98.

7 S Kasznica (1946) 98. These findings were developed and concretised, among others, in the works of W Dawidowicz, who distinguished two models of administrative law norms: those affecting directly and those affecting indirectly the behaviour of addressees. In the first case, the competence to control the observance of a given norm is granted to the administrative bodies and takes the form of general competence, in the second case – the administrative bodies have a detailed (related to a specific type of cases) competence to apply a legal norm; see W Dawidowicz, 'Pojęcie norm prawa administracyjnego w *świetle* obowiązującego ustawodawstwa' [The Concept of Administrative Law Norms in the Light of Applicable Legislation] (1981) Państwo i Prawo vol. 4, 30 et seq; and W Dawidowski, *Prawo administracyjne* [Administrative Law] (Państwowe Wydawnictwo Naukowe 1987) 12–14.

8 S Kasznica (1946) 98.

acts, issued either orally or by certain commonly understood signs". Secondly, he distinguished between positive acts, which settle the matter in accordance with the application, and negative acts, which refuse the application. He also distinguished "unilateral" acts, where "only the manifestation of the will of the authority is sufficient", and "bilateral, for the creation of which the cooperation, manifestation of consent on the part of the addressee is necessary" (examples of which are the appointment of an official or the granting of citizenship, which comes into effect only with the consent of the interested party). However, the author considered the distinction between acts defined as orders and judgments to be the most important, corresponding to the division into constitutive and declaratory acts, though this is currently contested by some part of the doctrine. In the inter-war period and in the initial post-war years, the notion of "decree" was reserved for acts shaping a legal relation, "always introducing something new, hitherto non-existent into the legal sphere of the addressee" and for this reason affecting that sphere "from the moment of its issuance – *ex nunc*". Meanwhile, "judgements" were equated with a statement of the existence or non-existence of a legal relationship "in its entirety or only in a certain part of it." Stanislaw Kasznica pointed out that such an act operates "*ex tunc*, from the moment when the given relation came into existence, or was supposed to come into existence"[9].

It is not hard to see that the concept of an administrative act, the outline of which is laid out in Stanislaw Kasznica's work, is firmly rooted in the Germanic legal tradition. As Jean-Bernard Auby states, in the Austrian and many other European laws on administrative procedure, this type of act issued by administrative authorities is associated exclusively with decisions in individual cases. He regarded the narrow understanding of the concept of an administrative act as a "constant orientation" of this tradition. According to him this category of acts does not include general (regulatory) acts of bodies forming part of public administration structures. According to the author, "they are rather similar to legislative acts. This position is in contrast to the one adopted by other legal traditions, in which administrative regulations are a variety of administrative acts and are therefore included in the scope of application of codes of administrative procedure, even if it is to be there subject to rules partially different from those that apply to individual decisions: this is what can be found in French law, for example. Jean-Bernard Auby further stated that, although it is not centered on the notion of administrative act, the US APA is in the same vein, since it governs both the procedures for resolving particular problems – »adjudication« – and the procedures for issuing general administrative standards – »rulemaking«".[10] The concept of a general administrative act has appeared in the Polish literature relatively recently. Moreover, it gives rise to disputes as to the legitimacy of using it, as well as the very methodological basis of the analyses devoted to this phenomenon. Neither does the court jurisprudence provide material that would allow the creation of a coherent, sufficiently developed concept of this form of public administration action.[11] It is therefore difficult to reproach Stanisław Kasznica who, in his inquiries into the subject of the administrative act, took into account the legal state and experience (Polish and foreign) from the inter-war period. On the other hand, some objections can be raised against

9 Ibid., 99. Critical of this classification J Borkowski, B Adamiak (2019) 592–593.

10 J-B Auby, 'Foreword' in Z Kmieciak (ed), *Administrative Proceedings in the Habsburg Succession Countries* (Wydawnictwo Uniwersytetu Łódzkiego 2021) 8.

11 More extensively, M Szewczyk, E Szewczyk, *Generalny akt administracyjny* [General Administrative Act] (Wolters Kluwer 2014) 27 et seq, also M Szewczyk, E Szewczyk, 'Relations Between the Procedures for Issuing Individual and General Administrative Acts and Making "Administrative Regulations"' in Z Kmieciak (ed), *Contemporary Concepts of Administrative Procedure. Between Legalism and Pragmatism* (Wolters Kluwer 2023) 209 et seq.

contemporary theoretical studies, which either touch on this issue in a perfunctory manner or omit it altogether. Apart from the works of Ewa and Marek Szewczyk, few scientific publications contain more in-depth reflections on the indicated type of administrative act.[12]

In the conditions of post-war reality, however, the concept of an administrative act – in the sense in which Stanisław Kasznica used it – was considered too narrow for entirely different reasons. These were purely ideological in nature, as can be seen from a study published in 1954 by a team comprising eminent representatives of the science of administrative law, which perfectly reflects the spirit of the times. The intention of the authors was to create a new concept of administrative act, "corresponding to the construction of socialism in the peculiar conditions of people's democracy"[13]. An administrative act was, it was argued, a form of activity of administrative bodies that "granted rights to particular individuals, limited them, imposed obligations which concerned the subjective rights of an individual (concessions, permits, especially industrial permits, expropriations for reasons of higher utility, police orders and prohibitions, etc.). Thus, the concept of an administrative act referred almost exclusively to matters between the authority and the individual. The guarantees of the correctness of the act were set accordingly: administrative procedure and administrative judiciary. In the first phase of capitalism, the centre of gravity rested on ensuring free economic activity; in the second, as the rule of law and the bourgeois rule of law decayed, on giving the administration adequate means to pursue the imperialist aims of the state"[14]. Meanwhile, in the socialist state, the social content of the administrative act is, as has been stressed, "new, much broader and, above all, creative: it is the planned reconstruction of the whole of social life", which follows "from the essence of the socialist state"[15].

Stanisław Kasznica in his textbook (*Polish Administrative Law*) pointed out that an issue giving rise to "some difficulties" was the determination of the meaning of the term "special form of an act". The dilemmas arising in this regard were expressed by the authors as follows: since "the 1928 Ordinance is not sufficient for all acts, we cannot content ourselves with the fact that this special form is only the form of the decision" – defined by the Regulation of the President of the Republic of Poland of 22 March 1928 on administrative proceedings (hereinafter: r.p.a.).[16] This issue was further complicated by the circumstance that "bourgeois science, while counting – one way or another – the element of »special form« among the elements of definition, i.e. the necessary

12 One of them is undoubtedly the article by M Kulesza, "*Źródła prawa*" i przepisy administracyjne w świetle nowej Konstytucji' ["Sources of Law" and Administrative Provisions in the Light of the New Constitution] (1998) Państwo i Prawo vol. 2, 12 et seq. Describing the solutions in the field of administrative police, the author emphasised the need to fulfil public tasks with the help of a tool in the form of "regulations" – acts from the borderland of law creation and application. In the context of activities conducted in this sphere of administration, the issue is considered, among others, by Z Kmieciak, *Zarys teorii postępowania administracyjnego* [An Outline of the Theory of Administrative Proceedings] (Wolters Kluwer 2014) 236 et seq. and Z Kmieciak, J Wegner, 'Postępowanie w sprawach administracyjnych w czasach pandemii' [Proceedings in Administrative Matters During the Pandemic] (2020) Państwo i Prawo vol. 12, 119–120.

13 T Bigo, F Longchamps, A Chełmoński jr., B Graczyk, Z Janowicz, J Litwin, W Pawlak, J Sieklucki, M Zimmermann, 'Akt administracyjny w świetle Konstytucji Polskiej Rzeczypospolitej Ludowej' [Administrative Act in the Light of the Constitution of the Polish People's Republic] in *Zagadnienia prawne Konstytucji Polskiej Rzeczypospolitej Ludowej* [Legal Issues of the Constitution of the Polish People's Republic] vol. 2, (Państwowe Wydawnictwo Naukowe 1954) 68.

14 T Bigo, F Longchamps, A Chełmoński jr., B Graczyk, Z Janowicz, J Litwin, W Pawlak, J Sieklucki, M Zimmermann (1954) 72–73.

15 Ibid., 73–74.

16 Rozporządzenie Prezydenta Rzeczypospolitej z 22 marca 1928 r. o postępowaniu administracyjnym [Regulation of the President of the Republic of Poland of 22 March 1928 on administrative proceedings] [1928] JoL 341.

elements of any act, spoke at the same time of »informal« acts. This misunderstanding cannot be continued". Instead, it is necessary – as signalled – "to put forward the problem of written and unwritten acts as an issue of classification, not of primary importance anyway"[17]. The authors' doubts were further raised by the question of the relationship between the concepts of administrative act and service order, which emerged against the background of the "still insurmountable ballast of bourgeois science". In this doctrine, "the juxtaposition of administrative act and service order arose from the fundamental juxtaposition of the »legal sphere« and the »political sphere« in the action of administration, from the juxtaposition of »external officialdom«, normalized by law, and internal relations, left as *res interna to the* freedom of administration". This statement was supplemented by the observation that the very concept of free internal relations, so conceived "was taken over by the bourgeois state still from the absolute state, as convenient for bureaucratic centralism"[18]. The quoted parts of the deliberations, exposing the weaknesses of legal constructions that were the product of a bygone era and demonstrating the superiority of socialist science, closed with a conclusion that was as concise as it was uninspiring. The authors stated bluntly: "In order to distinguish an administrative act from the totality of the contemporary legal and state superstructure of the People's Republic of Poland, the following term suffices [...]: an administrative act is a legal action of administrative law, concerning an individual situation, authoritative, with a special form [...]. The scope of this concept includes acts addressed to non-hierarchically subordinate units, acts of economic management and acts within the administrative apparatus. The content of this concept and its class role are characterised above all by: the social content of the act and the wide range of authorities that issue the act"[19]. The broadening of the scope of the term "administrative act" was thus a simple consequence of referring it both to the sphere of external relations (i.e. that with which Stanislaw Kasznica, using the findings of the European science of administrative law, linked the term under analysis) and to the area of internal relations, which included the issuing of acts of economic management and all types of service orders. Ideological embellishments, which are not lacking in the cited work, by no means compensated for the inadequacy of the methodology, or perhaps of the imagination – factors without which defining a new class phenomenon was a rather breakneck task, not to say: unfeasible. I believe, moreover, that the authors of the work were fully aware of this.

The inclusion of service orders in administration in the group of administrative acts called "informal" ("without written form") in the cited study by the author's team would probably not raise a fundamental objection from the doctrine even today. However, the word "informal", which in the common law terminology is also used to refer to the informal administrative process,[20] brings to mind a different type of construction known to contemporary law and in the sphere of administrative jurisdiction, i.e. the one Stanislaw Kasznica wrote about.

Firstly, the concept of informal (de-formalised) acts or procedures is often used when decisions are taken that do not require the observance of generally applicable procedural rigours, in particular an oral order or prohibition. An example of this type of solution is the proceedings on site (*řízení na místě*) regulated by the provisions of the Czech Administrative Procedure Act of 2004.[21] According to Section

17 T Bigo , F Longchamps, A Chełmoński jr., B Graczyk, Z Janowicz, J Litwin, W Pawlak, J Sieklucki, M Zimmermann (1954) 93.

18 Ibid.

19 Ibid., 94.

20 See for example, E Gellhorn, RM Levin, *Administrative Law and Process in a Nutshell* (West Academic Publishing 2006) 166 et seq.

21 Czech Administrative Procedure Act č. 500/2004 Sb [2004].

143(2) of this act, a prerequisite for the imposition of an obligation under the distinguished procedure is the establishment of the facts of the case in the course of the ongoing activities of an authorised official person. The decision is announced orally, but will be delivered to the party in writing without undue delay. Unless otherwise provided by separate laws, an appeal against a decision does not have a suspensive effect. The decision issued must be confirmed by the authority, "on site" if requested by a participant in the proceedings (§ 67(3) of the Act)[22].

Secondly, the word "informal" is used to denote simplified modes of administrative proceedings or their outcome, which does not necessarily take the form of a decision of an administrative body. As a reaction to the numerous handicaps and inconveniences of the traditional institutions of administrative procedure, including its protractedness and overgrowth of procedural formalism, they have become the subject of many code-level regulations.[23] According to the Croatian Law of 2009 on General Administrative Procedure,[24] the simplified procedure is applied when the facts of the case can be reconstructed already at the stage of initiating the proceedings, without the need to undertake investigations and hear the party in the course of further proceedings. As simplified adjudication in administrative cases poses a potential threat to a party's procedural rights, its admissibility is subject to two conditions. The use of this procedure is limited only to: a) cases defined by law, b) that do not involve parties with disputed interests. In proceedings conducted ex officio, the handling of a case under this procedure takes place if a certain state of facts can be established on the basis of official information available to the authority, provided that it is not necessary to hear the party in order to ensure the protection of their legal rights or interests. Where the burden of duty is involved, the simplified procedure is also applicable in *urgent measures* cases, where the protection of human life or health or of property of significant value precludes the delay of a decision, there is an overriding public interest and the existence of a certain state of affairs is demonstrated or at least plausible. In the case of proceedings on application by a party, a summary judgment is possible when the application presents facts and evidence in support thereof to such an extent that the facts of the case can be reconstructed, or where the facts of the case can be reconstructed on the basis of facts that are generally known or known to the authority ex officio, or when the law provides for lighter standards of proof. This is understood as allowing the case to be decided on the basis of facts or circumstances that do not require full corroboration, or which are only indirectly established by evidence, or which have been made plausible if the assessment of all the circumstances indicates that the application deserves to be taken into consideration. Rules for the use of this procedure may also be set out in special provisions relating to particular areas of public administration. A natural supplement to this regulation is a regulation concerning the time limit for handling a case and the legal conse-

22 See M Szubiakowski, 'Postępowanie uproszczone – nowa instytucja polskiej procedury administracyjnej' [Simplified Procedure – A New Institution of the Polish Administrative Procedure] in Z Kmieciak, W Chróścielewski (ed), *Idea kodyfikacji w nauce prawa administracyjnego procesowego. Księga pamiątkowa Profesora Janusza Borkowskiego* [The Idea of Codification in the Science of Administrative Procedural Law. Commemorative Book of Professor Janusz Borkowski] (Wolters Kluwer 2018) 326–327 and Z Kmieciak, 'In the Circle of the Austrian Codification Ideas' in Z Kmieciak (ed), *Administrative Proceedings in the Habsburg Succession Countries* (Wydawnictwo Uniwersytetu Łódzkiego 2021) 33.

23 See Z Kmieciak, 'Koncepcja trybu uproszczonego w postępowaniu administracyjnym ogólnym' [The Concept of the Simplified Procedure in General Administrative Proceedings] (2014) Państwo i Prawo vol. 8, 98 et seq. and H Knysiak-Sudyka, L Klat-Wertelecka, 'Model administracyjnego postępowania uproszczonego' [Model of Simplified Administrative Procedure] (2016) Państwo i Prawo vol. 7, 97 et seq.

24 Zakon o općem upravnom postupku NN 47/2009 [2009].

quences of a failure to do so by an administrative authority. Unless specific provisions provide otherwise, issuing a decision under a simplified procedure and delivering it to the addressee should take place immediately, and not more than 30 days from the date of a correct submission of an application. A failure to comply with this time limit will be understood, where provided for in specific provisions, that the application was properly submitted by the party. A party can claim written confirmation of a "tacit" decision in accordance with its application.[25] Similar in content to the Croatian regulation, the provisions on the simplified procedure were incorporated into the APC relatively recently, by the Act amending the Code of Administrative Procedure and Certain Other Acts of 7 April 2017.[26] Previously, this procedure was regulated by special provisions, at least when it came to its essential components. These special provisions are now treated as *lex specialis* in relation to the framework code regulation.

Thirdly, the term "informal" is sometimes associated with automated decision-making procedures or a form of "algorithmic decision". However, this is misleading for the reason that the use of an algorithm in this variety of procedures, which determines the "path to the result", does not necessarily reduce the degree of procedural formalism of the activities in the initiative phase of the proceedings. It does, of course, change their regime and nature in the instruction phase, during which the collected evidence (data in the possession of the administration) is verified automatically, with the use of previously unknown information technology. This shortens and simplifies the path of proceedings, but at the same time raises problems that the administration did not have to deal with in Stanislaw Kasznica's time: the humanisation of administrative proceedings.[27] An automatic decision-making procedure, operating alongside the full and a summary procedure, was regulated, among other things, by the provisions of sections 39–43 of the Hungarian Act No CL of 2016 – the Code of General Administrative Procedure.[28] According to Section 50 of that code, if this procedure is triggered, the case is dealt with within 24 hours (in a "full" procedure within a maximum of 60 days, and in a summary procedure within 8 days).[29]

This part of the deliberations highlights the conventionality and fragility of the distinction once made between formal and informal administrative acts. This thesis is further strengthened by the emergence of a new category of acts, resolving individual cases with the participation of parties who do not have any legal interest (the concept of *Formalparteien,* originating from the Austrian tradition). The form of the decision is then "detached" from the material legal basis for the formation of the rights and obligations of the individual, which, by the way, contradicts one of the main assumptions of the

25 D Derda, 'Republic of Croatia' in J-B Auby (ed), *Codification of Administrative Procedure* (BRUYLANT 2014) 113 et seq.

26 Ustawa z dnia 7 kwietnia 2017 r. o zmianie ustawy – Kodeks postępowania administracyjnego oraz niektórych innych ustaw [Act of 7 April 2017 amending the Act – Code of Administrative Procedure and Certain Other Acts] [2017] JoL 935.

27 For a broader discussion of the problems emerging in this respect, see S Vernile, 'L'adozione delle decisioni amministrative tramite formule algoritmiche' in F Aperio Bella, A Carbone, E Zampetti (eds), *Dialoghi di diritto amministrativo* (RomaTrE-Press 2020) 107 et seq. and G della Cananea, A Ferrari-Zumbini, 'Thirty Years with the Administrative Procedure Act: a View from Italy' in Z Kmieciak (ed), *Contemporary Concepts of Administrative Procedure. Between Legalism and Pragmatism* (Wolters Kluwer 2023) 159–160. From the Polish literature on the subject, see F Geburczyk, 'Aspekty prawne w pełni zautomatyzowanego wydawania decyzji administracyjnych. Doświadczenia Francji i Niemiec' [Legal Aspects of Fully Automated Issuance of Administrative Decisions. Experiences of France and Germany] in M Szewczyk, L Staniszewska, M Kruś (eds), *Kierunki rozwoju jurysdykcji administracyjnej* [Directions of Development of Administrative Jurisdiction] (Wolters Kluwer 2022) 277 et seq.

28 2016. évi CL. törvény az általános közigazgatási rendtartásról, Magyar Közlöny No 200/2016.

29 Z Kmieciak (2021) 33.

law on administrative jurisdictional proceedings in European states.[30] A broad view of standing in individual cases decided by EU and Member State administrations was also advocated by the drafting of the ReNeual model rules. Apart from the addressee of the decision, these rules recognised as a party also others affected by "its negative effects", if they apply to participate in the proceedings. They also allowed the EU sector-specific rules to grant this status to "persons who are not affected by the negative effects of the decision" (Book III – Issuing administrative decisions in individual cases, principle III-1 and 2).[31] In the Polish legal system, the concepts of a decision and a party are still key elements of the codified administrative procedure.[32] However, they, too, are gradually beginning to take on a new meaning due to the rapidly evolving rules that are the source of the *locus standi*[33].

The handbook by Stanisław Kasznica did not devote more attention to the issue of silence by the administrative body as an alternative form of settling the case to a decision (the fiction of a positive or negative settlement for the party). The institution in question – established especially in the systems of Roman law,[34] became part of our legal order soon after Poland regained its independence. It became the subject of regulations concerning, among other things, building permits, the publishing of periodicals, the opening of printing plants, the registration of trade unions by labour inspectors and the approval by supervisory authorities of resolutions of local authorities concerning municipal taxes. At that time, the prevailing pattern was as follows: if the competent authority did not take a position within the period provided for by the substantive law (i.e. did not issue an administrative decision), the lapse of the period gave rise to a legal effect amounting to the party's request being deemed accepted. Given the content of the specific substantive law provisions, the silence of the administrative body was therefore tantamount to an implied (not expressed in written form) decision, and thus had a qualified, legally relevant character.[35]

This scheme was, in principle, maintained by the provisions of Chapter 8a, Section II of the APC. The only debatable issue is whether the legal effect of a qualified silence arises "spontaneously", as a result of the occurrence of the event that is the lapse of the time limit, or whether it is triggered by the application of the provision on administrative silence – the administrative authority deliberately waiting until a given time limit expires, after it has first made findings on the factual and legal state of the case. There are more arguments in favour of the first of these concepts, because, regardless of whether the administrative body makes the relevant findings (fulfils its duty to investigate the case), the expiry of the deadline automatically entails the legal effect specified in the provisions of law.[36] Significantly, the analysed construction of a tacit settlement

30 More extensively, Z Kmieciak, 'Koncepcja interesu prawnego w sprawach udzielania na wniosek banków zezwoleń na wykonywanie prawa głosu z akcji' [The Concept of Legal Interest in Matters of Granting, at the Request of Banks, Permission to Exercise Voting Rights Attached to Shares] (2006) Przegląd Prawa Handlowego vol. 6, 5–7; and Z Kmieciak, 'Węgierska ustawa o ogólnych zasadach postępowania w sprawach administracyjnych – koegzystencja dwóch wizji porządku prawnego?'[Hungarian Act on General Principles of Procedure in Administrative Matters – Coexistence of Two Visions of the Legal Order?] (2017) Państwo i Prawo vol. 4, 23–24.

31 See M Wierzbowski, A Kraczkowski (eds), *ReNeual. Model kodeksu postępowania administracyjnego Unii Europejskiej* [ReNeual. Model Code of Administrative Procedure of the European Union] (CH Beck 2015) 77.

32 Z Kmieciak, 'Poland' in J-B Auby (ed), *Codification of Administrative Procedure* (BRUYLANT 2014) 337.

33 See J Wegner, 'Locus standi in Administrative Procedure' in Z Kmieciak (ed), *Contemporary Concepts of Administrative Procedure. Between Legalism and Pragmatism* (Wolters Kluwer 2023) 95 et seq.

34 For more details J Wegner, *Instytucja milczącego załatwienia sprawy przez administrację publiczną* [The Institution of Tacit Settlement of a Matter by Public Administration] (Wolters Kluwer 2021) 24 et seq.

35 See B Wasiutyński, 'Milczenie władz administracyjnych' [The Silence of the Administrative Authorities] (1926) Ruch Prawniczy, Ekonomiczny i Socjologiczny vol. 4, 200 et seq.

36 More extensively Z Kmieciak, J Wegner, 'Evolution of the Tacit Consent in the Polish Administrative Law' in B Lewaszkiewicz-Petrykowska, D Skupień (eds), *Rapports Polonais. XXIe Congrés International de Droit Comparé/*

of a case was included – albeit only marginally – in the first Polish codification of administrative proceedings. This conclusion can be deduced from the wording of Article 70 § 1 r.p.a. There is a formulation therein: if a case has not been completely settled within the time limit set out either in this regulation or in special provisions, and if "individual legal provisions do not provide for special consequences in the event of the absence of a decision by the authority within a certain period of time, a party has the right to demand that the case be referred to a higher instance in order for it to be settled". In his considerations, Stanislaw Kasznica stopped at a general description of a party's right of devolution (a demand to transfer the examination of a case – in the case of a "backlog" – to a higher instance), making a brief mention of the solution adopted in French law. He recalled that "the failure of the authority to respond within the prescribed time is to be considered as equivalent to a refusal decision; the party is then entitled to bring an administrative court action"[37]. The failure to develop this thread is easily explained– in our circle of legal culture – by the lack of a tradition of tacitly handling cases by the administration and, understandably, the small scale of application of this institution in interwar Poland. In the present reality, when the legislator is more and more boldly introducing it into our legal system, the analysis of the issue of a qualified silence by the administrative body must be treated as an immanent part of the discourse devoted to the individual administrative act.

Research into the "circumvention" of the form of this act, which is an administrative decision, by other means of fulfilling administrative tasks, should also be considered an inherent element of scientific discourse today. The efforts made by the legislature in this respect are justified – one can assume – by utilitarian considerations, i.e. by striving to use the simplest possible means to achieve the set goals, and independently – by the desire to relax, in a selected group of cases, the procedural rigours proper for taking and judicial control of an administrative decision. Undoubtedly, the "purity" and methodological correctness of the created constructions suffers from this and, what is more, the standard of legal protection granted to an individual is weakened. Examples of provisions where the drafting would allow the decision (the position of the authority) to be qualified as a decision in a material sense, despite being a source of authorisation for actions taking a different, unnamed legal form, are, for example, Article 16 (1) of the Act on Supporting the Sustainable Development of the Fisheries Sector with the Participation of the European Maritime and Fisheries Fund of 10 July 2015,[38] Articles 10(4) and 11(1)–(5) of the Act on Local Development with the Participation of the Local Community of 20 February 2015[39] and Article 35(1) of the Act on Supporting Rural Development with the Participation of the European Agricultural Fund for Rural Development under the Rural Development Programme 2014–2020 of 20 February 2015.[40]

XXIst International Congress of Comparative Law (Wydawnictwo Uniwersytetu Łódzkiego 2022) 271 and 274 et seq. The difference between the silence of the administration in a strict or colloquial sense of the word and a qualified silence, i.e. one with which the legal provision binds the legal effect of settling the matter in the applicant's mind, was noted by B Wasiutyński. The former – passive behaviour of an authority – cannot be treated as a manifestation of a declaration of intent. Only specific circumstances accompanying the silence may – as he emphasised – give it a legal meaning, i.e. be considered as consent or refusal (B Wasiutyński (1926) 201–202).

37 S. Kasznica (1946) 108–109.

38 Ustawa z dnia 10 lipca 2015 r. o wspieraniu zrównoważonego rozwoju sektora rybackiego z udziałem Europejskiego Funduszu Morskiego i Rybackiego [Act of 10 July 2015 on Supporting the Sustainable Development of the Fishing Sector with the Participation of the European Maritime and Fisheries Fund] [2017] JoL 1267.

39 Ustawa z dnia 20 lutego 2015 r. o rozwoju lokalnym z udziałem lokalnej społeczności [Act of 20 February 2015 on Local Development with the Participation of the Local Community] [2018] JoL 140.

40 Ustawa z dnia 20 lutego 2015 r. o wspieraniu rozwoju obszarów wiejskich z udziałem środków Europejskiego Funduszu Rolnego na rzecz Rozwoju Obszarów Wiejskich w ramach Programu Rozwoju Obszarów Wiejskich na lata 2014–2020 [Act of 20 February 2015 on Supporting the Development of Rural Areas with the Participation

According to the first of these regulations, if the conditions for granting aid are not met, or the limit of the funds allocated to it under the operational programme, as provided for in Article 9(1), (2) or (3), has been reached, "the body competent to grant the aid in question shall inform the applicant in writing of the refusal to grant the aid, stating the reasons for this refusal." The legislator seems to have avoided indicating in which legal form this refusal is expressed, confining itself to specifying the obligation to communicate it and to explain the reasons for the refusal. The provision of Article 16(2) of the Act on Supporting the Sustainable Development of the Fisheries Sector with the European Maritime and Fisheries Fund, on the other hand, provided the applicant with judicial protection through the exercise of the right to "file a complaint to the administrative court on the principles and in the procedure specified for acts or actions referred to in Article 3 § 2 item 4 of the Law on Proceedings Before Administrative Courts of 30 August 2002" (hereinafter: the p.p.s.a.).[41] This variant of protection was also introduced by the other two acts, at the same time limiting the scope of application of the provisions of the APC in the cases regulated by them to the necessary minimum. Therefore, provisions delineating the principles of a simplified administrative procedure, autonomous in relation to proceedings of a jurisdictional type, showing many features of third-generation administrative procedures,[42] were included in them. However, in the latter law, the dichotomy of procedural solutions has been preserved, distinguishing – in addition to the autonomous one – a more complex procedure regime, subject to a much higher degree of code regulation. A model of regulation corresponding to this regime was also adopted in the Act on Payments Under Direct Support Schemes of 5 February 2015,[43] inserting a clause in its Article 3(1): "Subject to the terms and conditions set out in the provisions referred to in Article 1(1), the provisions of the Code of Administrative Procedure shall apply to proceedings in individual cases resolved by decision, unless the provisions of the Act provide otherwise". The absence of that reference would not give rise to the claim that the APC does not apply at all to matters settled by decisions to which the provisions of this act apply. Thus, its use can only be explained by the intention to signal the fact that it is not fully applicable in them and, in the case of the Act on Support for Rural Development with the Participation of the European Agricultural Fund for Rural Development under the Rural Development Programme 2014–2020, also by the intention to highlight the distinction between the two separate procedural regimes and the forms of termination of proceedings appropriate to them.[44]

Drafting the provisions of these acts, shaping the right to "file a complaint with the administrative court on the principles and in the manner specified for the acts or actions referred to in Article 3 § 2 item 4 of the Law on Proceedings Before Administrative Courts of 30 August 2002, also leads to interesting conclusions". The reference to the principles and procedure of

of Funds from the European Agricultural Fund for Rural Development under the Rural Development Program for 2014–2020] [2018] JoL 627.

41 Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi [Act of 30 August 2002, Law on Proceedings before Administrative Courts] [2019] JoL 2325.

42 A characterisation of this procedural model was provided by J Barnes, in works: J Barnes, 'Towards a Third Generation of Administrative Procedure' in S Rose-Ackerman, PL Lindseth (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2010) 336 et seq. and J Barnes, 'Administrative Procedure' in P Cane, HCH Hofmann, EC Ip, PL Lindseth,*The Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2020) 847 et seq.

43 Ustawa z dnia 5 lutego 2015 r. o płatnościach w ramach systemów wsparcia bezpośredniego [Act of 5 February 2015 on Payments under Direct Support Systems] [2018] JoL 1312.

44 Z Kmieciak in Z Kmieciak, W Chróścielewski (eds), *Kodeks postępowania administracyjnego. Komentarz* [Code of Administrative Procedure. Comment] (Wolters Kluwer 2019) 39–41.

appeal appropriate for this category of acts or actions indicates that the contested result of the proceedings is not a form of administrative action referred to in the cited provision (with a different legal qualification, the reference would be redundant). The legislator's intention was not to formally "assign" it to the group of administrative decisions. What was it then? Simplifying the matter a little, one can probably assume that a decision of a competent authority – materially constituting an administrative decision – has been subject to a hybrid regime of proceedings (including, in part, the provisions of the APC) and subject to the principles and procedure of judicial review binding in relation to acts and actions provided for in Article 3 § 4 of the APC. This type of procedural construction is a sign of our times and – in a sense – evidence of the pragmatism of the legislator, forced to solve problems that were previously unknown in practice.

Produced at the end of the first half of the last century, Stanisław Kasznica's work can be legitimately regarded as a concise synthesis of the achievements of scientific thought of his day, and at the same time as a "signpost" pointing out the directions of research. Under the conditions of the bygone era of socialism – which left a lasting trace in people's consciousness[45] – this was a serious challenge for at least part of the scientific community. It faced a dilemma: whether and to what extent the concepts developed in legal systems respecting the universal ideas of liberalism and *Rule of Law* could be adapted in a different political and systemic reality. Life has provided a fairly obvious answer to such a question. What we recognise as a product of the legal culture of many nations and the truth about it have survived, and even laid a strong foundation for the further development of the science of public law in Poland. The memory of our great predecessors, who underwent many hardships, exposed to the greatest inconveniences and trials, has also survived.

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45 Cf. in particular the comments on the phenomena of "hyperpositivism" and "lazy administrative spirit" made in reports on the Bulgarian and Croatian legal systems by V Paskalev, 'Implementation of the Pan-European General Principles of Good Administration in Bulgaria? It Would Be a Really Good Idea' in U Stelkens, A Andrijauskaitė (eds), *Good Administration and the Council of Europe. Law, Principles and Effectiveness* (Oxford University Press 2020) 504 et seq; and L Ofak, 'The Impact of the Pan-European General Principles of Good Administration on Croatian Administrative Law-Arising from the Case Law of the Croatian Constitutional Court' in U Stelkens, A Andrijauskaitė (eds), *Good Administration and the Council of Europe. Law, Principles and Effectiveness* (Oxford Univerity Press 2020) 688 et seq.

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Contemporary Central & East European Law

Water Service as a Means of Ensuring a Public Good and the River Basin Management Plan in the Context of Procedures for General and Specific Acts: EU Institutions Against the Background of Professor Kasznica's Work

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Abstract
The subject of the article is the institutions of European law as defined by the Water Framework Directive. They are mentioned in the title of the article. It is important that both of these institutions are described and analysed in the context of Professor Kasznica's scientific output concerning the manner of ensuring the use of a public thing (here, the water service) and in the context of the procedures of applying general and specific acts (here, the river basin management plan). It is shown that the scientific theses of the professor remain valid also in the context of the regulations of European administrative law.

Keywords
water law; water service; public goods; administrative general act

1. Introduction

In the outstanding academic work of Professor Stanisław Kasznica, two fields of activity can be highlighted and addressed in this publication: firstly, the subject of administrative law and the purpose of public administration bodies, and secondly, the mode of action of administration and administrative law directly (in those cases where administrative jurisdiction is not required, or the organisational activity of public administration bodies is based on the law). Considerations on both issues can be found in the book entitled *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* (*Polish Administrative Law: Basic Concepts and Institutions*)[1]. In it the professor describes the concepts of a public good and rationing law. He calls rationing law the right of administrative

1 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Księgarnia Akademicka 1947).

authorities to issue general norms under the name of regulations[2]. He also describes the concept of a public good by calling them things for common use[3]. In his words: "These are things which can be used to a certain extent by everyone without separate permission"[4].

The public authority thus achieves its objective by means of administration, either by using procedures which make it possible to create general acts or by means of legislation, the application of which does not require administration in order to protect the enjoyment of a public good. In the first case, the administration may also enter the field of legislation. This generally involves regulations. According to the current Constitution of the Republic of Poland, regulations are sources of law. The professor argues that issuing them is an "[e]xtension of the scope of action of administrative authorities beyond the scope of the administrative function into the field of legislation". Of course, he is writing about the state of law relevant to the March Constitution. He goes on to say that "[a]dministrative authorities have the right to issue general norms under the name of regulations. This is the so-called rationing right of administrative authorities"[5]. On the other hand, when it comes to public goods, the professor states that "[l]egal norms concerning public goods have a public-legal character. Wherever it comes to the public service of this good, only the provisions of administrative law apply." Thus, we are dealing here with a situation in which the state achieves its objectives by legislating for direct application. The actions of the administration may consist, for example, in maintaining the proper condition of a good, access to which is determined by administrative law. Therefore, the state often nominates entities responsible for the maintenance of roads, forests or waters. One can describe these entities and their role as the stewards of a specific public good.

In his book, the professor refers to the various purposes and subjects of public administration and administrative law. One such area is water law[6]. The principle defined therein, today called the principle of universal use of water, concerns the use of this good. In the context of the role of the administration as a landlord, one can also note the development of this approach and the influence of European law – this is the new institution of water services. In the water law one can also find an example of an action that corresponds to the rationing legislation defined by the professor. It is about establishing by regulation a water management plan in a river basin area. The following section considers each of these issues separately.

2. Water services and the common use of a public good

Professor Kasznica cites access to water as one case in which administrative law regulates universal access to a public good. In this context, he mentions public waters, the sea coast, public wells and others. In doing so, he expresses his position that access to water, next to the use of roads, is the most common and for this reason the most important case of using a public good. The professor points out that public goods are universally accessible for two different reasons: 1) from nature, as with air or water, or 2) from their legal status, as with roads.[7] Nowadays, it can be seen, I think, that access to water also has a universal status. Whilst air cannot be physically captured and made a rationed good, the situation is different for water. In the current legal status, rivers, streams,

2 Ibid., 16.
3 Ibid., 161.
4 Ibid.
5 Ibid., 16.
6 Ustawa z dnia 20 lipca 2017 r. – Prawo wodne [Act of 20 July 2017 – Water Law] [2022] JoL 2625.
7 Ibid., 161.

groundwater and the territorial sea and internal sea waters are owned by the State Treasury (this is stated in Article 211(2) of the Water Law)[8]. The network of flowing waters can be compared to roads; likewise, some rivers and canals constitute waterways. Therefore, although waters are part of nature, like air and unlike roads, their status is the effect of a legal norm contrary to that of air. Highlighting the differences with regard to the use of water and air, it can be noted that in the modern world it is difficult to imagine a rational legal provision stating that everyone has the right to breathe the air in the atmosphere.

When one compares the status of waters according to the 1922 Water Law – which the professor writes about in the book – with the current regulation contained in the 2017 Act, one can see some differences. Firstly, in the former law, waters were public not because of their characteristics (e.g. because they are flowing) but only as long as they were not private. The Water Act[9] states in Article 1 that "[w]aters are either public or private. The former are public property (part of the public good), the latter are private property." In turn, Article 2(1) of the Water Act states that "[a]ll waters are public unless by virtue of this Act (Article 4) or as a result of special legal titles they are privately owned." Article 3(1) of the Water Act provides that "[p]rivate flowing waters and lakes may by legislation be categorised as public waters in the public interest." The statutory procedure for the acquisition of flowing waters is noteworthy. The professor states after the content of Article 4 of the Water Law that by law, the water from precipitation, reservoirs, groundwater and springs located on private land is the private property of the owner. Meanwhile, the contemporary Water Law states that flowing waters and groundwater are the property of the State Treasury. Article 211 of the 2017 Water Law stipulates that "[w]aters of the territorial sea, internal marine waters, inland flowing waters and groundwater are the property of the State Treasury." Thus, the ownership of statutory waters vested in the state has been broadened.

In his book, the professor identifies three types of use of a public good: ordinary, enhanced and special.[10] As he states about ordinary use, it results from the "inherent properties of the thing". The use of a public good in this case is protected and regulated by order regulations (police regulations according to the language of administrative law at the time). Enhanced use, on the other hand, involves the use of a public good to a wider extent. As a rule, as the professor states that this applies to the owners of the "realty", i.e. the real estate located next to the public good. In general, such use of a public good already requires an administrative permit. Special use, on the other hand, consists in such advanced use of a good that its substance is interfered with, e.g. "building on a river a bathing facility or water damming equipment, setting up a ferry, etc."

In this context, it is worth pointing out that the Water Law of 1922 distinguished the so-called general use of waters. Article 21(1) of this law stipulates that:

> [p]ublic waters may be used by anyone without separate permission of the authority in an ordinary manner that does not exclude the same use by others: for bathing, washing, washing, watering and swimming, riding in boats, slipping and drawing water with hand vessels for household purposes. With the same restriction, everyone is allowed to discharge ordinary or used farm water into public running waters. However, the discharge of polluted water through common facilities (sewers) does not fall under this provision. Neither the course and quality of the water and its banks may be impaired by the above-mentioned use, nor may it infringe upon the rights of others or cause damage

8 Ibid.

9 Ustawa wodna z dnia 19 września 1922 r. [Water Act of 19 September 1922] [1928] JoL 574.

10 S Kasznica (1947) 163.

> to anyone. In addition, police regulations must be observed at all times and this may only take place in places that have been designated for this purpose, using the accesses permitted for this purpose.

These three types of use of a public good basically correspond to what modern water law refers to as common, ordinary and special use of water (Articles 32, 33 and 34 of the Water Law, respectively). Common use is available to everyone, ordinary use has to do with the ownership of the property and special use refers to the economic use of water. Article 211(3) of the Water Law also stipulates that waters belonging to the State Treasury (also local authorities, in this case ponds and other waters which are not running waters) have the status of public water. The waters of the State Treasury and local government units are therefore a public good.[11] In this concept, legal science distinguishes three groups of property: 1) administrative property, 2) property whose purpose is to generate profit and 3) things of general use.[12] The last group includes water.

In this context, it is necessary to point out a novelty in the current Water Law, i.e. water services. This institution did not exist when the professor was writing his book, which does not mean that public entities did not carry out certain types of activities which are nowadays called water services. This institution is a sign of the times for two reasons: firstly, because its introduction into Polish law is the result of the influence of European Union law, and secondly, because it is the result of thinking that in the field of water management the state not only defines the rules of rationing, but also actively acts as a public service provider providing access to this critical public good. The origin of the water services institution is the Directive establishing a framework for Community action in the field of water policy.[13] This act has substantially cleaned up European water law by implementing the tenets of the legal institution of environmental security.[14] Water services make it possible to use water within a statutorily defined scope. According to the Act, water services consist in providing water use beyond the scope of common, ordinary and special water use. Water services are to be provided to businesses, but also to public entities and households. In addition to this general definition of what water services are, the legislature has, as in the case of special water use, established an enumerative catalogue of activities within water services: extracting groundwater or surface water or discharging sewage into waters or into the ground, which includes discharging sewage into water facilities. As noted:

> [t]his framing of the definition of water services is of a mixed nature and is a directional definition of the purpose of water services, while at the same time developing a classification of the types of these services. Subjectively, the definition has been constructed according to the concepts defined in the Act (including those defined in the "glossary"), which means that in the practice of applying

11 J Stelmasiak, L Bielecki, 'Rzecz publiczna a ochrona środowiska w samorządzie gminnym' [Public Interest and Environmental Protection in Municipal Government] in M Szewczyk (ed), *Z problematyki prawnej samorządu terytorialnego, Księga dla uczczenia 70. Rocznicy urodzin oraz 45. Rocznicy pracy naukowej Profesora Zbigniewa Janku* [On the Legal Issues of Local Government, a Book to Commemorate the 70th Anniversary of the Birth and the 45th Anniversary of the Scientific Work of Professor Zbigniew Janku] (Wydawnictwo Naukowe UAM 2017) 239. See also A Wilczyńska, P Wilczyński, 'Lasy jako dobro publiczne' in A Kaźmierska-Patrzyczna, P Korzeniowski, M Stahl (eds), *Problemy pogranicza prawa administracyjnego i prawa ochrony* środowiska [Problems on the Border between Administrative Law and Environmental Protection Law] (Wolters Kluwer 2017) 498.

12 Z Leoński, *Materialne prawo administracyjne* [Substantive Administrative Law] (CH Beck 2009) 139.

13 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L 327 .

14 P Korzeniowski, *Bezpieczeństwo ekologiczne jako instytucja prawna ochrony środowiska* [Ecological Safety as a Legal Institution of Environmental Protection] (Wydawnictwo Uniwersytetu Łódzkiego 2012) 282.

> the provisions of the new Act, after its entry into force, it will be indispensable to make a systemic interpretation, taking into account the meaning of all the defining elements, clarifying the conceptual scope of "water services".[15]

According to the definition in Article 2(38) of the Directive, water services means all services which enable households, public bodies or any economic activity (a) to abstract, dam, store, treat and distribute surface water or groundwater and (b) to collect and treat waste water which is subsequently discharged into surface water. It is thus clearly defined that the services are intended to enable the use of water resources. Therefore, it can be assumed that water services are activities intended to ensure that the recipient has the possibility to use water beyond the framework, common, ordinary and special uses of water. In this connection, it can be pointed out that the legislature envisages a new fourth category of water use, which has no name and is the most far-reaching category of water use. The provision of water use within this category is a water service. The management of water resources serves to meet the needs of the population and the economy as stated by the Water Law in Article 10. Meeting needs has thus been recognised as an objective of the water resources administration.[16] Water services can therefore be a bilateral legal relationship. It has been noted in the literature that such a relationship is not present in the case of navigation or flood protection activities, for example, but it is present in the case of water supply or sewage disposal.[17] Although the accuracy of this observation depends on how broadly water services are understood, this issue was the subject of a dispute before the Luxembourg Tribunal, as discussed below.

Water services are not performed as part of economic activity. The name "service" transferred directly from European law (as discussed below) creates terminological confusion. In fact, we are dealing with an activity of a public administration entity whose aim is to provide access to a specific water use. The organisation of these services is provided by a state legal person, i.e. the state's water management authority – Wody Polskie (Polish Waterways). It is worth adding that Wody Polskie is a foundation-type entity.[18] It is a state legal person which is endowed with public assets. It can also be qualified as an entity from the circle of state agencies.[19] Pursuant to Article 240(6)(4) of the Act, State Water Management – Wody Polskie – among its numerous tasks as part of its economic activity, it may provide services in the field of cargo and passenger water transport. These are economic services, not water services.

Water services are to be paid for – the principle of recovering costs for water services applies under Article 9 of the Directive. This is to ensure efficient, economical management of water resources

15 A Kozieł, 'Nowe prawo wodne – istotne zmiany systemowe i ich wpływ na działalność geologiczno-górnicza' [New Water Law – Significant Systemic Changes and their Impact on Geological and Mining Activities] (2016) Zeszyty naukowe Instytutu Gospodarki Surowcami Mineralnymi i Energią Polskiej Akademii Nauk vol. 96, 137.

16 P Szreniawski, 'Rzeki a samorząd terytorialny' [Rivers and Local Government] in M Szewczyk (ed), *Z problematyki prawnej samorządu terytorialnego, Księga dla uczczenia 70. Rocznicy urodzin oraz 45. Rocznicy pracy naukowej Profesora Zbigniewa Janku* [On the Legal Issues of Local Government, a Book to Commemorate the 70th Anniversary of the Birth and the 45th Anniversary of the Scientific Work of Professor Zbigniew Janku] (Wydawnictwo Naukowe UAM 2017) 296.

17 M Sobota, 'Europejski system opłat za usługi wodne jako instrument kształtowania zasady zwrotu kosztów i zasady zanieczyszczający płaci' [The European System of Charging for Water Services as an Instrument for Shaping the Principle of Cost Recovery and the Polluter Pays Principle] (2022) Ius Novum 16(2), 188.

18 J Zimmerann, *Prawo admnistarcyjne* [Administrative Law] (Wolters Kluwer 2012) 131.

19 R Michalska-Badziak, 'Podmioty administrujące' [Administering Entities] in M Stahl (ed), *Prawo administracyjne, pojęcie, instytucje, zasady w teorii i orzecznictwie* [Administrative Law, Concept, Institutions, Principles in Theory and Jurisprudence] (Wolters Kluwer 2013) 279.

to achieve environmental objectives. Against this background, the scope of the concept of water services as defined by the Directive was a subject of dispute. In its judgment of 11 September 2014 in Case C-525/12, the Court of Justice dismissed the action of the Commission against the Federal Republic of Germany, which was also supported by Denmark, Austria, Hungary, Finland, Sweden and the United Kingdom.[20] At issue before the Court was the fact that the Commission alleged that Germany, by limiting the scope of the term *water services*, had thereby restricted the collection of charges. Germany and the countries supporting it adopted the interpretation that activities such as damming water for energy production, navigation and flood protection, for example, were not water services. Meanwhile, the Commission pushed for the position that "in the interest of water resources, different uses of water should have a price". The Commission also stated that "[c] onsequently, Member States are obliged to set charges for the different forms of water use, even if these forms cannot be considered provision of services in the traditional sense of the term. Thus, navigation itself should already be subject to a charge." In this context, the Court noted that the charges are also intended to reimburse costs not only for services in the *sensu stricto* but also for the environment and resources. Germany also argued that:

> [w]ith regard to the definition of the concept of services, the Federal Republic of Germany submits that the definition in Article 57 TFEU should be used and requires the existence of a bilateral relationship, which is absent, for example, in the case of the use of water for navigation or in the case of flood protection measures, but which is established in the case of water supply and sewage treatment activities.

It was also correctly noted that "the broad interpretation adopted by the Commission of the concept of water services leads in practice to the negation of the existence of other forms of water use, which are nevertheless identified in Article 2(39) of Directive 2000/60." The Commission, in turn, noted that "in environmental law, services do not require human participation, as is evident from the Millennium Ecosystem Services Assessment produced by the United Nations in 2001 (CREDOC, Biotope, Asconit Consultants, 2009)." Here it is worth mentioning that Article 2(39) of the Directive defines the concept of water use in such a way that water services can be understood as only one type of water use. This interpretation confirms the correctness of the Polish legislature's implementation of the Directives as mentioned above. The Court dismissed the Commission's appeal. In the judgment it did not clearly define the scope of the definition of water services. Instead, it ruled that the directive does not require the introduction of an obligation to pay charges by way of reimbursement for each water use activity.

2.1. Conclusions

To sum up this part of the discussion, I think it can be said that, compared to the administrative and legal regulations which Professor Kasznica described, there has been a development in the rules of access to water related to the need to protect it. This has to do with the greenhouse effect and the widespread problem of water shortages in Europe, as evidenced for example by the European Environment Agency's report.[21] The administration must act to ensure that everyone and the economy has access to this life-giving resource. It is not enough just to lay down rules

20 Judgment of the Court C-525/12 EU:C:2014:2202.

21 'Water stress is a major and growing concern in Europe' (2021), <https://www.eea.europa.eu/highlights/water-stress-is-a-major> accessed 28 Jan 2023.

for its use. It is necessary to actively promote the use of water as a public good. This action must be taken by the state administration. In terms of the difference between economic services and water services within the meaning of the Directive, it can be pointed out that water services are classified as public services, which means that they can be offered either by public or private companies, with the proviso that public authorities are responsible for ensuring the quality and availability of these services. Therefore, the provision of water services in terms of availability, standards and payment is subject to strict administrative and legal regulation.

3. The River Basin Management Plan – Against the Background of the Different Modes of Issuing General Administrative Acts

As can be seen from the provisions of the Treaty on the Functioning of the EU,[22] the field of the environment falls within the Union's tasks. According to Article 4 of the TFEU, in this area the Union shares competences with the Member States.[23] This applies to an important extent to water management.[24] Of course, the scope of European regulation is determined by respect for principles such as proportionality and subsidiarity. The Union should carry out its legislative activity insofar as it is required at that level and insofar as legislative measures taken at the Union level are necessary. However, it should be noted that water management is, by its very nature, an area subject to quite substantial legislative regulation at the Union level. Water management cannot be contained within national boundaries. Watercourses, river basin districts and groundwater all transcend boundaries. On the other hand, water is essential for human life and health and for the functioning of the ecosystem in which humans live. Nowadays, a huge challenge for civilisation is climate change. These phenomena cause problems in the supply of sufficient freshwater, for both people and nature. These issues are of cardinal importance for the water management of countries, which is what the Union is concerned with, and as has been noted, they are of a transboundary nature.

In view of the above-mentioned issues and the need for common, EU-wide care for water management and the adopted principle of national authorities applying EU law, the institution of a river basin management plan appears in this Directive, and thus in the Polish Act. This plan, in a model approach, should be shaped and implemented by national authorities of Member States working together – insofar as it covers a river basin on the territory of several countries. It is worth noting that the preamble to the Directive points out the following: "The success of this Directive depends on close cooperation and coherent action at Community, Member State and local level as well as on information, consultation and involvement of the public, including users." Furthermore, paragraph 35 of the preamble reads:

> Within a river basin district where water use may have transboundary effects, the requirements for achieving the environmental objectives established under this Directive, in particular in any programmes of measures, should be coordinated for the whole of the river basin district. For river basins extending beyond the boundaries of the Community, Member States should endeavour to ensure appropriate coordination with the relevant third countries.

22 Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202, 1.
23 W Hackenberg, *Europarecht* (CH Beck 2018) 28; M Herdegen, *Europarecht* (CH Beck 2019) 213.
24 M Herdegen (2019) 474.

In pursuit of the objectives set out above, Article 13(2) of the Directive states that:

> [i]n the case of an international river basin district falling entirely within the Community, Member States shall ensure coordination with the aim of producing a single river basin management plan. Where such a plan is not produced, Member States shall produce river basin management plans covering at least those parts of the international river basin district falling within their territory to achieve the objectives of this Directive.

It follows from the above provision that Member States should aim to produce a single management plan for an international river basin district. However, the second sentence of the said provision also foresees a situation where coordination between Member State authorities fails and a common plan is not produced. In such a situation, Member State authorities are obliged to develop a plan for their territory which can ensure that the objectives of the Directive are met. The scope of the plan is defined in Article 318 of the Water Law. In the context of this plan, the concept of a river basin district, which is much broader than the river basin itself, is essential. Indeed, as follows from Article 16(31) of the Water Law, a river basin district comprises, firstly, an area of land and sea. In addition, an area may consist of one or more adjacent river basins. It also includes groundwater, internal marine waters, transitional waters and coastal waters. Importantly, the river basin district is the main spatial unit of water management. The plan is therefore prepared for the river basin district.

The current River Basin Management Plan takes the form of a regulation of the Council of Ministers. Consequently, it should be published in the Journal of Laws and has the value of a generally binding act. There has been a change in this respect, because before June 2011 the Plan was a resolution of the Council of Ministers and was published in Monitor Polski. The legislature justified this change by stating that:

> [t]he introduction of such a regulation is important for the role played by river basin management plans in the water management planning system and their environmental significance. It will also exclude legal doubts in relation to the reference to the findings of water management plans in the content of water permits.[25]

In this context, the important issue arises of whether the form of the regulation is adequate for the role played by the Plan. A regulation is an act implementing a law in the light of the Constitution of the Republic of Poland, whilst the Plan does not have such a character. Indeed, the act is an example of a general administrative act. The addressee is defined generally, but the circumstances are specified. This is an act that concerns a specific space. There must be a process of subsumption to determine the arrangements in this act. The whole process of developing the content of the plan is making a lengthy, detailed and comprehensive factual determination of the river basin area. Such an exercise corresponds to the essence of a general administrative act.[26] The unresolved change of form from a resolution of the Council of Ministers to a regulation of the Council of Ministers is further evidence of the problem of issuing general administrative acts in the Polish legal system.[27]

25 Explanatory Memorandum to the draft amending the Water Law Act and certain other acts, Parliamentary Print No. 2106 <https://sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=2106> accessed 1 Aug 2024.

26 E Szewczyk, M Szewczyk, *Generalny akt administracyjny* [General Administrative Act] (Wolters Kluwer 2014) 91.

27 Ibid., 187.

The provisions of the current Water Law also provide another example of the issuing of general administrative acts by establishing rules for determining development conditions in areas of special flood risk. This refers to the possibility to designate these areas for development in the local spatial development plan after obtaining permission in the form of an administrative decision, which also specifies the requirements for the location of new development. Such decisions are issued, *inter alia*, as part of the procedure for drawing up a local spatial development plan. They are issued by the director of the Regional Water Management Board of Wody Polski. At the stage of preparing a draft local spatial development plan, Article 166(2)(5) of the Water Law applies, which stipulates that it must be agreed with the Regional Director of the Water Management Board of Wody Polski as regards the development and use of land located in areas of special flood hazard. This authority issues an administrative decision when making its agreement (Article 166(5)).

The administrative decision in question is issued as an agreement on the draft local development plan. If the planned development is approved, the decision contains independent findings on the requirements and conditions for it. The decision can therefore be regarded as an additional necessary element to the planning arrangements. The development conditions are therefore determined simultaneously based on the local plan and the decision. The decision is a separate act. It is also taken under a separate procedure, i.e. administrative proceedings regulated by the Code of Administrative Procedure.[28] Nevertheless, its issuance is an element of the planning procedure and its findings are related to the findings of the local spatial development plan. Therefore, it is not an act which, irrespective of the findings of the local spatial development plan – such as establishing a conservation protection zone – regulates the possibility of undertaking construction activity. Both acts, i.e. the local spatial development plan and the consenting decision of the Polish Water Authority, are related, one could say. Not only are they to be applied simultaneously, but each of them separately is inapplicable. As the statement of the conciliating authority is binding in nature, it is assumed that it has the co-competence to take a decision and not the competence to control the authority issuing the decision.[29] This seems to be a special case of co-competence, where two authorities decide a case by each issuing their own act. Administrative decisions are individual in nature. Meanwhile, the essence of the decision is not only an expression of consent to the findings towards its addressee, i.e. the authority drafting the draft local spatial development plan. The decision, as indicated, also contains independent findings, as it specifies requirements for future projects. Thus, it will undoubtedly be used by entities designing construction projects or by bodies issuing, for example, building permits. The decision therefore has a number of addressees, but their scope is defined generally, i.e. it is addressed to anyone who wishes to build in an area at particular risk of flooding, or to those who will adjudicate in such cases. On this basis, it can be concluded that it is a general act.[30] The essence of a general administrative act consists of:

(1) belonging to the legal forms of application of substantive administrative law and
(2) the general and specific nature of the standards.[31]

28 Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [Act of 14 June 1960 Code of Administrative Procedure] [2017] JoL 1257.

29 B Adamiak, J Borkowski, *Kodeks postępowania administracyjnego. Commentary* [Code of Administrative Procedure. Comment] (CH Beck 2006) 495; M Matczak, *Kompetencja organu administracji publicznej* [Competence of a Public Administration Body] (Kantor Wydawniczy Zakamycze 2004) 54.

30 E Szewczyk, M Szewczyk (2014) 91. This is also how this type of act is referred to in German law – see H Maurer, *Allgemeines Verwaltungsrechr* (CH Beck 2009) 207.

31 E Szewczyk, M Szewczyk (2014) 92.

Undoubtedly, the concreteness of the norms manifests itself in relation to a specific place – the special flood risk area – where this particular act is to be respected. This act can be regarded as determining the status of that place. Thus, it belongs to the group of general administrative acts directed at things identified as such.[32]

The decision of the Water Authority is issued in the process of applying the law based on the formula of legal syllogism. The syllogistic conception of the application of law is derived from legal positivism,[33] whereby the legal syllogism is a model of the application of law with two types of premises – factual and legal – as well as a conclusion resulting from the subsumption of these premises. The legal premise is the general and abstract norm properly interpreted, the factual premise is the factual findings to which legal consequences are to be attached and the conclusion is the resolution in the form of an individual, concrete norm. The legal syllogism formula is also appropriate for the process of issuing a general administrative act.

It is worth noting that the creation of local spatial development plans, thus formally in the legislative process, involves similar activities. In order for a local spatial development plan to be drafted, it is necessary to establish the actual state of development of a given (specific) area and to establish the rules for its future development. The legislature decided that the local spatial development plan is an act of local law, though this does not change the actual character of at least some of its findings.[34] Indeed, to a large extent the act bears the characteristics of a general administrative act. Acts of local law are a source of law. At the same time, the determinations and the manner of their determination indicate that this is a specific and general act. It sets out specific rules for the development of specific properties. Very often it stipulates specific development parameters. In the process of drafting such an act, it is necessary to take into account the specific circumstances, i.e. the urban development conditions of the place in question. This is obviously connected with the urban planner. Therefore, the construction of the local plan is also based on the formula of legal syllogism. From the point of view of administrative law, this act should be assigned to general administrative acts and acts of law application.

Another example of a general act which is also an act of application of the law is an order of a *starost* approving the permanent organisation of traffic on a public road. The resolution of the 7th panel of judges of the Supreme Administrative Court of 26 June 2014 attempts to define the nature of such acts. The justification of the resolution reads:

> In the terms needed for the present considerations, it is possible to define traffic management as the regulation of the manner of movement on roads, the exercise of authority over the organisation of traffic carried out by issuing certain directives and orders in the form provided for by law and by a competent authority. The act of approving a road traffic organisation project is not normative in nature, even though it sets out certain rules of behaviour that may resemble rules that fall within common legal norms. Although it creates a new legal situation for the addressees of the act, it cannot be considered a general normative act. Traffic management on roads, including the approval of traffic organisation on roads, is not a form of legislating, but a form of applying legal rules. It belongs to the category of acts of management by application of legal norms.

32 Ibid., 149.

33 S Wronkowska in: S Wronkowska, Z Ziembiński (eds), *Zarys teorii prawa* [Outline of Legal Theory] (Ars Boni et Aequi 2001) 52; See also T. Spyra, *Granice wykładni prawa Znaczenie językowe tekstu prawnego jako granica wykładni* [Limits of Legal Interpretation. The Linguistic Meaning of a Legal Text as a Limit of Interpretation] (Wolters Kluwer 2006) 110.

34 Cf E Szewczyk, M Szewczyk (2014) 95.

The subject of the Supreme Administrative Court's consideration was whether the provision of Art. 3(2)(4) or Art. 3(2)(6) p.p.s.a. constitutes a basis for challenging this act.[35] The court analysed the views of the judiciary and legal scholars, finding that:

> [s]umming up these considerations, it should be stated that in the interpretation of the notions of act and actions regulated in Article 3 para. 2 item 4 of the p.p.s.a., it is agreed that they are not decisions but they belong to the scope of public administration, they concern an individualised subject, although they may also show the features of a general act, that they should rule on the nature of the connection with the rights and obligations set out in the applicable law. These features, however, allow the conclusion that the approval of the traffic organisation does not fall within this framework, first of all because the condition of individualisation of the act or action is not fulfilled, as well as because of the lack of connection with the right or obligation arising from the law made in this manner. Moreover, there is no implementation of a concretised legal norm here, but the creation of a norm of desirable behaviour on the road in traffic.

However, the Supreme Administrative Court in the resolution assumed that this is not only a general act but also an abstract act, despite the fact that it is an act of law application. The following remark was made in this context:

> Once again, it is fair to emphasise that the approval of traffic organisation is of a general and abstract nature, creates a new legal situation for road users and does so generally – on the principle of universality of access. Meanwhile, the acts and actions referred to in Art. 3 § 2 item 4 of the p.p.s.a. are acts or actions of individual character, concerning rights or obligations arising from the provisions of law. Acts executing road administration tasks are acts of public authority, because they interfere in the matter of using public roads, specifying their network, method of financing, quality, parameters, maintenance in serviceability. Therefore, the argumentation in favour of recognising the approval of traffic organisation as an act under Article 3 § 2 item 6 of the p.p.s.a. is more convincing. It is based on the conclusion, arising from the analysis of the legal state, on the effects of approving traffic organisation referring to the creation of a legal situation by establishing new rules of traffic organisation of a general and universal nature, and thus is not limited to the organisational and technical scope, and is not a one-off activity (so, e.g. the Supreme Administrative Court in the judgement of 8 March 2012, I OSK 1993/11). It is a peculiar activity of a local government body.

However, one may doubt whether we are really dealing here with an abstract act. An ordinance on the organisation of road traffic concerns the approval of a specific document containing rules for the movement of, inter alia, cars on a specific designated road. It is therefore a general administrative act. Taking this view in the context of this publication, it is worth noting that this is another form in which this type of act is issued. It may be added, however, that the basis for a complaint to the court could be Article 3(2)(4) p.p.s.a. Contrary to what the Supreme Administrative Court has established, this provision is not limited to cases of individual acts.[36]

35 Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi [Act of 30 August 2002, Law on Proceedings before Administrative Courts] [2022] JoL 329.

36 The control of public administration activities by administrative courts includes adjudication of complaints against [...] other than those specified in points 1–3, acts or activities of public administration concerning rights or obligations arising from the provisions of law, excluding acts or activities undertaken as part of administrative proceedings specified in the ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [Act of 14 June 1960 Code of Administrative Procedure] [2017] JoL 1257.

These cases involve the issuance of specific and general acts by public authorities. Examples include establishing a water management plan in a river basin district, issuing an administrative decision to accept a local plan in flood risk areas (and setting conditions for construction projects), adopting a local plan and approving traffic organisation on a public road by ordinance. Each time, the authority issues a specific general act, defining general rules in a specific case in the broadest sense of the public interest. Issuing general acts in specific cases is an intermediate situation between the application of law and lawmaking. Polish law does not specify the procedure for such decisions, leading to their issuance through either the legislative procedure (as in regulations), the local law procedure (as with the river basin management plan or local spatial development plan) or a jurisdictional administrative procedure as laid down in the Code of Administrative Procedure (such as administrative decisions by Wody Polskie defining conditions for construction in flood risk areas). Another example is the approval by ordinance of a traffic organisation project on a public road, showing that an independent procedure for issuing general acts of law application is possible. These decisions can be viewed as rationing lawmaking in the sense described by Professor Kasznica in his book. This type of administrative activity is likely to develop due to the complexity of facts requiring general rules, whilst regulating matters in abstract terms may be inadequate. The administration's role is to transfer the general dispositions of the legislature to specific cases, blurring the boundary between lawmaking and law application. The difference, of course, is that we are dealing with specific cases. However, this does not change the fact that by enacting norms of a general nature, the administration largely acts as a lawmaker. Thus, Professor Kasznica's description of this activity as rationing legislation accurately reflects its essence.[37] This problem is also indicated by the above quote from the Supreme Administrative Court concerning the qualification of the act of approving traffic organisation on a public road. In this context, the professor even speaks of extending the scope of action of administrative authorities beyond the administrative function into the field of legislation.

The problem of the boundary between an act of applying the law and a normative act is also present in the science of European administrative law. The literature points out that the acts issued by the Commission, in addition to being concrete, may also contain normative elements.[38] Implementing are acts issued in abstract circumstances and at the same time general acts having the character of regulatory acts. As indicated, they are specific administrative acts of European law. They serve to implement the obligations set out in European derived law.[39] It is an action of an administrative nature. In other words, these acts perform the typical administrative function of a management instrument – in this case towards generally defined addressees. Regulatory implementing acts are administrative acts in the sense that they constitute an instance of administrative action. They do not create statutory norms or even norms corresponding to the content of delegated acts (i.e. supplementing or not substantially amending an act of a legislative nature). They are general acts as far as the definition of the addressee is concerned. They may bind the Member State and the administered entities. Regulatory acts have the character of specific administrative acts of European law. Their specificity lies in the fact that prima facie they could

37 S Kasznica (1947) 16.

38 T Oppermann, CD Classen, M Nettesheim, *Europarecht* (CH Beck 2018) 134; M Pechstein, C Nowak, U Häde, *Frankfurter Kommentar zu EUV, GRC, AEUV* (Mohr Siebeck 2017) 920; M Niedźwiedź, 'Administracyjne wykonywanie prawa Unii Europejskiej' [Administrative Implementation of European Union Law] in R Hauser, Z Niewiadomski, A Wróbel. (eds), *Europeizacja prawa adminsitracyjnego* System Prawa Administracyjnego [Europeanization of Administrative Law. Administrative Law System] (CH Beck 2014) 136.

39 M Pechstein, C Nowak, U Häde (2017) 924.

be considered to be normative in nature – but it must be borne in mind that they are acts of law application; they are not normative acts, but are issued under abstract circumstances. The Polish literature indicates that one of the fastest growing areas of European administrative law is regulatory law. The relevant acts usually concern sectors of the economy involving infrastructure networks (e.g. telecommunications, energy or railways).[40] It is possible to identify a number of regulations issued under the executive procedure, which should be regarded as regulatory acts.[41] Similarly, in the case of executive decisions, there are those that can be considered regulatory acts.[42] It can be concluded that these types of acts complete the need for regulation between legislative acts and delegated acts and specific administrative acts. However, it is important to note that the distinction drawn here is not sharp. A significant proportion of general administrative acts may contain partly regulatory and partly specific regulations.

3.1. Conclusions

The Polish Constitution provides for a legislative procedure, but also for the issuance of executive acts and acts of local law. As indicated, the issuance of ordinances or acts of local law may also be used to enact general and specific acts. However, I think that even the legislative procedure can be essentially administrative, as pointed out by Professor Kasznica in his book. He states that sometimes administrative functions are reserved for the legislature itself by enacting laws which, in essence, have the character of administrative decisions. He gives the example of setting a quota

40 M Szydło, 'Relacje pomiędzy Komisją Europejską a krajowymi organami regulacyjnymi. Czy nowy model administracji europejskiej?' [Relations between the European Commission and National Regulatory Authorities. A New Model of European Administration?] in Z Janku, Z Leoński, M Szewczyk, M Waligórski, K Wojtczak (eds), *Europeizacja polskiego prawa administracyjnego* [Europeanization of Polish Administrative Law] (Kolonia Limited 2005) 209.

41 Commission Implementing Regulation (EU) 2016/226 of 17 February 2016 amending Implementing Regulation (EU) 999/2014 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia following an expiry review pursuant to Article 11(2) of Council Regulation (EC) 1225/2009 [2016] OJ L 41, 13; Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for the implementation of certain provisions of Regulation (EU) 952/2013 of the European Parliament and of the Council laying down the Union Customs Code [2015] OJ L 343, 558; Commission Implementing Regulation (EU) 2018/310 of 1 March 2018 fixing the import duties in the cereals sector applicable from 2 March [2018] OJ L 60, 19; Commission Implementing Regulation (EU) 2017/1142 of 27 June 2017 amending Annex I to Regulation (EC) 669/2009 as regards the list of feed and food of non-animal origin subject to an increased level of official controls on imports [2017] OJ L 165, 29; repealed also by normative implementing Commission Regulation (EU) 2019/1793 of 22 October 2019 on the temporary increase of official controls and exceptional measures governing the introduction into the Union of certain goods from certain third countries, implementing Regulations (EU) 2017/625 and (EC) 178/2002 of the European Parliament and of the Council and repealing Commission Regulations (EC) 669/2009, (EU) 884/2014, (EU) 2015/175, (EU) 2017/186 and (EU) 2018/1660 [2019] OJ L 277, 89. Commission Implementing Regulation (EU) 2018/125 of 24 January 2018 amending Annex I to Council Regulation (EEC) 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff [2018] OJ L 22, 10.

42 Commission Implementing Decision (EU) 2018/661 of 26 April 2018 amending Implementing Decision (EU) 2015/750 on the harmonisation of the 1,452–1,492 MHz frequency band for terrestrial systems capable of providing electronic communications services in the Union with regard to its extension to the harmonised frequency bands 1,427–1,452 MHz and 1,492–1,517 MHz [2018] OJ L 110, 127; Commission Implementing Decision of 28 February 2012 establishing the best available techniques (BAT) conclusions under Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions, for iron and steel production (notified under document C(2012) 903 [2012] OJ L 70, 63.

of recruits, enacting conscription, declaring war or concluding a peace agreement. As an example, the professor also used the state budget, which is adopted in the form of a law.[43] Currently, there are laws in Poland whose content indicates that they concern specific cases, or specific projects. These concern the construction of the gas port in Świnoujście or the cross-cutting of the Vistula Spit.[44] It has already been pointed out in the literature that the norms which these laws contain are of a concrete nature.[45]

It can therefore be argued that the legislative procedure is sometimes used not only to legislate, but also to adopt specific acts, which serve as examples of administration. This is a result of the lack of a distinct procedure for enacting specific and general acts, as well as the authority's search for special solutions. Consequently, the name of an act does not determine its nature in the material legal sense. For instance, a River Basin Management Plan, although adopted by regulation, is not actually an act implementing a law. Formally, we are dealing with a regulation, just as a local plan is an act of local law, and an agreement by Wody Polskie on the conditions for construction in a flood risk area constitutes an administrative decision – but only in a formal sense.

Therefore, the name of the act does not determine its nature; it is merely a derivative of the procedure through which it was issued. It can be concluded that the types of administrative acts defined by administrative law – acts of lawmaking – do not coincide with the legislative and administrative procedures defined by the Constitution and other laws. The legislature could structure the provisions to distinguish at least three types of procedures for lawmaking acts: general and abstract; specific and general; and specific and individual. Until this is done, we are left to use the existing procedures. This demonstrates that a restrictive distinction between acts of application and lawmaking, based on formally defined procedures, is not possible.

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43 S Kasznica (1947) 17.

44 Ustawa z dnia 24 kwietnia 2009 r. o inwestycjach w zakresie terminalu regazyfikacyjnego skroplonego gazu ziemnego w Świnoujściu [Act of 24 April 2009 on Investments in the Liquefied Natural Gas Regasification Terminal in Świnoujście] [2021] JoL 1836.

45 M Jędrzejczak, M Kruś, L Staniszewska, 'Specyfika regulacji prawnej w ustawie o inwestycjach w zakresie terminalu regazyfikacyjnego skroplonego gazu ziemnego w Świnoujściu' [Specificity of the Legal Regulation in the Act on Investments Regarding the Liquefied Natural Gas Regasification Terminal in Świnoujście] in B Popowska, E Kosiński, P Lissoń (eds), *Prawne uwarunkowania konkurencji na rynku gazu* [Legal Conditions of Competition on the Gas Market] (CH Beck 2015) 181–196.

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Legal Position and Organisation of Independent Regulatory Authorities in Poland

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Abstract
The article discusses the emergence and role of independent regulatory bodies in Poland, which were not part of the country's administrative law during the Second Republic (1918–1939) or the People's Republic of Poland (1945–1989). These bodies began to develop in the 1990s, influenced by European Union regulations designed to foster an internal market. The article examines how Poland, transitioning to a democratic state with a market economy after 1989, restructured its administrative apparatus to incorporate these bodies.

The concept of national regulatory authorities (NRAs) is explored, with a focus on their role in regulating specific sectors of the economy, such as infrastructure, financial services and competition protection. Regulatory authorities are defined as bodies that intervene in markets to promote competition, prevent monopolies and ensure the provision of essential public services. The article also addresses the flexibility in how EU law defines and shapes NRAs, allowing each Member State to adapt these bodies to its specific needs. The Polish legal system is analysed to identify whether a distinct 'Polish model' of an NRA exists, and this is compared to the approaches of other EU countries.

Keywords
independent regulatory authorities; Polish administrative law; public economic law; market economy; European Union regulations; sectoral regulation

1. Introduction

Independent regulatory bodies are not among the traditional institutions of Polish administrative law. They were not present in Poland during the Second Republic (1918–1939), when the country regained its independence after 123 years of non-existence on the map of Europe. In the reconstituted Polish state, public administration was structured similarly to that in other European countries of the time, consisting of government (state) administration and local government, which included municipal (rural and urban) and district (*powiat*) self-governments.

Additionally, in certain regions, such as the Pomeranian and Greater Poland Voivodeships, there was also a third type of self-government, the voivodeship self-government.[1] Still different solutions were envisaged for the Silesian Voivodeship, giving it a largely autonomous character.

The government administration of the Second Republic had a multi-level (multi-instance) structure, based on the principle of hierarchy, which precluded the existence of independent bodies. As Stanisław Kasznica, a leading figure in the field of administrative law in Poland, explained, "[h]ierarchy is an organisational system in which the personnel of an organisation are grouped according to levels. Those on lower levels – subordinates – are unconditionally subject to those on higher levels. This subordination is both direct to the immediate superior and indirect to those on further higher levels".[2] The institution of an independent regulatory body was also alien to the administration of the People's Republic of Poland (1945–1989), as the administration during that period was highly centralised, in accordance with the principle of "democratic centralism",[3] which was in force at the time and typical of a state with a socialist system. The emergence of independent regulatory bodies began in Poland, as in other European countries, in the last decade of the 20th century, under the influence of the European Union regulations aimed at establishing an internal market in particular spheres of the economy. Independent regulatory bodies were to play a key role in this process. It took place in Poland when the new democratic state system was being formed (formally adopted as a result of changes to the constitution made in 1989[4]), which resulted in the necessity to reorganise the administrative apparatus in order to adapt it to the new constitutional and legal situation and to functioning under a market economy.

As argued by Marek Szydło, the provisions of EU law on NRAs are largely framework in nature, and Member States have a relatively large degree of freedom in shaping important elements comprising the regime and status of these bodies.[5] As will be shown, some recurring, characteristic solutions can be observed in the provisions of Polish law relating to individual regulatory bodies. At the same time, there are differences between the system and status of Polish regulatory bodies and solutions and their counterparts in other EU Member States.[6] Thus,

1 For more on local self-government in Poland in the period 1918–1939 and the evolution of legal provisions in this regard, see M Kallas, I Lipowicz, Z Niewiadomski, G Szpor, *Prawo administracyjne. Część ustrojowa* [Administrative Law. Systematic Part] (LexisNexis 2002) 45 et seq.; B Dolnicki, *Samorząd terytorialny* [Local Government] (Wolters Kluwer 2009) 41 et seq.

2 See S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Księgarnia Akademicka 1947) 46.

3 For more on this principle and the scope of decentralisation permissible within its framework, see T Rabska, 'Podstawowe pojęcie organizacji administracji' [Basic Concept of Administration Organization] in J Starościak (ed), *System prawa administracyjnego* [Administrative Law System] (Ossolineum 1977) 320 et seq.

4 Ustawa z dnia 29 grudnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej [Act of 29 December 1989 amending the Constitution of the People's Republic of Poland] [1989] JoL 75, 444 as amended.

5 See M Szydło, *Krajowy parlament jako regulator sektorów sieciowych* [The National Parliament as a Regulator of Network Sectors] (Wolters Kluwer 2013) 26.

6 A broad overview of the differentiated legal position and system of regulatory authorities of the European Union Member States is presented by Waldemar Hoff in his study W Hoff, *Prawny model regulacji sektorowej* [Legal Model of Sector Regulation] (Difin 2008) 167 et seq. As can be seen from this overview, in many cases these are collegiate bodies, but also single-member bodies, whose executive apparatus is organised in the form of an entity without legal personality or with legal personality (including those taking the form of commercial law companies). These are bodies appointed for a term of office (of varying lengths) or without a term of office; they are appointed by the prime minister, the president of a given country, the monarch, or other bodies e.g. by ministers; and some have advisory and consultative bodies, whilst others do not. The scope of jurisdiction of the various bodies also varies. In many cases, the jurisdiction covers matters concerning several sectors of the economy.

the question arises whether there is a "Polish model" of an independent regulatory authority. In order to answer this question, it is first necessary to determine which public administration bodies in Poland can be classified as regulatory bodies, and then to list and characterise the most important elements defining their legal status and system.

2. The concept of regulatory authority

Although numerous legal provisions, at both the EU and national levels, use the term "regulatory authority" or "national regulatory authority" – and sometimes even the term "regulation" is included in the name of the institution – there is no universal definition for a *regulatory authority*. Different ways of distinguishing this type of body have been adopted in the literature on the subject. The most common assumption is that a body which performs a so-called "regulatory function", which is a particular way of intervening in the economy, can be called a regulatory authority. This is because this body applies legal measures primarily of an *ex ante* nature (i.e. anticipating the actions of companies), its decisions are characterised by a significant degree of discretion and it pursues specific objectives which the interference is intended to serve.[7] The objectives of regulation (also referred to as "sectoral regulation") include, on the one hand, creating effective competition on the market and, on the other hand, compensating for its absence in those areas where market competition is not possible, as well as achieving social objectives such as ensuring uninterrupted provision of certain public services.[8] It is pointed out that regulation is a consequence of demonopolisation and privatisation, processes understood as a departure from the state directly providing public services, when private entities take the place of the state and the state, whilst still responsible for the provision of these services, decides to exert a particular influence on the conditions of their provision.[9]

The objectives of regulation are also characterised in a similar way in German legal science, where they are assumed to include "the creation and maintenance of conditions of market competition and, at the same time, the guarantee of access to certain public goods instead of their provision by the state".[10] The legal provisions relevant in this respect are referred to as "regulatory law" (*Regulierungsrecht*), "regulatory administration law" (*Regulierungsverwaltungsrecht*) or "law of the consequences of privatisation" (*Privatisierungsfolgenrecht*).[11]

It should be noted that the notion of regulatory authority in Polish legal science is most often understood to refer to authorities specialised in matters of strictly specified sectors (fields of economic activity). Most often the term *regulatory authority* is used to refer to authorities competent in matters of the so-called infrastructure or network sectors (such as the energy sector).[12]

7 For more on the regulatory function, see K Jaroszyński, M Wierzbowski, 'Organy regulacyjne' [Regulatory Authorities] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Podmioty administrujące* System Prawa Administracyjnego [Entities Administering, Administrative Law System] (CH Beck 2011) 316 et seq.; T Długosz, 'Funkcja regulacyjna' [Regulatory Function] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Publiczne prawo gospodarcze* System Prawa Administracyjnego [Public Economic Law, Administrative Law System] (CH Beck 2013) 697 et seq.

8 Cf W Hoff (2008) 22.

9 So T Długosz (2013) 704.

10 See M Ruffert, 'Begriff' in M Fehling, M Ruffert (eds), *Regulierungsrecht* (Mohr Siebeck 2010) 359.

11 So R Stober, *Besonderes Wirtschaftsverwaltungsrecht. Gewerbe – und Regulierungsrecht, Produkt – und Subventionsrecht* (Kohlhammer 2007) 177 et seq.

12 See T Skoczny, 'Stan i tendencje rozwojowe prawa administracji regulacyjnej w Polsce' [The State and Development Trends of Regulatory Administration Law in Poland] in H Bauer, PM Huber, Z Niewiadomski (eds), *Ius Publicum*

Sometimes the term is also used to refer to authorities competent for the financial services sector.[13] The concept can also be understood in a broader way to include all authorities that perform specialised functions in the economic sphere, including authorities whose jurisdiction is "horizontal" (not relating to strictly defined sectors). On this basis, especially in Western European legal science, the concept of a regulatory authority also includes authorities with jurisdiction over, *inter alia*, environmental protection, product safety, consumer protection and competition protection.[14] The classification of regulatory authorities proposed by Krzysztof Jaroszyński and Marek Wierzbowski combines the above-mentioned approaches. It distinguishes three categories of regulatory authorities functioning in Poland:[15] firstly, authorities whose jurisdiction relates to infrastructure sectors; secondly, authorities whose jurisdiction relates to financial services sectors (banking, insurance and stock exchange services); and thirdly, those competent in matters of competition protection.

The competent authorities for infrastructure sectors in Poland include the President of the Energy Regulatory Office (ERO; for the electricity, gas fuel, heat energy and liquid fuel sectors), the President of the Office of Electronic Communications (OEC; for the postal and telecommunications sector, now referred to as the electronic communications sector), the President of the Railway Transport Office (RTO; for the railway transport sector), the President of the Civil Aviation Office (CAO; for the air transport sector) and the Regional Director of the Water Management Board of the State Water Management Authority (Wody Polskie; for the water supply services sector). The competent authority for the financial services sectors (banking services, insurance services and stock exchange services) is the Financial Supervision Commission (FSC), and for competition protection matters it is the President of the Office of Competition and Consumer Protection (OCCP). It is debatable whether the National Broadcasting Council is a regulatory authority; its task is primarily to protect freedom of speech in radio and television, and not to promote market competition or ensure access to certain services.[16]

It is also accepted in legal science that the category of regulatory authorities does not include competition authorities. It is recognised that the competition protection function is of a different nature to the regulatory function. The differences particularly concern the objectives being pursued. As

Europeum. Dwunaste polsko-niemieckie kolokwium prawników administratywistów, Warszawa 20–22 września 2001. Referaty i głosy w dyskusji [Ius Publicum Europeum. Twelfth Polish-German Colloquium of Administrative Lawyers, Warsaw, September 20–22, 2001. Papers and Voices in the Discussion] (Wydawnictwo Prawo i Praktyka Gospodarcza 2003) 155; M Szydło, *Regulacja sektorów infrastrukturalnych jako rodzaj funkcji państwa wobec gospodarki* [Regulation of Infrastructure Sectors as a Type of State Function Towards the Economy] (Wydawnictwo Prawo i Praktyka Gospodarcza 2005) 289; W Hoff (2008) 153; E Kosiński, 'Regulacja sektorowa. Stałość czy zmienność pojęcia?' [Sector Regulation. Stability or Changeability of the Concept?] in A Powałowski (ed), *Prawne instrumenty oddziaływania na gospodarkę* [Legal Instruments of Influencing the Economy] (CH Beck 2016) 117.

13 See T Nieborak, 'Prawo rynku finansowego Unii Europejskiej' in D Kornobis-Romanowska (ed), *Prawo rynku wewnętrznego* System Prawa Unii Europejskiej [Internal Market Law, The European Union Law System] (CH Beck 2020) 742.

14 See G Majone, 'The Rise of Statutory Regulation in Europe' in G Majone (ed), *Regulating Europe* (Routledge 1996) 47 et seq.; M Fehling, M Ruffert (eds), *Regulierungsrecht* (Mohr Siebeck 2010) 363 et seq.

15 See K Jaroszyński, M Wierzbowski (2011) 312 et seq.

16 Krzysztof Jaroszyński and Marek Wierzbowski recognise that among the competences of the National Broadcasting Council there is a preponderance of those which cannot be regarded as regulatory – see ibid., 313. A different position is presented by Zbigniew Kmieciak, who recognises the aforementioned organ as a regulatory body, primarily due to its specific forms of activity (the possibility to issue general acts and a constitutionally guaranteed independent position – see Z Kmieciak, 'Niezależne organy regulacyjne (aspekt prawnoporównawczy)' [Independent Regulatory Authorities (Comparative Law Aspect)] in J Boć, A Chajbowicz (eds), *Nowe problemy badawcze w teorii prawa administracyjnego* [New Research Problems in the Theory of Administrative Law] (Kolonia Limited 2009) 19.

mentioned above, regulation not only serves the development of market competition, but also pursues certain social objectives by ensuring wide access to certain services. These are public services, and they should therefore be affordable, of sound quality and provided to their users on a strictly defined basis. There are also differences in the way competition law and regulatory law are applied.[17] The protection of competition (counteracting restrictive practices) is implemented primarily on the basis of follow-up actions to the actions of companies. Indeed, the competition authorities' rulings are assessments of actions that have already taken place (infringements). However, it should be added that, to a certain extent, the protection of competition also requires pre-emptive (*ex ante*) actions, particularly in cases of controlling concentrations of businesses.[18] In the case of regulation, as mentioned above, its essence is to produce a specific effect in future, and therefore the regulator takes actions (including issuing decisions) that precede and define the desired behaviour of companies.

3. Construction of the "independence" of the regulator

According to Zbigniew Kmieciak, the construction of an independent regulatory body excludes the existence of any subordination of organisational and official type. Such bodies are supposed to perform the tasks entrusted to them independently of the entities which made the act of appointment as the head of a given body or as a member of a collegial body heading a given body.[19] However, an independent regulatory body is not an autonomous body. In the light of the legal provisions in force in Poland, it may be subject to certain supervisory powers from the Prime Minister or certain ministers, serving to coordinate its activities with the government's economic policy and maintaining consistency with it.[20] It is debated in the German literature whether the EU requirements for the independence of certain bodies should result in their exclusion from the ministerial right to issue orders, which is considered an integral part of the constitutional principle of democracy. Eberhard Schmidt-Aβmann, however, considers that although the democratic principle requires that all administrative hubs have a sufficient level of (democratic) legitimacy, the right to issue instructions is only one of many means to ensure it.[21] Other means may also be used, provided they have similar steering effects (e.g. parliamentary control). In the author's opinion, it should therefore – on the basis of German constitutional law – be considered permissible to have bodies that are not subject to instructions.[22] By way of comparison, the regulations in force in Poland provide that certain regulatory bodies may be the addressees of instructions and guidelines in order to adapt their principles and courses of action to the policy set by the Council of Ministers,

17 For more on the differences between competition protection and sectoral regulation, see T Skoczny, 'Ochrona konkurencji a prokonkurencyjna regulacja sektorowa' [Competition Protection and Pro-competitive Sector Regulation] (2004) Problemy Zarządzania vol. 3, 16 et seq.; M Szydło, *Prawo konkurencji a regulacja sektorowa* [Competition Law and Sector Regulation] (Wolters Kluwer 2010).

18 For an extensive overview on this topic, see M Błachucki, *System postępowania antymonopolowego w sprawach kontroli koncentracji przedsiębiorców* [The System of Antitrust Proceedings in Matters of Control of Concentration of Entrepreneurs] (Urząd Ochrony Konkurencji i Konsumentów 2012).

19 Z Kmieciak (2009) 17.

20 For more on this topic with regard to the President of the ERO, see M Swora, 'Organ do spraw regulacji gospodarki paliwami i energią' [Fuel and Energy Management Regulatory Body] in M Swora, Z Muras (eds), *Prawo energetyczne. Tom II: Komentarz do art. 12–72* [Energy Law. Volume II: Commentary to Articles 12–72] (Wolters Kluwer 2016) 180.

21 See E Schmidt-Aβmann, *Dogmatyka prawa administracyjnego. Bilans rozwoju, reformy i przyszłych zadań* [Dogmatics of Administrative Law: A Balance Sheet of Development, Reform and Future Tasks] (Wolters Kluwer 2022) 231.

22 Ibid.

but these guidelines and instructions may not concern "decisions on the merits of the case being settled by means of an administrative decision".[23]

In many cases, the authority concerned must be independent according to European Union law. The requirement of independence has been extended by EU law to national authorities responsible for electricity,[24] natural gas,[25] electronic communications,[26] post,[27] rail transport[28] and competition authorities.[29] The exclusion of certain authorities from the ties of hierarchical dependence may also result from a decision of a given country resulting from the fact that such a solution is standard in EU countries.[30] One example is the Financial Supervision Authority (FSA): this body's high degree of independence from the government and government administration has also been confirmed in the jurisprudence of the Constitutional Court.[31] On the other hand, EU regulations do not impose an obligation to create independent regulatory bodies in the water sector (the aforementioned Wody Polskie is such a body), whilst limited independence requirements are in force for the body competent for the aviation sector.[32] As a result, Polish regulations have not given the President of the CAO the status of an independent regulatory authority (they do not include the principle of appointing this authority for a specific term of office).

The EU's requirements for the independence of regulatory and competition authorities are designed to ensure that their decisions are independent of day-to-day political interests as well as the possible influence of the entities (businesses) they regulate, both private and public.[33] It should be noted here that in many sectors, state-owned companies and enterprises still hold a significant position, and sometimes even a monopoly. The independence of the authority is therefore also intended to limit the risk of favouring state sector entities at the expense of the private sector. As Teresa Rabska put it, the monopolistic

23 This is provided for in Article 34a of the ustawa z dnia 8 sierpnia 1996 r. o Radzie Ministrów [Act of 8 August 1996 on the Council of Ministers] [2022] JoL 1188.

24 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market in electricity and amending Directive 2012/27/EU [2019] OJ L 158, 125).

25 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211, 94.

26 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L 321, 36.

27 Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1997] OJ L 115, 71.

28 Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area [2012] OJ L 343, 32.

29 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to enforce the law more effectively and to ensure the proper functioning of the internal market [2018] OJ L 11, 3.

30 See Explanatory Memorandum to the Draft Law on Financial Market Supervision of 7 June 2006, Parliamentary Print No. 654, 1, <https://orka.sejm.gov.pl/Druki5ka.nsf/0/86174E62FCBBFD0CC1257187004C4DC0/$file/654.pdf> accessed 19 Aug 2024.

31 See Judgment of the Polish Constitutional Tribunal of 15 June 2011, K 2/09 (2011) OTK-A 42.

32 See Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency; Aviation Safety and amending Regulations of the European Parliament and of the Council (EC) No. 2111/2005, (EC) No. 1008/2008, (EU) No. 996/2010, (EU) No. 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council and repealing Regulations (EC) No. 552/2004 and (EC) No. 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No. 3922/91 [2018] OJ L 212, 1.

33 Cf M Swora, *Niezależne organy administracji* [Independent Administrative Bodies] (Polskie Wydawnictwo Ekonomiczne 2012) 167.

structure of the economy is usually linked to the centralist arrangement of the state administration. The democratisation of the economy consequently requires the democratisation and decentralisation of management, whilst the sovereign and ownership powers of the state should be separated.[34]

EU requirements for the independence of regulators have evolved as liberalisation has progressed and competition has developed in regulated areas, as evidenced in particular by the rules for the electricity and natural gas sectors.[35] Initially, there was only the requirement that Member States delegate tasks related to the implementation of the internal market rules for electricity and natural gas to "designated authorities". Later on, there was the requirement for these bodies to be "completely independent from the interests of the electricity industry" and "the gas industry". It was not until subsequent directives specific to the aforementioned sectors were introduced that the competent authorities in these matters were required to act not only independently of "any market interest", but also for their decisions to be "independent of any political entity". Consequently, these directives and directives relating to other regulated sectors adopt specific legal solutions to guarantee such independence. They concern the rules for appointing and dismissing persons in charge of the regulator (the EU rules most often require that they be appointed for a specific term) and for the regulator and its staff to operate independently of any public or private entity. The directives further require that the independent regulatory authority is equipped with adequate human and financial resources to fulfil its tasks and competences effectively, has separate resources in its annual budget and is independent in the execution of its allocated budget.[36]

An extremely important issue, however, is the accountability of independent administrative bodies. Mateusz Błachucki, analysing the example of a competition authority, notes that this issue is often not properly exposed.[37] Meanwhile, accountability should be seen as an indispensable complement to independence. This may imply the imposition of specific requirements as regards the qualifications of the person holding the authority as well as the staff of the authority subordinated to it, guarantees for preventing conflicts of interest, various forms of control over actions, including the obligation to regularly report on actions taken. The independence of the authority in question also does not exempt it from the control exercised by the Supreme Chamber of Control, the State Labour Inspectorate or the Public Finance Discipline Commission.[38]

An issue closely related to the independence of regulatory and competition authorities is their increasing interconnection with decision-making processes involving other Member States, the

34 Cf T Rabska, 'Gospodarka rynkowa i jej zasady' [Market Economy and its Principles] in P Kaczkowski (ed), *Konstytucja i gospodarka* [Constitution and Economy] (Societas 1995) 88 et seq. Under European Union law, the principle of separation of sovereign and proprietary powers is expressed in the directives concerning infrastructure sectors. See in particular Article 6(1) of Directive 2018/1972, according to which Member States that retain ownership or control of undertakings providing electronic communications networks or services are required to ensure effective structural separation of regulatory functions from activities associated with the exercise of ownership or control.

35 For a more detailed discussion, see P Lissoń, 'Rynek energetyczny' [Energy Market] in D Kornobis-Romanowska (ed), *Prawo rynku wewnętrznego* System Prawa Unii Europejskiej [Internal Market Law, The European Union Legal System] (CH Beck 2020) 596 et seq.

36 This is now specifically provided for in Article 9(1) and (2) of Directive 2018/1972 and Article 57(5) of Directive 2019/944.

37 See M Błachucki, 'Niezależność organów administracji publicznej na przykładzie ewolucji statusu prawnego Prezesa UOKiK' [Independence of Public Administration Bodies as Exemplified by the Evolution of the Legal Status of the President of the Office of Competition and Consumer Protection] (2019) Acta Universitatis Wratislaviensis. Prawo vol. 329, 271.

38 Ibid., 272.

European Commission and specialised EU bodies and agencies. This interconnected framework is commonly referred to as the "network administration". Although these bodies maintain their independence within the national system, their national authority – as Irena Lipowicz observes – is becoming increasingly subordinate to European authority. This shift can be seen as part of the erosion of state sovereignty, as states cede some of their executive power to broader European structures.[39] There is also a risk of blurring accountability for decisions taken within the network administration.[40]

4. Features of independent regulatory authorities in Poland

A detailed analysis of the legal provisions concerning the status and regulatory framework of independent regulatory authorities in Poland is presented below. Since similar solutions are applied to the body responsible for competition protection – the OCCP, which is sometimes classified as a regulator in a broader sense – the provisions concerning this body are also examined. For the sake of clarity and simplicity in the discussion, the OCCP will be referred to as a regulatory body.

4.1. Predominance of single-person authorities

Polish regulatory authorities are overwhelmingly one-person (monocratic) bodies, appointed through open and competitive recruitment by the Prime Minister. This applies to the Presidents of the ERO,[41] the RTO[42] and the OCCP.[43] The President of the OEC is appointed in a special way, namely by the Sejm following nomination by the Prime Minister.[44] Again, the appointment is made by way of open and competitive recruitment. Against this background, the authority competent for financial services sectors, the FSA, stands out. This is because it is the only collegiate regulatory body in Poland; it is composed of 13 persons, including the Chairman and three Deputy Chairmen appointed by the Prime Minister.[45] The other members of the FSA represent the supreme and central state authorities specified in the Act.[46] The dissimilarity of the FSC from

39 See Irena Lipowicz, 'Europeizacja i modernizacja. Administracyjnoprawne aspekty zmian polskiej administracji publicznej' [Europeanization and Modernization: Administrative and Legal Aspects of Changes in Polish Administration] in I Lipowicz (ed), *Europeizacja administracji publicznej* (Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego 2008) 27.

40 See I Lipowicz, 'Europeizacja administracji publicznej' [Europeanization of Public Administration] (2008) Ruch Prawniczy, Ekonomiczny i Socjologiczny vol. 1, 6 et seq.

41 Article 21(2a) of the ustawa z dnia 10 kwietnia 1997 r. – Prawo energetyczne [Act of 10 April 1997 – Energy Law] [2022] JoL 1385 as amended (hereinafter "EP Act").

42 Article 11(1) of the ustawa z dnia 28 marca 2003 r. o transporcie kolejowym [Act of 28 March 2003 on Railway Transport] [2023] JoL 602 (hereinafter "u.t.k.").

43 Article 29(3) of the ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów [Act of 16 February 2007 on the Protection of Competition and Consumers] [2021] JoL 275 as amended (hereinafter "u.o.k.ik.").

44 Article 190(4) of the ustawa z dnia 16 lipca 2004 r. Prawo telekomunikacyjne [Act of 16 July 2004 Telecommunications Law] [2022] JoL 1648, as amended (hereinafter "PT Act").

45 This is provided for in Articles 7(1) and 9 of the ustawa z dnia 21 lipca 2006 r. o nadzorze nad rynkiem finansowym [Act of 21 July 2006 on Financial Market Supervision] [2022] JoL 660 as amended (hereinafter "UNF").

46 Pursuant to Article 5(2) UNF, the members of the FSC include representatives of the President of the Republic of Poland, the Prime Minister, the Bank Guarantee Fund, the President of the OCCP, the minister in charge of coordinating special services (or, when such has not been designated, the Prime Minister) and ministers or representatives of ministers in charge of financial institutions, the economy, social security and the President of the National Bank of Poland (NBP) or a member of the NBP Management Board delegated by him.

the other regulatory bodies can be explained by the historical origins of this institution, which took over the tasks and competences previously held by three separate bodies, each of which was also a collegiate body. Established by the 2006 Act. Indeed, the FSC replaced the seven-member Banking Supervision Commission,[47] the five-member Insurance and Pension Funds Supervision Commission[48] and the nine-member Securities and Exchange Commission.[49]

The powers vested in the regulatory authority may also be exercised by vice-presidents or deputies, who act on behalf of and on the authority of the regulatory body. These individuals are appointed through an open and competitive recruitment process, similar to the appointment of the regulatory authority itself. In three instances, these appointments are made by the Prime Minister. For example, the President of the RTO has two Vice-Presidents, who are appointed by the Prime Minister upon the nomination from the President of the RTO.[50] The Vice-Presidents of the OCCP are appointed in a similar manner, namely by the Prime Minister upon the nomination from the President of the OCCP. The legislation does not specify the number of Vice-Presidents.[51] Currently, the OCCP does not have any, although previously there were two (one responsible for competition protection matters and the other for consumer protection matters). The same rules apply to Deputy Chairpersons of the OCC, who are appointed by the Prime Minister upon the proposal of the Chairperson of the OCC.[52] Different rules of appointment apply to the deputies of the President of the OEC and the Vice-President of the ERO, as they are not appointed by the Prime Minister. The deputies of the President of the OEC (for telecommunications matters and for postal matters) are appointed by the minister in charge of informatisation upon a motion by the President of the OEC.[53] Against the background of these solutions, the Vice-President of the ERO is appointed in an exceptional way, not by the Prime Minister nor by any minister, but by the President of the ERO.[54] The competence of the ERO President in this respect is stronger than that of any of the other regulatory authorities.

4.2. Tenure

The Polish regulators are appointed for a term of office, and the legislature adopted the principle that the term of office is five years (the issue of renewing the term of office is presented later in the discussion). This applies to the Presidents of the ERO, the OEC and the RTO, and legislation is currently under way to extend this principle to the President of the OCCP as well.[55]

47 The composition of the FSC is determined by Article 26(1) of the ustawa z dnia 29 sierpnia 1997 r. o Narodowym Banku Polskim [Act of 29 August 1997 on the National Bank of Poland] [2022] JoL 2025 as amended.

48 The composition of the OCCP is determined by Article 9(1) of the ustawa z dnia 22 maja 2003 r. o nadzorze ubezpieczeniowym i emerytalnym [Act of 22 May 2003 on Insurance and Pension Supervision] [2024] JoL 583 as amended.

49 The composition of the SEC is determined by Article 14(1) of the ustawa z dnia 21 sierpnia 1997 r. – Prawo o publicznym obrocie papierami wartościowymi [Act of 21 August 1997 – Law on Public Trading in Securities] [1997] JoL 118, 754 as amended.

50 Article 11(9) u.t.k.

51 Article 30(1) u.o.k.ik.

52 Article 9 UNF.

53 Article 190(8) PT Act.

54 Article 21(5) EP Act.

55 This refers to Article 1(8)(a) of the Draft Act amending the Competition and Consumer Protection Act and certain other Acts of 31 January 2023, Parliamentary Print No. 2990, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/DADF58847536C14EC125894800411FF0/%24File/2990.pdf> accessed 19 Aug 2024 (hereinafter "Act amending the u.o.k.ik.").

The situation is different with regard to the FSA, as it is a collegial body whose members are not appointed for a specific term of office. However, analogies can be found to the rules applicable to other regulatory bodies, as the Chairman of the FSA is also appointed for a five-year term.[56] On the other hand, different rules have been adopted with regard to renewing the term of office. In the case of the President of the ERO, the term of office may be renewed once.[57] An analogous principle is soon to be extended to the President of the OCCP.[58] In the case of the President of the RTO, the term of office may also be renewed once, but the regulations do not stipulate that this may be done *only* once.[59] It can therefore be assumed that multiple renewals of the term of office are possible for this body. The situation is different for the President of the OEC[60] and the Chairman of the PFSA,[61] for whom the legislature did not provide for the possibility of renewing their five-year term of office. The Prime Minister is entitled to dismiss the aforementioned authorities (the Presidents of the ERO, the OEC, the RTO and the FSA) before the end of their term of office. Such a situation may occur only for strictly defined, exceptional reasons (such as gross violation of the law, conviction by a final court judgement for an intentional crime or fiscal crime, circumstances that affect the independent performance of functions, illness that permanently prevents the performance of tasks or the submission of resignation). The amended provisions will also specify the prerequisites for premature dismissal of the President of the OCCP.[62] With regard to the President of the OEC and of the OCCP, the legislature has also provided that the person performing this function may be dismissed if facts are disclosed indicating that they do not fulfil the conditions set when they were appointed to the position of a regulatory authority.[63] As a rule, however, no term of office is provided for vice-presidents and deputies of regulatory bodies (this applies to Vice-Presidents of the RTO and the OCCP and to Deputies of the Presidents of the OEC and of the FSA). A Vice-President of the ERO has an exceptional status, as they are appointed (by the President of the ERO) for a five-year term and may be reappointed once more.[64] In contrast, the EP Act provides that the ERO President may dismiss the ERO Vice-President before the end of their term. However, the provisions do not specify any reasons for such dismissal.[65]

The Polish legislature is consistent as regards the length of the term of office of regulatory bodies (five years). Meanwhile, the EU legislature has defined the permissible term of office of individual regulators in different ways. Thus, Directive 2019/944, concerning the electricity sector, provides for the possibility to appoint members of the board of the regulatory authority or, in the absence of a board, the top management of the regulatory authority, for a fixed term of five to seven years, with the possibility of one renewal.[66] An analogous solution is provided for in Directive 2009/73/EC, concerning the natural gas sector.[67] Directive 2018/1972, on the electronic communications sector, on the other hand, stipulates that the head of the national regulatory authority – or, where applicable, the members of the collegiate body exercising that function in the national regulatory authority or their alternates – shall be

56 Article 7(1) UNF.
57 Article 21(2l) EP Act.
58 Article 1(8)(a) Act amending the u.o.k.ik.
59 Article 11b(1) and (2) u.t.k.
60 Article 190(4) PT Act.
61 Article 7(1) UNF.
62 Article 1(8)(d) Act amending the u.o.k.ik.
63 With regard to the President of the OEC, this is provided for in Article 190(4ac) PT Act, and with regard to the President of the RTO in Article 11b(4) u.t.k.
64 Article 21(5b) EP Act.
65 Article 21(5) EP Act.
66 Article 57(5d) Directive 2019/944.
67 Article 39(5)(b) Directive 2009/73/EC.

appointed for a minimum term of three years. By contrast, Directive 2012/34/EU, on the rail transport sector, addresses the issue of tenure in a rather general manner. Indeed, it provides that Member States shall decide whether the regulatory body is appointed for a fixed term with the possibility of renewal or for a permanent term.[68] Directive 2019/1, concerning the competition authorities of the Member States, also addresses the issue of tenure in very general terms. It stipulates that the heads of the national administrative competition authorities may be appointed for a term of office or (non-permanently) employed.[69] In contrast, Directive 97/67/EC, concerning the postal sector, does not address the issue of the tenure of the regulator at all.[70]

4.3. Multisectionality

The Polish legislature has generally allocated the tasks and competences of regulatory authorities in a manner that reflects a multisectoral approach. This means that these authorities are assigned responsibilities across multiple sectors rather than focussing on just one. The principle involves assigning tasks and competences to authorities that oversee sectors with interrelated functions or similar characteristics. For example, the President of the OEC oversees both the postal and telecommunications sectors, whilst the President of the ERO is responsible for the gas, electricity, heat and liquid fuel sectors. Similarly, the FSA covers the banking, insurance and securities sectors. In contrast, the President of the RTO has jurisdiction limited to a single sector: rail transport. The OCCP, by nature, operates as a multisectoral body, given its broad mandate to oversee competition and consumer protection across various sectors.

In other European countries there are both regulatory bodies whose sectoral jurisdiction is comparable to that of Polish regulators (e.g. the UK Office of Gas and Electricity Markets; Ofgem[71]) and regulatory bodies whose jurisdiction is incomparably broader than that of any of the Polish regulators. An example is the German Federal Network Agency (*Bundesnetzagentur*), which has jurisdiction over regulation in the electricity, natural gas, postal, telecommunications and rail transport sectors.[72] An even more "sectorally capacious" body is the Spanish National Commission for Markets and Competition (*Comisión Nacional de los Mercados y la Competencia*) with jurisdiction over the electricity, liquid fuel, biofuel, natural gas, post, telecommunications, air transport, radio and television and competition sectors.[73] Against the background of these bodies, the method adopted by the Polish legislature of allocating tasks and competences within a single regulatory body can be considered rather cautious. In the literature, however, the thesis is put forward that one regulatory body covering a wider range of matters than a single sector may be beneficial if the legislature also creates general principles, common for all sectors within the competence of this body, on which interference in the activities of entities subject to regulation will be based.[74]

68 Article 55(3), second subparagraph Directive 2012/34/EU.
69 Recitals 18–20 Directive 2019/1.
70 See Article 22 et seq. Directive 97/67/EC.
71 'Welcome to Ofgem', <https://www.ofgem.gov.uk/> accessed 1 Feb 2023.
72 'Homepage', <https://www.bundesnetzagentur.de/cln_121/DE/Home/home_node.html> accessed 1 Feb 2023.
73 'What is the CNMC', <https://www.cnmc.es/sobre-la-cnmc/que-es-la-cnmc> accessed 1 Feb 2023.
74 So J Masing, *Soll das Recht der Regulierungsverwaltung übergreifend werden?* (CH Beck 2006) 189.

4.4. The way the enforcement apparatus is organised

The executive (clerical) apparatus of Polish regulators is organised in almost all cases in the form of a state budget unit (this refers to the Presidents of the ERO, the OEC, the RTO and the OCCP). The term denotes an organisational unit of the public finance sector without legal personality, whose expenses are paid directly from the budget and who transfers any revenues collected to the state budget revenue account.[75] A different solution has been adopted only in the case of the FSC, whose executive apparatus takes the form of a state legal entity.[76] Thus, it can be said that the Polish legislature, with regard to regulatory bodies, prefers the traditional model of organising the executive apparatus. The form of a legal entity would likely create the possibility of more flexible rules regarding the remuneration for the regulatory authority's employees. In this respect, original solutions were provided for by the EP Act in its first years. This is because the rules for the remuneration of ERO employees were determined "taking into account the remuneration in the fuel and energy sector", without applying the provisions on the formation of remuneration funds in the state budget sphere.[77] Over time, however, the legislature withdrew these solutions.[78]

4.5. The nature of proceedings before regulatory authorities and judicial review of the decisions taken by them

Another common feature of regulatory authorities in Poland is the nature of the proceedings conducted before them. In each of the analysed cases, these proceedings are single-instance administrative proceedings. This is because the laws defining the tasks and competences of individual regulatory bodies do not provide for a higher-level administrative body to which an appeal against the decisions of the regulatory bodies could be made. Additionally, there are no subordinate or lower-level bodies beneath the regulatory authorities. In other words, regulatory bodies in Poland function as central authorities, and Polish law does not establish subordinate field regulatory bodies. Appeals against the decisions of the President of the ERO, the President of the OEC, the President of the RTO and the President of the OCCP are therefore directed to the courts rather than to a second administrative instance.

Based on Article 177 of the Constitution of the Republic of Poland[79] (presumption of jurisdiction of common courts[80]) and Article 184 (jurisdiction of administrative courts[81]), it should be recognised that in the Polish legal order the function of exercising control over the activity

75 This is how state budget units are defined by Article 11(1) of the ustawa z dnia 27 sierpnia 2009 r. o finansach publicznych [Act of 27 August 2009 on Public Finances] [2022] JoL 1634 as amended.

76 Article 3(1) UNF.

77 Article 29 of the ustawa z dnia 10 kwietnia 1997 r. – Prawo energetyczne [Act of 10 April 1997 – Energy Law] [2022] JoL 1385 as amended.

78 The content of Article 29 EP Act was amended by Article 23 of the ustawa z dnia 23 grudnia 1999 r. o kształtowaniu wynagrodzeń w państwowej sferze budżetowej oraz o zmianie niektórych ustaw [Act of 23 December 1999 on the Formation of Remuneration in the State Budget Sphere and on the Amendment of Certain Acts [1999] JoL 110, 1255.

79 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483 as amended.

80 This provision states: "The ordinary courts shall administer justice in all cases, except for cases statutorily reserved for the jurisdiction of other courts."

81 This provision (first sentence) states that the Supreme Administrative Court and other administrative courts shall, to the extent specified by law, exercise control over the activities of the public administration.

of public administration belongs, as a rule, to administrative courts.[82] However, some strictly defined public administration cases have been included by the legislature in the jurisdiction of common courts. Such a solution has been applied to the decisions of the majority of regulatory bodies, which is another shared feature.[83] Pursuant to the provisions of the Code of Civil Procedure (CCP),[84] cases of appeals against decisions of the President of the OCCP and complaints against the decisions of this body (Arts 479–479[2835] CCP), appeals against decisions of the President of the ERO and complaints against the decisions of this body (Arts 479–479[4656] CCP), appeals against decisions of the President of the OEC and complaints against the decisions of this body (Arts 479–479[5767] CCP), appeals against the decisions of the President of the RTO and complaints against the decisions of this body (Arts 479–479[6878] CCP) and appeals against certain decisions of the Regional Director of Wody Polski and complaints against the decisions of this body (Arts 479–479[7988] CCP) are heard by a division of the District Court in Warsaw: Sąd Ochrony Konkurencji i Konsumentów (SOKiK). From the judgments of this court, the party to the proceedings and the administrative body (regulator), is entitled to appeal to the Court of Appeal, and then a cassation appeal to the Supreme Court. The President of the OCCP may also use a special measure to overturn a final judgment of the Court of Appeal. This is an extraordinary complaint addressed to the Supreme Court.[85] As for the FSA, its proceedings are administrative in nature, similar to those of other regulatory bodies. However, judicial review of FSA decisions is carried out by administrative courts – specifically, the Voivodeship Administrative Court in the first instance and the Supreme Administrative Court in the second instance. This procedural distinction sets the FSA apart from other regulatory bodies.

5. Conclusions

The findings presented herein lead to the conclusion that the Polish legislature has identified two models for independent regulatory authorities. The dominant model is characterised by a one-person authority appointed by the Prime Minister for a five-year term, jurisdiction spanning multiple sectors (with the RTO being an exception), an executive apparatus organised as a state budgetary unit, single-instance administrative proceedings and judicial review of decisions by the authority (with oversight by the Voivodeship Administrative Court, which can decide on the merits of the case). Currently, four authorities fit this model: the President of the ERO, the President of the OEC, the President of the RTO and, regarding appointments, the President of the OCCP.

The second model is represented by the FSA. This model features a collegiate body with jurisdiction over multiple sectors. Members of the FSA are not appointed for a fixed term (only the

82 Cf R Hauser, 'Konstytucyjny model polskiego sądownictwa administracyjnego' [The Constitutional Model of Polish Administrative Justice] in J Stelmasiak, J Niczyporuk, S Fundowicz (eds), *Polski model sądownictwa administracyjnego* [The Polish Model of Administrative Justice] (Verba 2003) 145.

83 For more on this topic, see P Lissoń, 'Polski model sądowej kontroli administracji z perspektywy publicznego prawa gospodarczego' [The Polish Model of Judicial Control of Administration from the Perspective of Public Economic Law] in P Lissoń, M Strzelbicki (eds), *Państwo a gospodarka. Zasady – instytucje – procedury. Jubilee book dedicated to Professor Bożena Popowska* [The state and the economy. Rules – institutions – procedures. Jubilee book dedicated to Professor Bożena Popowska] (Wydawnictwo Poznańskie 2020) 474 et seq.

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

85 This is provided for in Article 89(2) of the ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym [Act of 8 December 2017 on the Supreme Court] [2021] JoL 1904 as amended.

Chairman is appointed for a term), and its executive apparatus is organised as a state legal entity. Proceedings before the FSA are single-instance administrative proceedings, with judicial review being conducted by the administrative courts.

The upcoming provisions, which establish the term of office for the President of the OCCP and introduce detailed rules regarding the independence of the President, Vice-Presidents and employees of this body[86] – which is unprecedented in the Polish legal system –can be read as an expression of the trends of the above-described dominant model of an independent regulatory authority. It should be added, however, that the Polish legislature has already more than once repealed provisions providing for the tenure of independent regulatory bodies,[87] subsequently re-establishing such provisions. Perhaps Peter M. Huber is right in his view that independent administrative bodies are in a sense a "foreign body" in the public administration of European countries, and in any case they cannot be categorised as "traditional administrative bodies".[88] It can be asserted that Polish legislation has established a model of independent regulatory authorities and competition authorities, which has evolved over the years and is characterised by recurring features related to the legal position and structure of these bodies. This dominant model is defined by specific characteristics in terms of authority and organisation.

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86 This concerns the content of Article 1(11) Act amending the u.o.k.ik. Pursuant to this provision, the following shall be added to the SCA after Article 34: "Article 34a. (1) The President of the Office, the Vice-Presidents of the Office and the employees of the Office shall: 1) perform their duties and powers independently of political and other external influences; 2) not seek or accept instructions from government authorities or any other public or private entity in the performance of their duties and powers; 3) refrain from any action that could result in a conflict of interest. (2) The President of the Office, the Vice-Presidents of the Office and the employees of the Office who were involved in the issuance of the decision shall not, for a period of 3 years after the termination of their functions or employment with the Office, be involved in the same matter."

87 Provisions of the ustawa z dnia 24 sierpnia 2006 r. o państwowym zasobie kadrowym i wysokich stanowiskach państwowych [Act of 24 August 2006 on State Human Resources and High State Positions] [2006] JoL 170, 1217 repealed the tenure of office of the Presidents of the ERO, the OEC, the RTO, the OCCP and the FSA. When, on the basis of the provisions of the u.o.k.ik. enacted in 2007, the President of the OCCP was again to become a tenure-appointed body, the provisions of the ustawa z dnia 13 kwietnia 2007 r. o zmianie ustawy o ochronie konkurencji i konsumentów i ustawy o ochronie konkurencji i konsumentów i ustawy o państwowym zasobie kadrowym i wysokich stanowiskach państwowych [Act of 13 April 2007 on Competition and Consumer Protection and the Act on State Human Resources and High State Positions] [2007] JoL 99, 660 again repealed such provisions before they came into force.

88 See PM Huber, 'Grundzüge des Verwaltungsrecht in Europa – Problemaufriss und Synthese' in A von Bogdandy, S Cassese, PM Huber (eds), *Handbuch Ius Publicum Europaeum, Band V: Verwaltungsrecht in Europa: Grundzüge* (C.F. Müller 2014) 24.

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Efficiency Rules for the Organisation and Functioning of Public Administration in the Views of Professor Stanisław Kasznica

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Abstract
This article refers to the issue of the administrative apparatus system in the views of Professor Stanisław Kasznica. On their basis, an attempt was made to reconstruct efficiency guidelines concerning the formation of public administration structures, relations between them as well as administrative tasks and competences. A catalogue of these praxeological rules justifies the claim that the Professor's views remain fundamentally up-to-date both for the contemporary science of administrative law and in the sphere of administrative science.

Keywords
public administration system; efficiency rules; rules of operation of administration structures; relations in public administration; regulation of administrative competences

1. Introduction

The topic of analysis for this study is probably Professor Stanislaw Kasznica's best known work, namely "Polish Administrative Law. Basic concepts and institutions".[1] This title alone suggests that it focuses on certain principals of the indicated scope of norming, which undoubtedly also include the issue of the proper organisation of the administrative apparatus. Against this background, it is not difficult to establish the meaning of the concept of efficiency rules relating to the proper organisation of public administration and its functioning.[2] It covers certain patterns of shaping structures, relations, tasks and competences of public administration, performed by the state and other administrative entities, and in the terminological convention used by Professor

1 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946).
2 Ibid., 155.

Stanisław Kasznica – "by the state and by public-legal unions."[3] Essentially, therefore, the subject of consideration is that sphere of administrative law regulation that is often labelled systemic administrative law.[4] These "benchmarks" have been called efficiency rules on the grounds that they do not constitute an end in themselves, but are intended to ensure the efficiency, advantageousness and effectiveness of public administration activities.[5] In other words, they are a means of achieving an objective relevant to this administration, which Professor Stanislaw Kasznica defined as "the induction in the external world of certain phenomena considered beneficial from the point of view of the public interest; the objective is the production of some specific social values: a good road or school, a sense of security, order, etc."[6] Thus, in the context of the above, the aim of the argument is to reconstruct how, in the professor's opinion, the legislator should design the system of organisation and functioning of the public administration in order for it to be able to efficiently achieve the values singled out for the common good. In view of this, the article is of a relational and reconstructive nature, taking into account the fact that the professor did not at any point in his textbook single out the concept of rules (or principles) for the organisation of public administration, nor did he single out a passage that would refer to such (or similar) guidelines. Because of this, they require a search covering the entire content of the professor's referenced publication.

2. Rules of operation for public administration structures

In terms of the praxeological rules indicated by Professor Stanisław Kasznica relating to the structural features of public administration entities, reference can first be made to the continuity of an office. At the same time, it is worth noting that the notion of office was understood by the professor in a peculiar way – as a synonym of "authority". It meant a group of tasks, public functions, separated and strictly defined, fulfilled permanently and compulsorily on behalf of a given administering subject (the state or a "public-legal association") in a given territory by people appointed for this purpose (public officers), with the help of a permanent set of material means and on the basis of established rules of conduct.[7] In other words, in this determination, two fundamental system-legal concepts are merged ("shuffled"). These two concepts are the public administration body (directly representing the administering subject[8]) and its auxiliary apparatus (office), which are clearly differentiated in the current state of knowledge.[9] At the same time, the rule of the "continuity of the office" (understood in the terminological convention of Professor Stanisław Kasznica) is connected with the fact that it is a category separate from the

3 Ibid., 8.

4 See for example W Dawidowicz, *Wstęp do nauk prawno-administracyjnych* [Introduction to Legal-administrative Sciences] (Wydawnictwo Naukowe PWN 1974) 108–109.

5 Cf Z Cieślak, 'Istota i zakres prawa administracyjnego' [The Essence and Scope of Administrative Law] in Z Niewiadomski (ed), *Prawo administracyjne* [Administrative Law] (LexisNexis 2011) 56.

6 S Kasznica (1946) 10.

7 Ibid., 44.

8 Cf B Majchrzak, 'Istota administracji publicznej' [The Essence of Public Administration] in Z Cieślak (ed), *Nauka administracji* [Administrative Science] (Wolters Kluwer 2017) 14–18.

9 See e.g. J Szreniawski, J Stelmasiak, 'Zagadnienia ogólne aparatu administracyjnego' [General Issues of the Administrative Apparatus] in J Stelmasiak, J Szreniawski (ed), *Prawo administracyjne ustrojowe. Podmioty administracji publicznej* [Systemic Administrative Law. Public Administration Entities] (Oficyna Wydawnicza Branta 2002) 19.

acting people, existing independently of its personal composition – the people who form the office. It is characterised by "constancy" in three respects. Firstly, although the people who make up the personnel composition of the office may change, "the thing itself persists and still has the same content" – we observe constancy in the objectives and means of action, constancy in the internal arrangement. Secondly, there is constancy in the arrangement of the material means used by each office (the office and its equipment, files, etc.). And thirdly, the legal acts issued by the office remain in force, despite the change in personnel on the part of the issuing entities.[10]

The analogous efficiency rule continues to be referred to, in particular in current judicial decisions. For example, in its resolution of 14 November 2007 (BSA I-4110-5/2007)[11], the Supreme Court pointed to the applicability of the "principle of continuity of administrative action". According to the court, this stems from the assumption that the administrative apparatus should be constructed in such a way as to prevent a break caused, in particular, by reasons preventing the activity of the hub, i.e. the person constituting the personal staff of the body, which is in fact only a certain structural and organisational construction.[12]

In the professor's opinion, another important element affecting the efficiency of implementing the tasks of public administration is when the activities of "single-person authorities" and "multi-person authorities" (according to the current terminology – monocratic and collegial bodies[13]) are based on the office system. This way of organising their work means that a single person, or a group of people (a college), entrusted with an "office" would not be able to carry out the ever-expanding public tasks. Hence, "colleagues" have to be added and organised into an "office". The civil servants who form them consider all the cases coming into the office, prepare drafts for handling them and then submit them to the head of the college for a decision, which is then implemented.[14] At the same time, according to Professor Stanislaw Kasznica, it is fully justified to limit the right of approval of senior staff to matters of high importance only. This allows them to properly perform other equally important tasks, such as the management and supervision of the office and subordinate offices, learning directly about the needs of the population, etc. However, it is important that the name of the official who issued the decision is clearly visible on each decision. This means that responsibility for the acts coming out of the office can be easily established.[15]

The above characterisation of "clericality" could be used to supplement the argumentation in favour of distinguishing offices of public administration bodies in the legal and currently established sense. Indeed, it is argued in the literature on the subject that the *sine qua non* condition for the efficient performance of tasks and competences by any authorities is a properly organised "auxiliary apparatus", i.e. a set of assisting personnel and material means, called an office.[16] At the same time, the organisation, the principles of functioning of such an office and the distribution of tasks within

10 S. Kasznica (1946) 45.

11 Resolution of the PSC BSA I-4110-5/2007 [2007] Lex 356265.

12 Ibid.; see also resolution of the PSC III CZP 81/07 [2007] Lex 276905; decision of the Supreme Administrative Court of 9 June 2010, I OZ 400/10 [2007] Lex 643374. See also I Stancea, 'Aspects Regarding the General Principles of Public Administration' (2020) Management Strategies Journal. Constantin Brancoveanu University 4(50), 151, <https://ideas.repec.org/a/brc/journl/v50y2020i4p147-151.html#download> accessed 19 Feb 2023.

13 Z Leoński, *Nauka administracji* Podręczniki Prawnicze [Administrative Science, Law Textbooks] (CH Beck 2002) 68–69.

14 S Kasznica (1946) 61.

15 Ibid., 62.

16 See Z Leoński, *Zarys prawa administracyjnego* [Outline of Administrative Law] (Wydawnictwa Prawnicze PWN 2000) 67; C Martysz, *Właściwość organów samorządu terytorialnego w postępowaniu administracyjnym* [Jurisdiction of Local Government Bodies in Administrative Proceedings] (Wydawnictwo Uniwersytetu Śląskiego 2000) 214.

its framework are generally determined by the administrative authority, adapting them to the needs existing at a given moment.[17] Particular caution in this respect is required, as it is, after all, "the very foundation of the problem of efficient administration."[18]

Professor Stanisław Kasznica also drew attention to the need for civic participation in government authorities. This can take various forms, e.g. consultative bodies or bodies of social control.[19] "The principle of citizen participation in administration" is also singled out in more recent administrative law textbooks as "a fundamental principle of administrative law and administration."[20] In addition, numerous arguments in favour of such public participation are pointed out, taking into account the improvement in attitudes of both the administration itself and the addressees of its actions.[21] The thesis finds its basis in the constitutional principle of social dialogue, resulting from the preamble and Article 20 of the Constitution of the Republic of Poland.[22] "Social dialogue" is, in fact, the process of negotiating key decisions on public issues in order to "socialise" the mechanisms of making such decisions and counteract the processes of marginalising various interests.[23] In particular, public authorities are the addressees of this obligation.[24] Against this background, it can be noted that the emphasis is now placed on the functional dimension of this civic participation with a broad object scope, rather than only formal-organisational and limited only to government administration (as it appears from the views of Professor Stanisław Kasznica). In addition, it is also worth noting that participation in public decision-making processes is sometimes seen in an even broader sense, not only as the involvement of the public (stakeholders) in the implementation of public administration functions, but also as the participation of public entities in decision-making procedures belonging in the main to the competences of other public administration bodies.[25] The latter aspect may also be defined in terms of cooperation of bodies constituting one of the types of systemic ties in administration, though this did not appear in the professor's orbit of interest.

3. Rules defining relationships within the public administration

In the context indicated, Professor Stanisław Kasznica firstly referred to the hierarchical system of government administration. It constitutes an organisational system in which the personnel of an organisation is grouped according to levels, with the lower levels (subordinates) being absolutely subordinate to the

17 See C Martysz (2000) 214.

18 See WF Willoughby, *Principles of Public Administration* (Johns Hopkins Press 1927) 105.

19 S Kasznica (1946) 156.

20 E Ura, *Prawo administracyjne* [Administrative Law] (LexisNexis 2004) 72.

21 See DH Rosenbloom, RS Kravchuk, RM Clerkin, *Public Administration. Understanding Management, Politics, and Law in the Public Sector* (McGraw-Hill Education 2015) 474–475.

22 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483 as amended.

23 ME Stefaniuk, *Preambuła aktu normatywnego. W doktrynie oraz w procesie stanowienia i stosowania polskiego prawa w latach 1989–2007* [Preamble to the Normative Act. In the Doctrine and in the Process of Establishing and Applying Polish Law in the Years 1989–2007] (Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej 2009) 328.

24 Judgment of the Polish Constitutional Tribunal of 7 May 2014, K 43/12 (2014) Lex 1461264.

25 See J Mendes, 'Participation and Participation Rights in EU Law and Governance' in H Hofmann, A Türk (eds), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar Publishing 2009) 258.

higher levels – directly to those who stand at the nearest higher level (direct superiors) and indirectly to those who stand at further higher levels (indirect superiors).[26] Although *prima facie* the principle of hierarchy refers to micro relations, i.e. within a given office between its individual employees, the description of its characteristics has been made in the context of the powers of one authority towards another, and therefore as a macro relationship between separate governmental bodies (and their supporting apparatus – the office). Its elements are: a) the right to fill offices and positions in subordinate authorities; b) the right to direct the activities of subordinate offices by means of instructions (general norms) and official orders (individual, relating to specific cases); c) the right to supervise the activities of subordinate offices taking the form of supervision in the course of an instance (exercised in connection with the consideration of citizens' complaints against the acts of the office) and supervision *ex officio*, on the superior authority's own initiative; d) the right to abolish – delete and amend acts issued by a subordinate office due to their illegality or inexpediency; e) the right to hold subordinate officials accountable for violating their duties; and f) the right to reward such officials (promotions, decorations, etc.).[27] To the features of the "hierarchy", the professor also included what he called the "official way", which means that communication between offices, both "from top to bottom and from bottom to top," should, as a rule, follow the hierarchical levels, without "jumping over" them. The subordinate office is to address the supreme authority via the intermediate authority, and the supreme authority should in principle give instructions to the lower offices via the intermediate offices.[28]

The above treatment of the feature of hierarchical subordination of public administration functions essentially in the current literature of administrative law and administrative sciences. In particular, attention is paid to the micro and macro aspects of hierarchical subordination (as an employee and inter-authority relationship), and the elements constituting this relationship (i.e. being manifestations of personal and official dependence) are similarly approached.[29] At the same time, however, the possible existence of a *de facto* and rather wide autonomy of subordinate authorities[30] within the hierarchical system, and its replacement to a certain extent by a loose network mechanism, applied in particular in areas such as energy, transport, telecommunications, antitrust, etc. is pointed out.[31]

Another aspect of the interconnection of authorities is – in Professor Stanisław Kasznica's opinion – the postulate of the deconcentration of authorities. This means that the burden of carrying out public administration rests with the territorial authorities, who are in charge of almost all administration. The central authorities are responsible only for managing the entire subordinate apparatus, i.e. first and foremost for rationing activities and general supervision, legislative initiative and deciding on appeals against decisions made by regional authorities in the first instance.[32] This demand is closely related to the professor's argumentation in favour of

26 S Kasznica (1946) 46; see also WB Graves, *Public Administration in a Democratic Society* (DC Heath and Company 1950) 37.

27 S Kasznica (1946) 47–49.

28 Ibid., 49.

29 See e.g. R Giętkowski, 'Hierarchiczne podporządkowanie' [Hierarchical Subordination] in E Bojanowski, K Żukowski (ed), *Leksykon prawa administracyjnego. 100 podstawowych pojęć* Leksykony prawnicze [Lexicon of Administrative Law. 100 Basic Concepts, Legal Lexicons] (CH Beck 2009) 90–91.

30 Ibid., 91.

31 J Zimmermann, *Aksjomaty prawa administarcyjnego* [Axioms of Administrative Law] (Wolters Kluwer 2013) 110–111; similarly M Ruffert, 'National Executives and Bureaucracies' in P Cane, HCh Hofmann, EC Ip, PL Lindseth (eds), *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2021) 507.

32 S Kasznica (1946) 57–58.

the decentralisation of power – the expansion of self-government in general (i.e. administration exercised independently by public-law associations[33]), and of local self-government in particular, equipping it with the broadest possible scope of action and guaranteeing it real independence.[34] Of course, certain limitations to the implementation of this postulate should also be recognised, arising from the state-wide nature of certain matters or the recognition of such matters as not being of local importance.[35] The validity of these efficiency demands does not raise major doubts,[36] even concerning the establishment of relevant provisions being their implementation,[37] including at the level of the Constitution of the Republic of Poland (see Article 15(1)).

In Professor Stanisław Kasznica's views, we also find justification in favour of the need for state supervision of local and personal self-government. It involves the state's vigilance to ensure that the power granted is not abused, that it is used properly and that it is exercised dutifully (as a public service that must indeed be fulfilled).[38] This supervision should include not only the criterion of legality, but also of expediency – whether the self-government fulfils its tasks in accordance with the public interest in general, and in particular in accordance with the interest of the association itself and its members, whether it runs its economy, etc. The argument in favour of purposive oversight is the fight against corruption, private and the pursuit of private interests under the guise of acting in accordance with the public interest.[39] All these issues are also pointed out by contemporary representatives of the doctrine of administrative law, additionally emphasising the fact that supervision is a structural feature of the decentralist positioning of the supervised entity, guaranteeing its independence[40] ("the independence of the decentralised entity is a simple function of the content and scope of the application of supervision measures"[41]).

33 Cf ibid., 63.

34 See ibid., 78–80 and 156.

35 Cf ibid., 70.

36 See for example IA Bilouseac, 'Specific Elements of Administrative Decentralization' (2015) European Journal of Law and Public Administration vol. 2, 6; R Giętkowski, K Łokucijewski, 'Dekoncentracja/koncentrracja' [Deconcentration/Concentration] in E Bojanowski, K Żukowski (ed), *Leksykon prawa administracyjnego 100 podstawowych pojęć* Leksykony prawnicze [Lexicon of Administrative Law. 100 Basic Concepts, Legal Lexicons] (CH Beck 2009) 52; L Terec-Vlad, 'Public Administration and the Current Socio-Political Environment in Romania' (2021) Logos Universality Mentality Education Novelty Section: Political Sciences and European Studies 1(7), 32.

37 See e.g. article 15(4) of ustawa z dnia 6 marca 2018 r. o Rzeczniku Małych i Średnich Przedsiębiorców [Act of 6 March 2018 on the Ombudsman for Small and Medium-sized Entrepreneurs] [2023] JoL 1668 ("The statute will, in particular, determine the seat of the Ombudsman's Office and the Ombudsman's field representatives, taking into account the need to ensure effective implementation of the Ombudsman's tasks and guided by the need for deconcentration"), or article 12(5) of ustawa z dnia 15 marca 2002 r. o ustroju miasta stołecznego Warszawy [Act of 15 March 2002 on the structure of the capital city of Warsaw] [2018] JoL 1817 ("When transferring the funds referred to in paragraph 4 to the district at its disposal, the Warsaw City Council shall take into account the need to ensure effective decentralisation of the tasks of the municipality, even development of all districts and maximum possibility of satisfying the collective needs of the communities in the districts").

38 S Kasznica (1946) 75.

39 Ibid., 75.

40 See Z Niewiadomski, 'Samorząd terytorialny' [Local Government] in R Hauser, Z Niewiadomski, A Wróbel (ed), *Podmioty administrujące* System Prawa Administracyjnego [Administering Entities, Administrative Law System] (CH Beck 2011) 198–199.

41 Z Cieślak, 'Podstawowe instytucje prawa administracyjnego' [Basic Institutions of Administrative Law] in Z Niewiadomski (ed), *Prawo administracyjne* [Administrative Law] (LexisNexis 2011) 88–89.

With regard to the remaining – other than directing and supervising – typical ties occurring within the administrative apparatus (i.e. control, cooperation and coordination[42]), Professor Stanisław Kasznica indicated only public administration control (which he termed internal control). It was characterised as an element of the hierarchy of authorities, as well as control exercised in the course of instance through legal measures applicable in administrative proceedings.[43] The efficiency aspect of control (as well as supervision) in administration is also currently emphasised in research on public administration.[44] Furthermore, it is recognised that control, together with other legal ties, forms a set of "bonding factors" of the administration as an organisation in the institutional sense, intended to ensure the optimal realisation of the common good.[45]

4. Rules on the Formation of the Administration's Competence

Some important remarks have also been made by Professor Stanisław Kasznica with regard to the requirements related to defining the competence of public authorities. Here, within the framework of these remarks, the notion of "competence" is combined with the legal forms of action of administrative authorities.[46] Among the mentioned requirements concerning them, the professor pointed first of all to the competence separation of public authorities. It is linked to the strict definition by laws of the competences of each authority, leading to a clear demarcation of these competences between administrative authorities mutually, and even more so between them and the courts or the legislature.[47] "The principle of competence separation of authorities", which prescribes a clear and precise delimitation of the actions of public administration authorities and the responsibility for them, has also been distinguished by Zbigniew Cieślak as one of the "principles of administrative law."[48]

Another element worth noting is the presumption of validity of an act of public authority.[49] In the literature on the subject, it is also sometimes referred to as the presumption of legality of such an act, which is considered to be legally valid and binding from the moment it is communicated to the addressee.[50] It should be noted that in Professor Stanisław Kasznica's book, this is clearly linked only to the relationship between the individual authorities ("each authority should

42 See for example ibid., 87.

43 S. Kasznica (1946) 159–164.

44 See e.g. WM Hrynicki, 'Kontrola wewnętrzna w administracji publicznej jako instrument sprawnego zarządzania' [Internal Control in Public Administration as an Instrument of Efficient Management] (2021) Ius Novum 15(3), 147, 150, 157–158, 161–162, <https://doi.org/10.26399/iusnovum.v15.3.2021.26/w.m.hrynicki>; EK Pakuscher, 'Control of the Administration in the Federal Republic of Germany' (1972) The International and Comparative Law Quarterly 21(3), 469–470; A Miruć, 'Efficiency of Public Administration – Selected Problems' (2010) Slovenian Law Review 7(1–2), 121.

45 B Majchrzak, 'Prawne relacje między starostą a powiatowym inspektoratem nadzoru budowlanego' [Legal Relations between the Starost and the District Building Supervision Inspector] (2011) Samorząd Terytorialny vol. 1–2, 103.

46 See for example J Filipek, *Elementy strukturalne norm prawa administracyjnego* [Structural Elements of Administrative Law Norms] (Państwowe Wydawnictwo Naukowe 1982) 78; J Filipek, *Rola prawa w działalności administracyjnej państwa* [The Role of Law in the Administrative Activities of the State] (Państwowe Wydawnictwo Naukowe 1974) 44.

47 S Kasznica (1946) 14 and 155–156.

48 Z Cieślak (2011) 61.

49 S Kasznica (1946) 12.

50 B Schotel, 'Administrative Law as a Dual State. Authoritarian Elements of Administrative Law' (2021) Hague Journal on the Rule of Law vol. 13, 209, <https://doi.org/10.1007/s40803-021-00156-4>.

recognise the valid acts of the other authority").[51] This state of affairs, however, indirectly affects the situation of citizens and other subjects outside the administrative apparatus, which allows for a broader understanding of the consequences of the above presumption. For if an authority recognises acts as valid, then the addressee of its actions should do likewise, otherwise they are exposed to the negative consequences of omitting the act in question, which will be determined by that authority.

An important aspect of the effectiveness of the exercise of administrative powers is that they are based on state coercion.[52] Professor Stanisław Kasznica additionally pointed out that its application should be justified by the public interest, which at the same time justifies the negative "private-legal" consequences that may arise for the "interested party".[53]

Both of the above praxeological rules are nowadays sometimes treated as attributes of administrative authority,[54] which is regarded as a direct consequence of the institutionalisation of the state itself.[55] In addition, the presumption of the correctness of administrative acts is recognised as a principle of administrative law,[56] and in the scope limited to administrative decisions it functions as a detailed principle of administrative proceedings,[57] derived from Article 16 (1) APC.

In addition, giving those manifestations of the authorities' will that are intended to have legal effect, the form of an "administrative act" with all its definiteness and strictness, can be regarded as a factor in streamlining the activities of the public administration. In this way, the citizen is able to find out exactly what their obligations or rights are. They are therefore in a position to take an appropriate stance with regard to the formation of their legal situation and possibly to undertake a defence.[58] Against the background of these words of the professor, it is possible to formulate a postulate concerning the widest possible use of the form of an administrative act to settle individual and specific matters of citizens and other subjects external to the administrative apparatus. This postulate is addressed both to the legislator and to the bodies applying the law. Its source can be found in the current state of law in Article 2 of the Constitution of the Republic of Poland and the resulting right to a trial. Indeed, the essence of the latter consists in granting an individual the right to defend a legal interest in proceedings regulated by procedural law, with the right to defend oneself by means of legal remedies guaranteed. As accepted in the doctrine of administrative law, exercising this right is served in particular by the presumption

51 S Kasznica (1946) 12.

52 Ibid., 13; cf also ibid., 7.

53 Ibid., 13.

54 M Błachucki, 'Negociacyjny sposób uzgodadniania treści aktu administracyjnego a istota władztwa administracyjnego (na przykładzie prawa antymonopolowego)' [Negotiation Method of Agreeing on the Content of an Administrative Act and the Essence of Administrative Power (Based on the Example of Antitrust Law)] in J Łukasiewicz (ed), *Władztwo administracyjne. Administracja publiczna w sferze imperium i w sferze dominium* [Administrative Authority. Public Administration in the Sphere of Empire and in the Sphere of Dominion] (TNOiK 2012) 67; I Lipowicz, 'Istota administracji' [The Essence of Administration] in Z Niewiadomski (ed), *Prawo administracyjne* [Administrative Law] (LexisNexis 2011) 30–31; E Ochendowski, *Prawo administracyjne* [Administrative Law] (TNOiK "Dom Organizatora" 1999) 24–25.

55 See M Krawczak, *Podstawy władztwa administracyjnego* [Basics of Administrative Power] (Wolters Kluwer 2016) 116 et seq.

56 Z Cieślak (2011) 65.

57 See B Adamiak, 'Komentarz art. 16' [Article Comment 16] in B Adamiak, J Borkowski (eds), *Kodeks postępowania administracyjnego. Komentarz* Komentarze Kodeksowe [Code of Administrative Procedure. Commentary, Code Comments] (CH Beck 2017) 119.

58 S Kasznica (1946) 156.

that an individual's affairs are settled in the form of an administrative act and, above all, in its specific form, i.e. in the form of an administrative decision, when the substantive law does not provide for a form of settling the case other than an administrative act.[59] Deciding by means of an administrative decision is namely connected with the obligation to apply a detailed standardised procedure, serving in particular to protect the legal interest of the individual and providing for their specific procedural rights.

5. Conclusions

As a result of reviewing the content of Professor Stanisław Kasznica's book "Polish Administrative Law. Concepts and Basic Institutions", it is possible to formulate a conclusion that indicating efficiency patterns in the organisation and functioning of public administration constituted an important subject of his work. These rules relate to the following issues: a) the operation of public administration structures; b) the relations between entities and organisational units of this administration; c) the formation of its competence. Within this classification, the first group includes guidelines in the form of: the continuity of the operation of the office, the basing of the government's activities on the office system and the participation of the civic factor in the governmental authorities. The second group consists of: the hierarchical nature of government administration, the deconcentration and decentralisation of power, state supervision of local and personal self-government and the internal control of administration. The third group of praxeological rules consists of: the competence separation of public authorities, the presumption of the validity of the acts issued by them, their reliance on state coercion and the use of the form of an administrative act to deal with the affairs of an individual. The reconstructed catalogue indicates that Professor Stanisław Kasznica's views relating to the above scope remain, in principle, valid both from the perspective of the contemporary science of administrative law and in the areas being researched by the science of administration.

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59 B Adamiak, 'Wprowadzenie' [Introduction] in B Adamiak, J Borkowski (eds), *Kodeks postępowania administracyjnego. Komentarz* Komentarze Kodeksowe [Code of Administrative Procedure. Commentary, Code Comments] (CH Beck 2017) 48–49.

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The Institutionalisation of Values in Light of Stanislaw Kasznica's Work

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Abstract
The life and work of Professor Stanisław W.A. Kasznica follow values in a special way. This is indicated by his scientific output, his curriculum vitae and also the history of his family. This article analyses S. Kasznica's textbook *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* (Polish Administrative Law: Basic Concepts and Institutions), 2nd Edition, Poznan 1946 to determine how, in his scientific output, S.W.A. Kasznica assigned values to the legal and juridical institutions he described. The first method is the contextual "indirect" assignment of values to a given legal institution (i.e. resulting from the general overtone meaning of a given passage of text). The second method of institutionalising value refers to value as transcendental. The third method used is the direct criticism or negation of certain institutions in a way that indicates that their antithesis is some kind of good. The fourth method of institutionalising values is to define certain institutions by directly indicating that the institution serves values. This is, in other words, the introduction of certain values into the content of a legal institution. The fifth method of value institutionalisation by S. Kasznica is based on signalling how certain anti-values objectively external and internal to the law can nevertheless be beneficial to the law. Of course, these observations are made on the basis of an analysis of the practice of public authorities and take the form of statements tinged with a slight cynicism. S. Kasznica points out in this case how the "slowness", or in other words the procedural incompetence of the parliamentary legislature, can peculiarly counteract the inflation of the law.

Keywords
values; institutionalisation of values; personification of values; meaning of values; substantive legal state; totalitarian state

1. Introduction. The meanings of "values" in legal theory

The life and work of Professor Stanisław Wincenty Antoni Kasznica follows values in a special way. This is clearly indicated not only by his scientific output, but also by his biography and the history of his family and his children.[1] In the case of Stanisław Kasznica, researching and writing about the law is inseparably linked with assigning values to certain legal concepts and institutions. He does this in a scientific, natural and balanced way. At the same time, his life shows that he was not detached from these values. He knew from experience what he was writing about. The impulse behind this paper is S. Kasznica's textbook called *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* (Polish Administrative Law: Basic Concepts and Institutions), 2nd Edition, Poznan 1946,[2] which presents the essence of administrative law, which was primarily shaped during the first 20 years of the Polish state after regaining independence in 1918. Interestingly, it also takes into account the new political and system realities taking place in Poland after the end of the Second World War. This Monograph by S. Kasznica is a narrative about the law and its values on the basis of the interwar experience. It points out the timelessness of certain institutions along with the dangers of certain solutions adopted in administrative law.

The title of this work – The institutionalisation of values – is based on an analysis of the Monograph in terms of what objectively existing values outside the law (pre-state and supra-state) and in the law S. Kasznica attributes to the state, its functions and tasks in the division of power. In other words, on what values is the phenomenon of the functioning of law, the state and public administration and its offices based (treated as forms of value institutionalisation). The principles of the system and the organisation of public administration are also treated as a form of the institutionalisation of values. Apart from presenting the forms of the institutionalisation of the values of law in the legal writing output of S. Kasznica, the text presents the thesis that the institutionalisation of values, i.e. the introduction and realisation of their objective content through the law – is connected with the personification or personification of values. Law is a product of the human mind, it exists in its abstract content located in its carriers – as an intellectual tool enabling man, based on the social contract and the authority of the state, to regulate social relations.[3] The history and the daily practice of the functioning of the state and the organs of public authority indicate that it is important who creates and applies public and administrative law, as well as who interprets it, who resolves the disputes that arise and who participates in the judicial control of public administration. This should unquestionably be a person who, in addition to the appropriate legitimacy derived from the law, has the ability to decode social and legal values in an independent, non-arbitrary but law-based, objectified and relatively expert manner, even if this were to be to the detriment of their own diverse interests. In order to assist this process, solutions are introduced into the legal order to prevent conflicts and collisions of

1 See S Kasznica, *Druga wojna światowa. Wspomnienia spisane na podstawie codziennych notatek* [World War II: Memoirs Written from Daily Notes] (Instytut Pamięci Narodowej 2013).

2 Hereafter referred to in the article as the Monograph.

3 It is worth noting the communicative concept of law according to Jürgen Habermas. In his work *The Dreams of Philosophers*, he writes that law can be legitimised by its content and directly shaped when citizens participate in its creation. The authority of the state is not needed in this case. For a more extensive discussion see S Tkacz, Z Tobor, 'Uwagi na temat aksjologicznego wymiaru Konstytucji RP z 1997 r. i jej wykładni w świetle prac Profesora Piotra Winczorka' [Comments on the Axiological Dimension of the Constitution of the Republic of Poland of 1997 and its Interpretation in the Light of the Works of Professor Piotr Winczorek] (2022) Archiwum Filozofii Prawa i Filozofii Społecznej 1(30), 113–125 and the literature cited therein.

interest in those who create and apply the law. At the same time, the law variously formulates systemic and material and uses ethical prerequisites for the exercise of certain offices and social functions. Consequently, the normative sphere of the law should be oriented towards the fact that the values institutionalised in the law are decoded by people who, not only through morality and professional ethics, but also through normative solutions to the requirements imposed on them by the law, are prepared to create, execute, apply and enforce the law in which the values are institutionalised. Increasingly applicable today, artificial intelligence is prepared to make legal decisions in a formal sense based on relatively schematic states of fact and law that do not require value judgements.[4] If the development of science makes it capable of making decisions in an axiological and material sense, the problem of its legal subjectivity will arise.

For the topic at hand, it is important how the concept of value can be understood from the perspective of the theory of the philosophy of law in order to consider which concepts of value Stanislaw Kasznica uses.

Among other things, legal theory refers to four basic meanings of value.[5] The first meaning indicates value as a criterion of valuation: it is referred to by sentences stating the value of a certain thing, importantly an individual thing. In this case, the scheme applies: X is valuable (positive, good and lawful). Values appear in this sense, among other things, in the jurisprudence of tribunals and courts.[6] In the second sense, value appears as a state of affairs (an object) so qualified (a good, i.e. in this case a valuable thing, a state of affairs, a phenomenon or a relation). Here value is treated as a kind of thing or a certain general thing (with the important proviso that it is not an individual thing). In this view, the value can be the institution of an administrative act, an administrative-legal relationship, a legal norm, a social welfare phenomenon, a nation, a society. The current state of social relations in the state of a third meaning is referred to the value as transcendental, with this meaning being referred to as proper. In this case, axiological sentences state that a certain object, fact or state of affairs is good in the sense of "being good" – as opposed to "being good" typical of the first meaning of value presented above. In this view, it is good that "the substantive rule of law is secure," it is good that "the substantive rule of law provides security for citizens and people." In this view, security as a value serves to attribute certain characteristics to certain states of affairs.[7] In the fourth sense, value is understood as a family of sets of equal states of affairs ordered by general preference relations. This concept, as noted by M. Kordela, is based on the asymmetry and transitivity of relations between legal values. It is argued in science that the asymmetricity of the preference relation consists in the fact that if the legislator prefers the state of affairs W1 over W2, he thereby does not prefer W2 over W1. Transitivity consists in the fact that if the legislator prefers the state of affairs W1 over W2 over W3, he thereby prefers the state of affairs W1 over W3. If we assume that the asymmetry and transitivity of the relationship between values legitimises the assumption of the hierarchical nature of the legislator's axiological system, then "constitutional values will overcome statutory values, statutory values will overcome sub-statutory values."[8]

4 See D Użycki, 'Czym grozi sztuczna inteligencja?' [What are the Threats of Artificial Intelligence?] (2019) Personel Plus vol. 5, 95; P Fik, P Staszczyk, 'Sztuczna inteligencja w unijnej koncepcji e-sprawiedliwości – teoria i możliwy wpływ na praktykę' [Artificial Intelligence in the EU E-Justice Concept – Theory and Possible Impact on Practice] (2022) Europejski Przegląd Sądowy 2022 vol. 7, 4–9.

5 The author is guided by the work of M Kordela: M Kordela, 'Wstęp metodologiczny do wykładni aksjologicznej' [Methodological Introduction to Axiological Interpretation] in J Czapska, M Dudek, M Stępień (eds), *Wielowymiararowość prawa* [Multidimensionality of Law] (Wydawnictwo Adam Marszałek 2014) 31–34.

6 Ibid., 31.

7 Ibid., 33.

8 Ibid., 40.

According to the current preferential order, as expressed in the Constitution of the Republic of Poland of 2 April 1997, human dignity constitutes the supreme value, and at the same time the source of human rights and freedoms. The value of material truth, in turn, constitutes the overriding value of all proceedings governed by law. All these values "ultimately become subordinated to a specific super value – the rule of law."[9] Of course, with reference to Stanislaw Kasznica, it must be emphasised that the starting point for his axiology within the science of law that he practised was the Constitution of 17 March 1921.

Reading the analysed Monograph allows one to conclude that S. Kasznica institutionalised certain values or, conversely, that he axiologised certain institutions in different ways.

2. Review of the institutionalisation of values in the works of S. Kasznica

The first method is the contextual attribution of value to a given institution of law.[10]

In the analysed Monograph, Stanisław Kasznica most often "ascribed" values to a given legal institution contextually, indirectly. Precisely from the context (the general overtone and impression), the reader can deduce whether the legal or juridical institution discussed at a given moment is a good, a value, and whether, due to these properties, they are in some cases timeless and universal. For example, such a context occurs when defining certain institutions. It is possible to deduce from the guided argument whether this institution is a value or a good.[11] Of course, in this way we enter, among other things, the complex issue of the conceptual apparatus of legal dogmatics, but, regardless of the statement that with the development of law this apparatus is subject to transformations, it must be stated that certain legal concepts have a relatively constant application over time. Such a context may additionally be the very practical significance of the definition, the fact that the author defines some legal or juridical institutions. As a rule, in the science of law, or in the law itself, institutions are defined that have meaning according to a criterion derived at least from the category of what are known as internal values of law (not to mention external ones). This, of course, does not detract from the observation that new definitions are based on criticism of previous ones, and that they may define and stigmatise negative phenomena. Contextualising a good institution may also result from demonstrating a causal relationship between the operation of certain institutions and their effects as goods expected by the law and society. The contextual valuing of legal institutions may originate in the author's authority. This comes from the very fact that he writes about them without criticising them (even contextually).

In the case of S. Kasznica, readers familiar with his biography may be interested in his approach to the institution of the state. S. Kasznica values the institution of the state contextually. Reflecting on administration, he states that, "nowadays, no one's administration can come into

9 Ibid.

10 The author defines the concept of an institution as a set of norms recurring in a legal act, the identification and naming of which serves the purpose of ordering and interpreting a legal text and legal dogmatics. These are also concepts deductively without normative origin, derived in dogmatics as a tool for cognition of law. For more details see B Adamiak, J Borkowski, 'Pojęcie instytucji procesowych i ich rodzaje' [The Concept of Procedural Institutions and their Types] in B Adamiak, J Borkowski, *Postępowanie administracyjne i sądowoadministracyjne* [Administrative and Court-administrative Proceedings] (Wolters Kluwer 2022) 139–143.

11 See the definition of office (authority) according to S Kasznica: S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 44.

comparison with the state administration, both because of the vastness of the fields covered by it and the intensity of the power of action."[12] It follows from this sentence that the importance of administration is determined by the number of spheres of social relations it affects, as well as the power of this effect. Referring to the state itself, S. Kasznica writes:

> The state has at its disposal a means of action that no one else has (unless the state lends it or allows it to be used). This is authority, the ability to impose and assert one's will by means of absolute coercion. It is based on the monopoly of physical force (armed force) as its deepest foundation. Without this monopoly the state cannot exist."[13] The state and its authority is contextually accepted by S. Kasznica as a good; he links it to the essence of the state: " Where it does not exist, there we are dealing either with a state just being formed or a state in decay.

This approach testifies to S. Kasznica's scientific objectivity. It is even phenomenal that S. Kasznica, so wronged in his private life by the institution of the state,[14] does not transfer his negative experiences of the state as such into a scientific text. As an administrativist, he is well aware of the fact that the operation of law is based on the unified institution of the state, and in his scientific narrative he treats it contextually as a good.

However, in relevant places in the analysed monograph he included criticism, a bad evaluation of a totalitarian state. This form of state is negatively assessed by S. Kasznica explicitly, as discussed below.[15]

He contextualises as good the principle of a tri-partite government, stating: "It is only the totalitarian states of the 20th century that break it."[16] On the practice of applying this principle, he states: "nowhere has this principle been carried out ruthlessly and mechanistically."[17]

The second method of institutionalising values refers to values as transcendentals.

12 Ibid., 7.

13 Ibid.

14 Prof. Stanisław Wincenty Antoni Kasznica was imprisoned by the tsarist authorities in Pawiak prison and the Warsaw Citadel by the Austrian authorities in Zamarstynów, and in 1939 by the Germans in Poznan. Source: from the justification of the Substitute Ordinance No KN-I.4102.65.2017.3 of the Governor of Wielkopolskie Province of 13 December 2017 on naming 9 Maja Street located in the city of Poznan as Stanisława Kasznica. Wielk. 2017.8475 of 13 December 2017. The order refers to Stanisław Józef Bronisław Kasznica, alias "Stanisław Wąsacz", "Wąsowski", "Przepona", "Służa", "Maszkowski", "Borowski", "Stanisław Piotrowski" (born 25 July 1908 in Lviv, died 12 May 1948 in Warsaw) – son of Professor Stanisław Wincenty Antoni Kasznica. As it then follows from the justification as above: by judgement of the Military District Court in Warsaw of 2 March 1948, No. 68/48, presided over by Lt. Col. Alfred Janowski, sentenced the son of Prof. S Kasznica in the trial to a fourfold death penalty and to four prison sentences, as well as to additional penalties – loss of public, civic and honourable rights and confiscation of property, and on the basis of the summary of sentences imposed on him the death penalty and the additional penalties. President Bolesław Bierut did not exercise his right to pardon. The sentence was carried out on 12 May 1947 in Mokotow prison by shooting. On 14 October 1970, his personal file was handed over, together with the files of 1322 convicts from the archive of the Mokotow prison, to the Provincial Headquarters of the Civic Militia. On 30 September 1992, the Court of the Warsaw Military District declared the conviction of Stanisław Kasznica invalid. SWA. Kosznica had five children. It should be noted that his son Jan did not survive the war. He was killed during the Battle of Laski on 19 September 1939. See M Szczesiak-Ślusarek, 'Historia rodu Kaszniców' [History of the Kasznica Family] in S Kasznica, *Druga wojna światowa. Wspomnienia spisane na podstawie codziennych notatek* [World War II: Memoirs Written from Daily Notes] (Instytut Pamięci Narodowej 2013) 36–38, 53, 66.

15 S Kasznica (1946) 21.

16 Ibid., 16.

17 Ibid.

Sometimes from S. Kasznica's reflections it appears that his statements in the analysed monograph state that a certain object, fact or state of affairs (office, authority or local government) is good in the sense of "being good". S. Kasznica's deliberations concerning the element accepted by him are carried out in this convention, with the core of the office determining its timelessness and the phenomenon of its duration in time as "a thing that lasts by itself and still has the content, if not quite the same, then in any case the same type."[18] The point here is that it is a good thing that "In every office, the same functions are still fulfilled, similar matters are still dealt with. And at the same time they are constantly being dealt with in a similar, if not entirely the same way, which is the result not only of the existence of rigid rules of procedure, but to an even higher degree – of the formation in each office of certain traditions in office, practices and precedents, which have already been mentioned."[19] From S. Kasznica's statement, it can be concluded that it is good that "To this is added the constancy of the arrangement of the material means used by each office, the external appearance: so the office with its equipment, files, etc."[20] In addition, S. Kasznica points to the relatively permanent binding force of legal acts issued by an office, which retain their force despite the fact that the people who issued it are no longer there.[21]

Presenting the rationale for deepening the institution of self-government, and in particular local government, S. Kasznica mentions its good sides. Thus, local government is good because it is good that: "(...) it is a dam against the omnipotence of the state"; "(...) it is a huge civic school"; "(...) only here can the needs and tendencies of individual territories and population groups be fully taken into account"; "(...) transferring a considerable part of the tasks of public administration to self-government relieves the state budget superbly."[22]

The third method used is to criticise or negate certain institutions in a way indicating that their antithesis represents some kind of good. S. Kasznica clearly fears a revival of the old police state in the contemporary form of a totalitarian state.[23] He had been noting these tendencies since the second quarter of the century. He identifies as the attributes of this state the disregard of legal norm, the dominance of discretion, the retardation of the development of administrative law, the abuse of preventive supervision against local government. His critical analysis of the sources of administrative law is extremely interesting, coming in the form of decree-law by virtue of the Constitution itself, and by virtue of a special law (decrees with authority) and then decrees.[24] The reflections on this topic still provide a valuable perspective on the critical analysis of this form of sources of law today.

From reading the monograph, it is clear that S. Kasznica negates positive definitions of public administration;[25] he negates when administration does not produce anything positive[26] and negates bureaucracy in the negative overtones of the word.[27] He writes about the acutely felt lack of a general part of administrative law,[28] speaking very negatively about the inflation of law in a totalitarian state,[29] about decrees as a work of bureaucracy[30] and about the shifting of respon-

18 Ibid., 45.
19 Ibid.
20 Ibid.
21 Ibid.
22 Ibid., 80.
23 Ibid., 21.
24 Ibid., 24–29.
25 Ibid., 9.
26 Ibid., 10.
27 Ibid., 10, 29.
28 Ibid., 21.
29 Ibid.
30 Ibid., 29.

sibility.[31] He criticises the excessive number of ministries,[32] centralism, monocratic power,[33] the preventive supervision of local government[34] and even the courts.[35] It is telling how up-to-date S. Kasznica's words are on civil servants' salaries: "They are at starvation level; they do not fulfil their purpose because they do not provide the civil servant with a sufficient, decent livelihood."[36]

The fourth method of institutionalising values is to define certain institutions by directly indicating that the institution serves values. This is, in other words, introducing certain values into the content of a legal institution. In the definition of administration, S. Kasznica writes that it serves tangible and intangible values.[37] When defining administrative law, S. Kasznica points out that it is a means to an end, defines the limits of administrative activity and is related to efficiency and pragmatism.[38] When defining public service, S. Kasznica refers to "people taking action", perceiving in them an essential value and claiming correctly that: "the essence of the office – as in any community – is people taking action."[39] He also uses values when defining the administrative relationship and acts of public administrations. These acts are undertaken exclusively in the public interest and in the performance of some public service.[40] The value of the administrative-legal relationship is that it is legal, public and purely personal.[41] The value of "saving" as a value is associated by S. Kasznica with the functioning of large provinces.[42] He assesses the breaking of borders in the process of establishing a new territorial division of the country as determined by a prior value, i.e. the unification of legal regulations.[43] The institutions of law are filled with values and when analysing them, it is worth quoting Kasznica's definition of the judge's independence: "He stands directly face to face with the legal norm. No one has the right to impose upon him how he is to understand and explain it. He does it himself, guided solely by his own understanding and conscience."[44]

The principles of law serve as a classic example here.[45] Two of them are regarded by S. Kasznica as the most important, namely the rule of law in the operation of public administration and equality before the law.[46] He sees in hierarchy the protection of subjective rights by providing a vertical course of instances for the institution of appeal. In his opinion, this hierarchy makes it possible to protect the subjective rights of the individual, because there is a place to lodge an appeal.[47] He also writes about the values associated with the principle of deconcentration and unitisation.[48]

31 Ibid., 47.
32 Ibid., 55; cf also contextually critical on this subject ibid., 17–19.
33 Ibid., 58.
34 Ibid., 77.
35 Ibid., 171.
36 Ibid., 91.
37 Ibid., 7.
38 Ibid., 10.
39 Ibid., 45.
40 Ibid., 96.
41 Ibid., 116.
42 Ibid.
43 Ibid., 52–53.
44 Ibid., 11.
45 Ibid., 106–109.
46 Ibid., 117.
47 Ibid., 44, 46.
48 It is worth noting that these principles were expressed in Art. 66 of ustawa z dnia 17 marca 1921 r. – Konstytucja Rzeczypospolitej Polskiej [Act of 17 March 1921 – Constitution of the Republic of Poland] [1921] JoL 267, 55, which stated: "In the organisation of state administration the principle of deconcentration will be carried out. The organs of state administration in individual territorial units are to be united in one office under one head. At the same time, account will be taken of the principle of the participation of elected citizens in the performance of the tasks of these bodies, within the limits laid down by law. On the principle of grouping".

S. Kasznica's fifth method of referring to values when writing about the law is to indicate how values objectively external to the law can be misunderstood and misapplied, and thus oppose its internal and other external values. In this case, S. Kasznica made interesting observations from which it follows that an objectified value of social relations external to the law, such as solidarity, may, in the case of the application of the law by officials (e.g. when considering appeals), become a reason/premise for its application not so much in the name of the public interest and the interest of the individual, but in the name of the solidarity of the professional group of officials.[49] In the case of such a pathological understanding of the solidarity of civil servants – as a phenomenon unexpected and not tolerated by the law – such instruments should be opposed. This implies there should be control from an independent and autonomous administrative court. Against the background of the indicated and analysed phenomenon, S. Kasznica formulated apt and timeless theses on the grounds of the separation of powers, about the need for administrative court judges not to continue their "solidarity" with the officials applying the law. S. Kasznica disavows a certain myth about the undisputed systemic value of the Supreme Administrative Tribunal (NTA) throughout the interwar period. He recognises and describes the negative changes in its system that followed the May Coup of 1926. He criticises this systemic state of law, which aims "at one goal: to strengthen the influence of the government on the personnel composition of the Tribunal."[50] The changed legal state in force post-May[51] saw, in his opinion, a departure from the principle that the President of Poland could appoint NTA judges from three nominees presented by the General Assembly of Judges.[52] The criticised change was that the Prime Minister presented to the President of Poland for appointment as a judge one of the

49 S Kasznica (1946) 166.

50 Ibid., 171; see Articles 30–36 of rozporządzenie Prezydenta Rzeczypospolitej z 27 października 1932 r. o Najwyższym Trybunale Administracyjnym [Regulation of the President of the Republic of Poland of 27 October 1932 on the Supreme Administrative Tribunal] [1932] JoL 806; Rozporządzenie Prezesa Rady Ministrów z 23 grudnia 1932 r. – Regulamin Najwyższego Trybunału Administracyjnego [Regulation of the Prime Minister of 23 December 1932 – Rules of Procedure of the Supreme Administrative Tribunal] [1932] JoL 968.

51 See rozporządzenie Prezydenta Rzeczypospolitej z 27 października 1932 r. o Najwyższym Trybunale Administracyjnym [Regulation of the President of the Republic of Poland of 27 October 1932 on the Supreme Administrative Tribunal] [1932] and also the subsequent amendments to Article 6 of ustawa z dnia 3 sierpnia 1922 r. o Najwyższym Trybunale Administracyjnym [Act on the Supreme Administrative Court] [1922] JoL 600, referred to in footnote 52.

52 Ibid. 171; See Art. 6: "The Supreme Administrative Court shall consist of the first president and the requisite number of presidents and judges. The first president, presidents and judges shall be entitled to the full judicial rights reserved by the provisions of Chapter IV of the Constitutional Act; in terms of emoluments they shall be equal to the first president, presidents and judges of the Supreme Court. The President of the Republic appoints, on a proposal from the Council of Ministers: the first president and the chairmen from among persons who have held the office of judge of the Tribunal for at least two years, and the judges from among candidates chosen in triplicate by the Assembly of Presidents and Judges of the Supreme Administrative Tribunal (General Assembly of the Tribunal); before appointing the chairmen, the Council of Ministers consults the first president. The first president, presidents and judges of the Court may be only persons who have a legal education. Half of the number of judges shall be qualified for the office of judge."(Amended by Article 13 of the decree under the rozporządzenie Prezydenta Rzeczypospolitej z 7 lutego 1928 r. o zmianie i uzupełnieniu przepisów, dotyczących ustroju Najwyższego Trybunału Administracyjnego, oraz o stosunku służbowym sędziów Najwyższego Trybunału Administracyjnego [Regulation of the President of the Republic of Poland of 7 February 1928 on amending and supplementing the provisions concerning the structure of the Supreme Administrative Tribunal and on the service relationship of judges of the Supreme Administrative Tribunal] [1928] JoL 94, as amended by Article 1 of rozporządzenie Prezydenta Rzeczypospolitej z 3 grudnia 1930 r. w sprawie zmiany ustawy z dnia 3 sierpnia 1922 r. o Najwyższym Trybunale Administracyjnym [Regulation of the President of the Republic of Poland of 3 December 1930 amending the Act of 3 August 1922 on the Supreme Administrative Tribunal] [1922] JoL 657 amending the present Act as of 6 December 1930).

candidates indicated by the administrative college of the NTA, in which the first president had a decisive vote, and the Prime Minister, in turn, had a say in who became the first president of the NTA. S. Kasznica emphasises that, "regardless of this, 1/10th of the total composition of the NTA could be appointed from among the candidates that the Prime Minister chooses at his own discretion."[53] At the same time, also at his own discretion (free discretion according to S. Kasznica), the Prime Minister presented candidates for the position of first president and presidents of the NTA to the President of Poland for nomination. Previously, such managerial positions could only be taken up by judges who had previously held judicial office for some time.[54] As S. Kasznica notes, "The real blow to the judiciary in general, and to the NTA in particular, was the suspension of judicial irremovability on several occasions after 1926."[55] Already at that time, S. Kasznica formulated how significant – and particularly relevant today, in the Third Republic of Poland – this is, through his words: "There can be no real truly effective judicial control over the administration if the judge lives in constant fear that at any moment the suspension of immovability may be renewed, and then there will be a score to settle with him for judgments not issued in accordance with the government's ideas."[56]

The fifth method of valuation by S. Kasznica is based on signalling how certain anti-values external and internal to the law can – from an objective point of view – be beneficial to the law. Of course, these observations are made on the basis of an analysis of the practice of public authorities and take the form of statements tinged with light cynicism or black humour. S. Kasznica points out in this case how the "slowness", or in other words the procedural incompetence of the parliamentary legislature can peculiarly counteract the inflation of the law.

3. Personification of values

The introduction to this article explores the concept of personification – the embodiment of values. Values, deeply rooted in morality and ethics, are intricately tied to human existence. In applying, contemplating and living with the law on a daily basis, individuals take a stance in relation to the values that underpin the creation, execution and enforcement of laws. Through their sphere of freedom, individuals can embody these values to various extents. Both the state and the law are profoundly influenced by how individuals, especially citizens, personify these values in pursuit of the common good.[57] On the one hand, texts of vows and oaths imbued with values are introduced into the legal order, as well as civic duties of a nature referring to moral and ethical norms.[58] On the other hand, there are institutions that create various forms of responsibility for non-compliance with values defined by law. At this point, I would like to raise some aspects of the personalisation of values related to Prof. S. Kasznica and his family. It is a kind of tragic paradox

53 S Kasznica (1946) 170–171.
54 Cf ibid.
55 Ibid.
56 Ibid., 171.
57 See S Kasznica's reflections on the moral duty of loyalty of an official to the state – ibid., 88–89.
58 See the oath of the President of the Republic of Poland contained in the Constitution of the Republic of Poland of 17 March 1921: "I swear to Almighty God, in the Trinity One, and I swear to you, the Polish Nation, on the office of President of the Republic of Poland, which I assume: to uphold and defend the laws of the Republic of Poland, and in particular the Constitutional Act; to serve the common good of the Nation faithfully and with all my strength; to avert all evil and danger from the State; to guard the dignity of the Polish name unswervingly; to hold justice towards all citizens without distinction as my first virtue; to devote myself undividedly to the duties of office and service. So help me God and the Holy Passion of His Son. Amen".

in the life of Prof. Stanisław Kasznica that the institution of the formal people's state (possessing the attributes of the totalitarian state that he criticised), serving formal and informal "values" (or, in fact, anti-values) of the goals and political struggle of the people's state – with its dehumanising, but effective mechanism of action – ultimately led to the conviction and execution of Stanisław Józef Bronisław Kasznica, son of Prof. Stanisław W.A. Kasznica. This is a cruel aspect of a state that draws only on its forms and authority, rather than on universal values, including human and civil rights and freedoms. Even a change of regime does not in any way justify the biological elimination of those people who express values different from those favoured by the change. After the political changes had been introduced into the Third Republic as a legal state, it turned out that the mechanism of the state, based on other values, led the instruments of public law to bring about the legal and social rehabilitation of Stanisław Józef Bronisław Kasznica, son of Prof. Stanisław W.A. Kasznica.[59] It turned out that the public and administrative law, to which Prof. S. Kasznica devoted his entire life made through its institutions the personification of values unfortunately posthumously in relation to a Person whom the State had earlier, in the formal sense, unlawfully deprived of life[60]. When dealing with public and administrative law, it is impossible not to keep these reflections in mind.

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59 Here, I am thinking primarily of the recognition on 30 September 1992 by the Court of the Warsaw Military District of the invalidity of the conviction of Stanisław J. B. Kasznica; as well as zarządzenie nr 9/2019 Prezesa Narodowego Banku Polskiego z dnia 22 marca 2019 r. w sprawie ustalenia wzoru, próby, masy i wielkości emisji monety o wartości nominalnej 10 zł, z serii "Wyklęci przez komunistów żołnierze niezłomni" – Stanisław Kasznica "Wąsowski" [Order No 9/2019 of the President of the National Bank of Poland of 22 March 2019 on determining the design, sample, weight and size of the issue of a coin with a nominal value of PLN 10, from the series "The Unbroken Soldiers Cursed by the Communists" – Stanisław Kasznica "Wąsowski"] [2019] MP 293 and zarządzenie zastępcze nr KN-I.4102.65.2017.3 Wojewody Wielkopolskiego z 15 grudnia 2017 r. w sprawie zmiany zarządzenia zastępczego z 13 grudnia 2017 r., nr KN-I.4102.65.2017.3 [Substitute Ordinance No. KN-I.4102.65.2017.3 of the Governor of the Wielkopolskie Voivodship of 13 December 2017 on on amending the substitute order of 13 December 2017, No. KN-I.4102.65.2017.3] [2017] OJ 8575.

60 He himself was decorated posthumously by the postanowienie Prezydenta Rzeczypospolitej Polskiej z 20 sierpnia 2009 r. o nadaniu orderów i odznaczeń [Order of the President of the Republic of Poland of 20 August 2009 on the awarding of orders] [2009] MP 217;, for outstanding merits for the independence of the Republic of Poland: The Grand Cross of the Order of Poland Rebirth.

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Contemporary Central & East European Law

Administrative Action According to Stanislaw Wincenty Kasznica: The Beginnings of the Polish Science of Legal Forms of Public Administration Action

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On the same subject, whether in books, lectures, or dissertations by different individuals, there are always varying views, interpretations, starting points, and outcomes. Even within the views of the same person on the same subject, there can be significant divergences at different times in their life.
Stanisław Kasznica, *Rozważania*[1]

Abstract
One of the key characteristics of administrative law is the diversity of entities acting on behalf of the state and the multitude of areas requiring administrative-legal regulation. As a result, there is also a greater variety of actions taken by parties involved in legal relations than in other branches of law. Contemporary doctrine offers numerous studies dedicated to administrative actions. However, it is important to remember that such dynamic development of this field of research would not have been possible without the contributions of pre-war Polish scholars of administrative law. A particularly notable contribution was made by Stanisław Wincenty Kasznica, who was the first to present and organize a catalog of actions undertaken by the administration. The concept of "administrative action", proposed by the Professor, can be seen as the first attempt to formulate what has since evolved into the structure that today we refer to as the "form of administrative action".

Keywords
administrative action; public administration; forms of public administration action; Stanisław Kasznica

1 S Kasznica, *Rozważania* [The Considerations] (Albertinum, Księgarnia Św. Wojciecha 1946) 14.

1. DOCTRINE ON LEGAL FORMS OF PUBLIC ADMINISTRATION AS A FIELD OF ADMINISTRATIVE LAW SCIENCE

One of the salient features of administrative law is the multiplicity of actors acting on behalf of the state and the diverse areas requiring administrative-legal regulations. Consequently, it becomes apparent – more so than in other branches of law – that there are a variety of actions taken by the subjects of these legal relationships. Therefore, contemporary scholars of administrative law consider the study of legal forms of action of public administration to be one of the fundamental fields within this research area. This field's focus is on the principles and rules of law on the basis of which the doctrine and administrative jurisprudence attempt to systematise and evaluate the actions of public administration bodies.[2] The result of this research will be a set of theorems defining and distinguishing the typical manifestations of the behaviour of administrative bodies, describing their characteristics, as well as establishing the effects and conditions of their regularity or defectiveness.

The importance of the legal forms of administrative action for administrative law as a whole stems not only from their ordering function, but from the fact that they play a servile role in relation to the tasks of public administration and should primarily be considered in this context.[3] In view of this – as underlined by I. Lipowicz – they will "evolve along with the tasks for the realisation of which they were created,"[4] showing how administrative law has developed over the years. Studying the legal forms of administrative action functioning at a given time and under given circumstances will help build a picture of the current state of scientific research on the activity of administration.

At present, the doctrine has numerous comprehensive studies on the classification of administrative action. Several, leading legal definitions of forms of action of administration have also been constructed. Obviously, this includes monographs by J. Starościak,[5] J. Borkowski[6] and the work of K. Ziemski.[7] It is important to remember, however, that the currently visible, so dynamic, development of the discussed

2 DR Kijowski, 'Pojęcie prawnych form działania administracji' [The Concept of Legal Forms of Administration Activity] in J Korczak (ed), *Administracja publiczna pod rządami prawa Pamiątkowa księga z okazji 70-lecia urodzin prof. zw. dra hab. Adama Błasia* [Public Administration under the Rule of Law Commemorative Book on the Occasion of the 70th Anniversary of the Birth of prof. conv. dr hab. Adam Błaś] (Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego 2016) 217.

3 See T Rabska, 'Kontrakt wojewódzki – forma działania administracji publicznej w strukturach zdecentralizowanych' [Provincial Contract – a Form of Public Administration Operation in Decentralized Structures] in I Niżnik-Dobosz, P Dobosz, D Dąbek, M Smaga (eds), *Instytucje współczesnego prawa administracyjnego. Księga jubileuszowa Profesora zw. dra hab. Józefa Filipka* [Institutions of Modern Administrative Law. The Jubilee Book of the Professor dr hab. Józef Filipek] (Wydawnictwo Uniwersytetu Jagiellońskiego 2001) 608.

4 I Lipowicz, 'Prawne formy działania administracji publicznej – między stabilizacją a potrzebą przełomu' [Legal Forms of Public Administration Activity – between Stabilization and the Need for a Breakthrough] (2016) Ruch Prawniczy, Ekonomiczny i Socjologiczny vol. 4, 41.

5 J Starościak, *Prawne formy działania administracji* [Legal Forms of Administration Activity] (Wydawnictwo Prawnicze 1957).

6 J Borkowski, *Decyzja administracyjna* [Administrative Decision] (Zachodnie Centrum Organizacji 1998).

7 An attempt to define the concept of the legal form of administrative action was also made by KM Ziemski. According to him: "By the legal form of an action of the administration, we should understand a distinguished or distinguishable, legally defined, with fixed features type of conventional or factual action, or a set of such actions of a specific entity (or a set of entities) appointed to perform public administration tasks in order to fulfil the tasks within the scope of public administration." The author intended the above definition to be a synthesis of the prevailing views of the doctrine. See KM Ziemski, *Indywidualny akt administracyjny jako forma prawna działania administracji* [An Individual Administrative Act as a Legal Form of Administration Activity] (Wydawnictwo Naukowe UAM 2005) 138.

field would not have been possible if it had not been for the achievements worked out by the pre-war representatives of the Polish science of administrative law, and in particular Stanisław Wincenty Kasznica, regarded as the author of the first full textbook on administrative law. As C. Martyniak states, in order to "advance research in one's specialty" it is necessary, first of all, to get acquainted with previous views on the subject matter in question, and then, to appropriately address them in the process of one's own research.[8]

Although most current researchers in this area use the term "legal forms of administrative action",[9] or the shorter "forms of administrative action" – recognising that all administrative actions must have a legal basis[10] – there are also those who use more general terms such as "administrative actions".[11] Significantly, this second way of defining actions taken on behalf of the state was also appropriate for the first representatives of the Polish science of administrative law. K.W. Kumaniecki, W.L. Jaworski, and S.W. Kasznica all used the term "administrative action" or "administrative activity".[12]

2. Administrative action in the first Polish studies of administrative law

In the first Polish studies referring to what we would call today the subject of forms of administrative action, particular attention was paid to the category of the administrative act. It was taken in a very broad way, identified in principle with any action taken by the administration.[13] Its basic – and one could even assume that its only – essential feature was its origin from entities representing the state. It is worth noting that pre-war authors used various names to describe this. The first Polish author to conduct research in this area, as early as 1913, K.W. Kumaniecki, used the term: "an act of state authority." By this he meant any activity of entities representing the state, which included acts of law enforcement (these were both acts of law application by administrative authorities and acts of law execution undertaken by courts) consisting in the implementation of already existing legal norms.[14] In addition to this, however, there were law-making acts, creating new norms.[15]

8 C Martyniak, *Moc obowiązująca prawa a teoria Kelsena* [The Binding Force of Law and Kelsen's Theory] (Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego 1938) 1.

9 See, among others, M Stahl, E Olejniczak-Szałowska, 'Prawne formy działania administracji publicznej' [Legal Forms of Operation of Public Administration] in M Stahl (ed), *Prawo administracyjne. Pojęcia, instytucje, zasady w teorii i orzecznictwie* [Administrative Law. Concepts, Institutions, Principles in Theory and Jurisprudence] (Wolters Kluwer 2019) 531–580.

10 This is also pointed out by DR Kijowski. The author adds that, since in our state there is in force, as expressed in par. 2 of the Constitution of the Republic of Poland, the principle of a democratic state under the rule of law, it is difficult to assume that there are such actions of the administration that are not regulated by law in any way. See DR Kijowski (2016) 220. Similarly I Lipowicz also refers to the principle of legalism. See I Lipowicz (2016) 41.

11 See DR Kijowski (2016) 217–218 together with the literature cited therein. The author also provides arguments that make it impossible to equate the notions of "form" and "action" – ibid., 221.

12 This will be looked at further later in this paper.

13 Cf KM Ziemski, 'Kształtowanie się doktryny wobec prawnych form działania administracji' [The Development of Doctrine Regarding Legal Forms of Administration] in A Błaś, R Hauser, Z Niewiadomski, M Stahl, A Wróbel (eds), *Prawne formy działania administracji* System Prawa Administracyjnego [Legal Forms of Administration Activity, Administrative Law System] (CH Beck 2013) 9.

14 KW Kumaniecki, *Akt administracyjny, Studya nad istotą aktu administracyjnego z uwzględnieniem zasadniczy orzecznictwa austryackiego Trybunału Administracyjnego* [Administrative Act, Study on the Essence of an Administrative Act, Taking into Account the Essential Case Law of the Austrian Administrative Tribunal] (Drukarnia Związkowa 1913) 9–11.

15 Ibid., 9–11, 27–32.

Undoubtedly important for the later cataloguing – also by S. Kasznica – of the activities of the administration was the study by W.L. Jaworski.[16] This study recognised that, in addition to those administrative acts listed in the Act on the Supreme Administrative Court of 3 August 1922[17] (i.e. orders and rulings), there were others.[18] Compared to Kumaniecki, Jaworski narrowed the concept of an administrative act, assuming that it would only be an act originating from public administration, i.e. "(...) performed by an administrative authority, whether governmental or local governmental (...)," even if the legal basis was civil law.[19] He also added that it must "entail a legal effect,"[20] and is "only a certain form, a certain shape by which we want to mentally encompass the activity of the state."[21] In this aspect, there are references to our contemporary understanding of the forms of administration. However, compared to today's construction, W.L. Jaworski's depiction of the administrative act was still quite broad. It should be noted that this author also identified it with an action of public administration.[22] He points out, for example, that both an arrest order and the arrest action itself are considered administrative acts.[23] To define an administrative act, W. L. Jaworski used the name "emanation of administrative power."[24] This term refers to a feature of administrative acts that was later distinguished, i.e. sovereignty. He pointed out that, even if the act of authority is not regulated by law, it is nevertheless an administrative act if it produces a legal effect.[25]

The classical approach towards what we now would call the legal forms of administrative action, as seen in particular in the work of W.L. Jaworski, and – as will be discussed later – that of S.W. Kasznica, thus boiled down to a particular emphasis on the administrative act, as well as much more narrow discussion on other administrative actions. This approach should not come as a surprise, however, given that Polish administrative law, and indeed Polish public administration, was only just being constituted. Here I again refer to the statement by I. Lipowicz that the activities of the administration and their catalogue will "evolve together with the tasks for the realisation of which they were created."[26] It is therefore not surprising that the "theoretical axis of division" for the pioneers of Polish administrative law were legal actions that produced legal effects and other administrative actions not included in the first group, as these – according to the beliefs of the time – did not produce such effects.[27] The reference to forms of civil law,[28] characteristic for the description of administrative actions, is also not surprising.

16 WL Jaworski, *Nauka prawa administracyjnego. Zagadnienia ogólne* [Learning Administrative Law. General Issues] (Instytut wydawniczy "Biblioteka Polska" 1924).

17 Ustawa z dnia 3 sierpnia 1922 r. o Najwyższym Trybunale Administracyjnym [Act of 3 August 1922 on the Supreme Administrative Tribunal] [1922] JoL 600, <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19220670600/O/D19220600.pdf> accessed 19 Aug 2024.

18 WL Jaworski (1924) 70.

19 An administrative act is any act of public administration: "(...) an authority, an office, an administrative body both governmental and local governmental (...)" – ibid., 71.

20 Ibid., 71, 83–84.

21 Ibid., 76–78; 82–84 and 92.

22 This issue is also highlighted by K Ziemski (2005) 19.

23 WL Jaworski (1924) 70.

24 Ibid., 71, 83–84.

25 Ibid., 71.

26 I Lipowicz (2016) 41.

27 Ibid., 48.

28 Here I should point out that WL Jaworski was also, or perhaps above all, a civilian. It is worth recalling the following titles of his works: *Zarys teorii wynagradzania szkody, Nauka o służebnościach wedle prawa austriackiego* or his habilitation thesis: *Prawo nadzastawy wedle ustawodawstwa austriackiego*. See M Jaskólski, 'Władysław Leopold Jaworski (1865–1930)' [Władysław Leopold Jaworski (1865–1930)] in J Stelmach (ed), *Złota Księga Wydziału Prawa i Administracji UJ* [Golden Book of the Faculty of Law and Administration of the Jagiellonian University] (Wydawnictwo Uniwersytetu Jagiellońskiego 2000) 239.

In the later literature, despite the fact that most researchers on the forms of action of the administration referred mainly to the concept of J. Starościak, there were also positions containing direct references to the constructions presented by what I. Lipowicz called "the classics rooted in the Second Polish Republic."[29] This can be seen, for example, in a study by E. Ochendowski. The author even tries to reactivate the construction of what S. Kasznica described as general orders, i.e. "acts on the basis of which a specific legal relationship arises, changes or extinguishes,"[30] but which is not addressed to a specific subject.[31]

To conclude this section, I have one more remark of a general nature. When reaching today for the works of Kumaniecki, Jaworski and Kasznica, among others, one has to remember that the political situation in Poland, immediately after the end of the Second World War, made it difficult for subsequent authors to use freely the achievements of scientists from the interwar period or the times of the Nazi occupation. This was due to the visible activity at many levels (not only science, but also social and political) for regaining independence, undertaken by the first authors of administrative law.[32] State, civic and patriotic education was a matter of course in the Second Republic.[33] There was a widespread conviction that, in addition to imparting general and practical knowledge, it was necessary "to educate good citizens capable of thinking in terms of the common good. (...) Such a good was the state regained, with great difficulty, thanks to the enormous collective effort."[34] Hence also the works of: K.W. Kumaniecki, W.L. Jaworski, and S. Kasznica of a political and religious nature.[35] This patriotic attitude, also evident in their scientific output, was obviously not well received in post-war Poland.

3. Administrative actions and their catalogue, by Stanislaw Wincenty Kasznica

In contemporary literature, it is accepted that S. Kasznica, as the first among the representatives of the science of administrative law, presented a "systematised typology of legal forms."[36] I fully

29 I Lipowicz (2016) 49.

30 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 99.

31 E Ochendowski, *Prawo administracyjne* [Administrative Law] (Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora" 2013) 193.

32 A Rzegocki, 'Kazimierz Władysław Kumaniecki (1880–1941)' [Kazimierz Władysław Kumaniecki (1880–1941)] in A Zięba (ed), *Jubileuszowa Księga Nauk Politycznych* [Jubilee Book of Political Science] (Wydawnictwo Uniwersytetu Jagiellońskiego 2015) 159–165, <https://ruj.uj.edu.pl/xmlui/bitstream/handle/ item/23657/rzegocki_kazimierz_wladyslaw_kumaniecki_2015.pdf?sequence=1&isAllowed=y> accessed 19 Aug 2024.

33 Ibid., 162.

34 As a result, so much attention was paid to ancient literature, which contained a clear message of the subordination of individual ambition to state objectives. Polish thinkers of the Middle Ages and the Enlightenment period were also drawn upon, prioritising spiritual issues over material ones. A Rzegocki (2015) 162–163.

35 For example, it is worth mentioning the work of: KW Kumaniecki, *W poszukiwaniu suwerena* [In Search of the Sovereign] (Ksiegarnia Akademicka 2006); or S Kasznica (1946) op cit; See also P Czarny, B Naleziński, 'Kazimierz Władysław Kumaniecki (1880–1941)' [Kazimierz Władysław Kumaniecki (1880–1941)] in A Szmyt, P Sarnecki, R Mojak (eds), *Konstytucjonaliści polscy 1918–2011. Sylwetki uczonych* [Polish Constitutionalists 1918–2011. Profiles of Scientists] (Wydawnictwo Sejmowe 2012) 224; M Jaskólski (2000) op cit; M Szczesiak-Ślusarek, 'Historia rodu Kaszniców' [The History of the Kasznic Family] in SW Kasznica (ed), *Druga wojna światowa. Wspomnienia spisane na podstawie codziennych notatek* [World War II. Memories Written Based on Daily Notes] (Instytut Pamieci Narodowej 2013) 11–92.

36 K Ziemski (2005) 22.

share this position.[37] Although considerations on the actions of administration were undertaken earlier by W.L. Jaworski, unlike his *Science of administrative law,* which contained typically scientific inquiries oscillating around the – widely understood – construction of the administrative act, Kasznica's textbook *Polskie prawo administracyjne* contains a practical, often innovative look at the actions of administration. It was the first attempt to organise the current state of science in this area. A more thorough analysis of the two works referred to, however, sheds light on the influence that the position presented by his predecessor[38] had on the content of Kasznica's study.

S. Kasznica distinguishes the concept of "administrative action". He considers it to be "every manifestation, every action of any administrative body, regardless of its type and character."[39] This is the most general definition of any administrative action, with the classifying criterion being the subjective criterion. The only condition for an activity to be considered administrative is that it originates from an entity acting on behalf of the state.

The concept of "administrative action" that S. Kasznica proposed can be regarded as the first attempt to formulate a construction to which later authors gave the name "form of administrative action", with the cited author being a precursor in this area.[40]

When examining administrative actions, S. Kasznica – unlike K.W. Kumaniecki – emphasises the need to distinguish them from actions taken by the courts. He points out that in the area of administrative actions, "(...) between the act and the individual the authority slips in, and it is only on the basis of the provision of the act that it decides what is due to the individual or what he should fulfil."[41] According to S. Kasznica, the difference between the judiciary and administration thus boils down to the fact that, while the judge "faces the legal norm that he is supposed to apply in a given case," between the official and the legal norm he is supposed to apply, "a superior may slip in at any time with a binding directive as to how this norm should be interpreted."[42] The citation also draws attention to the fact that all administrative actions find their origin in a legal norm. An administrative action is always an action taken on the basis of legal provisions. This is a step forward compared to the position presented by W.L. Jaworski.

S. Kasznica further divides administrative actions into legal actions (otherwise known as legal acts) and factual actions. The division into legal and factual actions is currently regarded as one of the most useful for the development of research on administrative actions.[43] In making the distinction in this respect, Kasznica uses the criterion of the purpose of undertaking a given action, which will be to produce a specific legal effect.[44] A legal effect is the grant or denial of an entitlement to the addressee, as well as a change in the scope of the entitlement; the imposition

37 J Starościak's catalogue of legal forms of administration came later.

38 This is evidenced, among other things, by the fact that Kasznica cites the same examples of administrative actions as Jaworski, with the remark that he often gives a different classification of them. For example, referring to an event such as an arrest, he distinguishes the factual preparatory activity, which would be, for example, holding or leading an arrested person, from the legal act on the basis of which this activity is undertaken (the result of this activity), i.e. an arrest warrant. Cf S Kasznica (1946) 96; WL Jaworski (1924) 80. See also K Ziemski (2005) 454.

39 S Kasznica (1946) 96.

40 M Zimmermann was the first to use the term "forms of administrative action", giving this title to Chapter IX in the textbook he compiled. See M Zimmermann, 'Formy działania administracji i postępowanie administracyjne' [Forms of Administration Activities and Administrative Proceedings] in M Jaroszyński (ed), *Prawo administracyjne* [Administrative Law] (Wydawnictwo Naukowe PWN 1952) 91.

41 S Kasznica (1946) 98.

42 Ibid., 11.

43 This is accepted, for example, by K Ziemski (2005) 100.

44 KM Ziemski also draws attention to this: KM Ziemski (2013) 22.

of an obligation, an exemption from an obligation, or a change in the scope of an obligation, or even the mere determination of the existence or non-existence of a specific legal relationship.[45] This detailed delineation of individual legal effects shows that the author saw a difference between acts that created new legal relations and those that merely affirmed them (today, we would refer to the division into constitutive and declaratory acts).

The remaining acts, on the other hand, constitute what he called factual acts, which the author saw as only ancillary to legal acts. "They serve to prepare or to execute legal acts." Hence the division into executive factual actions (e.g. holding a person) and preparatory factual actions (e.g. clerical actions).[46] In this group of actions, therefore, the author includes those that, applying today's criteria for the division of forms of administrative action, we would describe as material-technical actions.

Contrary to what we assume nowadays, he does not classify certificates as factual acts, but considers them to be legal acts.[47] It seems, however, that S. Kasznica treated the category of certificates quite broadly. He assumed that these were actions concerning "strictly specified, concrete, individual situations and accidents"[48] and included in this group not only actions that "ascertain certain facts of significance for legal relations,"[49] but also those that "ascertain the existence of a certain legal relation."[50] Today, we would refer to this second category as individual declaratory acts (otherwise known as declaratory decisions). As an example of acts of the former type, the author gives: "a certificate of birth from a civil registry office," and of the latter: "the certification by the administrative authorities that a person has state citizenship."

Legal acts (actions) – as in Jaworski's case – could only be taken by entities performing public administration duties, and only "in the performance of public service" and in the "public interest."[51] Thus, given this unarticulated interest criterion, it can be assumed that, in subjective terms, all legal acts are public law acts. From the subjective aspect, conditioned, among other things, by the form of a given action[52] or the form of defence,[53] we can distinguish such legal acts that will have a private-law character,[54] i.e. those undertaken within the framework of notifying the administration. Nowadays, we would say that these are such forms of action where the legal basis are the norms of civil law. Kasznica's considerations in this section show he recognised that not all of the actions of the administration are characterised by an element of sovereignty.[55] This can be regarded as a reference to the division of administrative actions into authoritative and nonauthoritative or, using a different term, public-law and private-law forms.[56] According to K. Ziemski, S. Kasznica identified the notion of wielding power with the one-sidedness of actions of administration.[57]

Kasznica further divides legal acts of a public-law character into: general, normative acts (e.g. regulations) and individual acts. The former contain general norms, including, as the author puts it himself,

45 S Kasznica (1946) 96, 98.
46 Ibid., 96.
47 Ibid., 97.
48 Ibid.
49 Ibid.
50 Ibid., 97.
51 Ibid., 96.
52 The author points out that administrative entities are also often parties to bilateral acts, e.g. sales contract, lease contract), ibid.
53 Because of what legal remedy is used to challenge the act in question.
54 S Kasznica (1946) 96.
55 Further, the author notes that a sovereign act will be an individual act (decision). Ibid., 97.
56 This is also accepted by K Ziemski (2005) 113.
57 Ibid., 447.

the "rules of conduct" (today we would probably use the term principles of law). The second are those that concern "strictly defined, concrete, individual situations and accidents."[58]

As far as individual acts are concerned, it is worth noting that S. Kasznica defines this category quite broadly, including in it: a) administrative acts, also referred to as decisions under the rules of procedure, b) certificates, c) notices and d) announcements.[59]

With regard to the construction of the administrative act, as presented by Kasznica, it is interesting to note that, when presenting its elements, he combines those of a material nature with those of a procedural nature.[60]

However, upon reconstructing the material definition of an administrative act according to S. Kasznica, we would state that it is: a manifestation of the intention of a public administration body, with which this entity exercises the state authority granted to it in relation to an individually specified addressee in specific factual circumstances, causing legally specified effects. K. Ziemski emphasises that Kasznica, as one of only a few authors, assumed that the basis for issuing an administrative act is an individualised factual state.[61] The procedural definition of an administrative act, on the other hand, focuses primarily on the need to base a decision on a directly indicated legal basis and to precede the issue of the act by conducting proceedings.

4. Summary

There is no consensus in the literature as to whether there is any real difference between the terms: "administrative action" (in polish: "czynność organów administracji") and "form of administrative action" (in polish: "forma działania administracji"). D.R. Kijowski proposes that, for "semantic reasons, but also in order to facilitate the understanding of the explained formulations" both concepts should be distinguished.[62] He believes that what is different is the action and the form in which this action will be undertaken. "Consequently, one should see in the forms of administrative action the external manifestations of the conduct of public administration."

S. Kasznica does not use the term "form", but the term "administrative action". However, there should be no doubt that he saw a difference between the "image" (manifestation) of the intention of an authority and the administrative action itself. I will come back to the example of an arrest warrant and an act on the basis of which it is the arrest warrant. This fact alone makes it possible to consider Kasznica as one of the first representatives of the science of legal forms of administrative action.

In considering the forms of administrative action, however, it is worth posing an additional question. Is it possible for any action of the administration to be taken without – as we would put it with reference to the science of civil law – it being in one form or another? It would seem that this is not possible. Consequently, since the form is only the external manifestation of the action, the concept of administrative action will be primary and thus should be given precedence. The category of forms of administrative action must therefore be treated as derivative in relation to the construction of administrative actions. According to A. Błaś, the forms of administrative action are in fact "manifestations of public administration actions reduced to legally defined, typical forms."[63]

58 S Kasznica (1946) 96–97.
59 Ibid.
60 Ibid.
61 K Ziemski (2005) 449.
62 DR Kijowski (2016) 221.
63 A Błaś, 'Prawne formy działania administracji publicznej' [Legal Forms of Operation of Public Administration] in J Boć (ed), *Prawo administracyjne* [Administrative Law] (Kolonia Limited 1998) 282.

The term "form" (in the sense of type, kind, shape and outward appearance) undoubtedly has significant procedural overtones. An act taking the form of a decision and a resolution will contain different elements of content and the means of challenging each of these acts will also be different. Importantly, the distinction between particular types/kinds of activities is intended to enable an individual to better protect their rights.[64] It can be assumed, therefore, that the notion of forms of administrative action should be mainly seen in the procedural (formal) aspect as a category of substantive law. Given the issues raised here, it is not surprising that some representatives of the doctrine have stopped using the term "form of action" in favour of the term "administrative action". This issue has been specifically addressed by the Polish legislator. For example, Article 3 § 2 point 4 the Act on Administrative Court Procedure refers to both categories, subjecting to the control of administrative courts both "acts" and "acts of administration." The applied procedure results in the fact that there is no requirement for administrative actions as to the form in which they were adopted.[65] It is also worth adding that in subsequent provisions the legislator uses the phrase "acts and other actions of the authority,"[66] which allows us to assume that the actions of the administration are treated as a key concept.

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64 As K Ziemski observes, "Individual legal forms of administrative action require different behaviours of the administration, give rise to different consequences, both for the administration and for the addressees of its activity, requiring the application of different forms of control and supervision over the correctness of their application, determining the way for an individual to claim his or her rights, in the event of their violation by the administration undertaking activity in a specific form". K Ziemski (2005) 8.

65 DR Kijowski (2016) 224.

66 See Article 33(1a) or Article 53(2), (3) and (4) p.p.s.a.

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Gradability of Public Law Interference with Property Rights: Valdity of Stanisław Kasznica's Considerations on the Subject

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Abstract
The study demonstrates the actuality of the theses put forward by Stanisław Kasznica in the interwar period as regards the types of public law interference with the right to property. It is possible to make such an assessment, since immediately after Poland regained its independence the rule of law and the protection of private property were inscribed in its political foundations. Because Kasznica was aware of the fact that private property would be increasingly used in the public service, he made a graded classification of this interference on the basis of the regulations in force at the time. It turns out that his classification is also applicable in the Polish legal order.

Keywords
restrictions on the right to property; principle of proportionality; expropriation; gradation of interference with the right to property; progressive expropriation

1. Introduction

Stanisław Kasznica did not write many publications, but those he left behind are of great cognitive value and are highly useful not only for didactic purposes, but also for scientific research. These include the general lecture on administrative law, *Polish Administrative Law: Concepts and Basic Institutions*, which, as the author indicates in his introductory remarks, was of a strictly practical nature and aimed at future administrative employees.[1] For this reason, Kasznica treated the work as a foundational text in the fields of constitutional, substantive and procedural (formal) administrative law. Consequently, he refrained from citing numerous doctrinal views, instead choosing to write about complex matters in a clear and straightforward manner, definitively addressing challenging issues without leaving the reader uncertain about the correct interpretations

1 S Kasznica, *Polskie prawo administracyjne: pojęcie i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Księgarnia Akademicka 1946), also referred to as "the handbook".

or understandings of specific legal institutions. By presenting only one solution to a problem, Kasznica transformed his handbook into an authoritative lecture on administrative law, thereby enhancing its value.

The content of the handbook frequently complements contemporary perspectives on the subject, and in some instances addresses issues that remain inadequately understood today. For example, the concept of the informal administrative act as a form of administrative action and the issue of remonstration (representation) have only recently been acknowledged in the Polish doctrine.[2]

In the chapter entitled *Measures of Administrative Action*, Kasznica presents the conception of lawful interference in the right to property, which, due to its differentiation, can be ascribed the value of gradation depending on its depth. The study will present this concept and verify it against current positive law and the views of legal scholarship and the judicature. This is possible due to the fact that both in the period analysed by Kasznica and today the state system is based on the rule of law, which recognises private property as one of its foundations.

2. Gradability of public law interference with the right to property and the essence of the exercise of the right to property

Within deliberations on the encroachment of public administration into the subjective rights of real property owners (and not only), it is easiest to notice and distinguish those regulations which involve the most far-reaching encroachment into property rights, manifested in its deprivation. This takes the form of expropriation in the case of seizure for public purposes, although other forms of expropriation can also be found, such as confiscation (forfeiture of property) or nationalisation. However, it is much more difficult to distinguish those situations in which there is no formal expropriation, i.e. by means of an individual administrative act, but at the same time restrictions are established which worsen the scope of the original ownership rights, the so-called progressive expropriation,[3] also creeping (hidden)[4] or indirect.[5] In French doctrine, it is argued that the accumulation of restrictions cannot ultimately result in preventing the use of the property in the previous manner.[6] Whilst the separation of the first institution at the beginning of the 20th century did not give rise to much doubt, the perception of

2 See E Szewczyk, *Remonstracja w prawie administracyjnym procesowym* [Remonstration in Administrative Procedural Law] (CH Beck 2018); E Szewczyk, M Szewczyk, 'Status organizacji społecznej w postępowaniu prowadzącym do wydania decyzji na podstawie art. 7 ust. 3 in fine ustawy z dnia 21 sierpnia 1997 r. o ochronie zwierząt. Glosa do uchwały NSA z dnia 24 lutego 2020, II OPS 2/19' [The Status of a Social Organization in the Proceedings Leading to the Issuance of a Decision Pursuant to Art. 7 section 3 in fine of the Act of 21 August 1997 on Animal Protection. Comment on the Resolution of the Supreme Administrative Court of February 24, 2020, II OPS 2/19] (2020) Orzecznictwo Sądów Polskich vol. 9, 127–147.

3 See M Bors, 'Wywłaszczenie pośrednie i postępujące a ochrona inwestora w świetle międzynarodowego prawa inwestycyjnego' [Indirect and Progressive Expropriation and Investor Protection in the Light of International Investment Law] (2014) Studia Iuridica Lublinensia vol. 21, 181–203.

4 S Litvinoff, 'Creeping expropriation' (1964) Revista Juridica de la Universidad de Puerto Rico 33(2), 222. See also BA Wortley, *Expropriation in Public International Law* (Cambridge University Press 1959) 107.

5 L Spataru-Negura, 'Special Considerations Regarding Indirect Expropriation in International Economic Law' (2017) Juridical Tribune 7(2), 125–126.

6 J-F Giacuzzo, 'Nouvelles précisions sur le régime constitutionnel des servitudes administratives' (2016) Constitutions vol. 1, 66–74.

the second situation is no longer so obvious. Kasznica was aware of the complexity of these issues, writing that "in contemporary legislation there is a tendency to limit property more and more – to put it more and more intensively into the public service".[7]

Nowadays, there is no longer much doubt that public law interference with the right to property is gradable, i.e. it can be more or less intense. Indeed, its depth determines the type of legal institution with which we are dealing. Legal systems based on the rule of law and a democratic state distinguish two types of such interference at the constitutional level: the first one is expropriation, whereas the second one is the restriction of individuals' rights and freedoms, including the right to property.

The limitation referred to above is expressed through the principle of proportionality, which, after the Second World War, became permanently embedded in universally ratified international agreements, both European and global,[8,9] in constitutions and in the global doctrine.[10] According to the principle of proportionality, it is permissible – in principle – to restrict individual rights and freedoms, including the right to property. However, this must be done in line with the principle of primacy of the law and in view of the values commonly accepted as fundamental to European legal orders. In the case of the Constitution of the Republic of Poland, these are public safety or order, protection of the environment, public health and morals and the freedoms and rights of other persons. Crucially, however, such limitations must not affect the essence of the right in question. This statement allows one to conclude that expropriation is an interference which violates the essence of the right to property, whereas the limitation of the right under Article 31(3) of the Constitution cannot exceed this limit.

Undoubtedly, an infringement of the essence of the right to property occurs in the case of expropriation *sensu stricto*, i.e. consisting in the deprivation of the right to property in favour of a public law entity, a local self-government unit or the State Treasury (Article 113, para. 1 of the A.G.N.[11]). On the other hand, it is much more difficult to indicate the difference between a restriction of the ownership right which complies with the principle of proportionality and one which violates its essence. The former case has been very well described by another prominent an outstanding scientist of the interwar period, M. Zimmermann, who concluded that:

> a restriction of the right to property, i.e. one which does not affect its essence, is effected by law and consists in the abrogation of a certain category of rights in general, in all those in whom it is found,

7 S Kasznica (1946) 156.

8 E.g. Article 10(2) or 11(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome [1950] OJ 61, 284.

9 See Article 22(2) of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966 [1977] OJ 38, 167.

10 In European jurisprudence, in line with the understanding developed by the German courts, there is a consensus that a proportionate regulation is one that fulfils three characteristics: usefulness, necessity and proportionality *sensu stricto* – *see e.g.* judgment of Federal Constitutional Court of 15 December 1965, BVerfGE 19 [1965], 342 (348-9), 55, 159 (165); see also G Stylianos-Loannis Koutnatzis, 'The Proportionality Principle in Greek Judicial Practice' (2016) Diritto & Questioni Pubbliche: Rivista di Filosofia del Diritto e Cultura Giuridica vol. 2, 205–224; B Schueler, 'Methods of Application of the Proportionality Principle in Environmental Law' (2008) Legal Issues of Economic Integration 35(3), 231–240; M Andreescu, 'Proportionality: A Constitutional Principle' (2010) Annales Universitatis Apulensis Series Jurisprudentia vol. 13, 8–19; D Derda, 'Principle of Proportionality in Administrative Adjudication' (2016) Zbornik Pravnog Fakulteta Sveucilista u Rijec vol. 1, 175–200; M Poto, 'The Principle of Proportionality in Comparative Perspective' (2007) German Law Journal 2007, no. 9(8), 835–870.

11 Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami [Act of 21 August 1997 on Real Estate Management] [2021] JoL 1899.

and is therefore of a general nature. Expropriation, on the other hand, consists in the taking away of an individual right, while preserving all other, equal rights.[12]

Thus, the violation of the essence of the right to property will no longer be its restriction, as referred to in Article 31(3) of the Constitution of the Republic of Poland or Article 64(3). From the point of view of the criterion of the obligation to compensate for damages caused to a property subject to public law interference, several types can be distinguished:

(1) expropriation – there is a compensation obligation;
(2) restriction that violates the essence of the property right – there is a duty to compensate;
(3) restriction of a general nature – there is no obligation to indemnify.

However, in order to determine the depth of the interference, it is sometimes necessary to analyse the sum of individual restrictions resulting from many normative acts.[13] It is therefore crucial when determining the scope of interference with the right to property to indicate what its essence is based on.[14] Although this task is not easy, sometimes it is even said that this criterion is too laconic and thus it significantly hinders the verifiability of legal acts establishing such restrictions,[15] it is possible to find certain directives in the legal system. Reference should be made here first of all to the Roman triad of proprietary powers (*ius possidendi*, *ius utendi* and *fruendi et abutendi and ius disponendi*). Here, the fundamental question becomes whether a violation of the essence of only one of these three attributes can have an expropriatory effect. This is because it happens many times that the owner can hold the property right and dispose of it, but cannot use it. Such situations are referred to as de facto expropriation,[16] and its most recognisable variety is planning expropriation.[17] The author advocates the position that restrictions preventing the use of the property have an expropriatory effect.

12 M Zimmermann, *Wywłaszczenie. Studium z dziedziny prawa publicznego* [Expropriation. Study in the Field of Public Law] (Towarzystwo Naukowe, Drukarnia Uniwersytetu Jagiellońskiego pod Zarządem J Filipowskiego 1933) 92.

13 Judgment of the Polish Constitutional Tribunal of 12 January 2000, P 11/98 (2000) OTK 3; see also resolution of the Polish Constitutional Tribunal of 2 March 1994, W. 3/93 (1994) OTK 17, part I, 159; judgment of the Polish Constitutional Tribunal of 12 January 1999, P 2/98, OTK 2, 21.

14 See L Garlicki, S Jarosz-Żukowska in L Garlicki, M Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary] (Wydawnictwo Sejmowe 2016), commentary on art. 64 of the Constitution of the Republic of Poland, para 42–45.

15 F Zoll, 'Prawo własności w Europejskiej Konwencji Praw Człowieka z perspektywy polskiej' [Property Law in the European Convention on Human Rights from the Polish Perspective] (1988) Przegląd Sądowy vol. 5, 33.

16 See e.g. S. Pawłowski, *Modyfikacje klasycznej koncepcji wywłaszczenia, a gwarancje praw jednostki jednostki* [Modifications of the Classic Concept of Expropriation and Guarantees of Individual Rights] (Wydawnictwo Naukowe UAM 2018) 380 et seq.; P Ispas, 'Exproprierea de fapt' (2020) Pandectele Romane vol. 1, 70–79; P Ion, 'De Facto Expropriation – General Confusion of Romanian and the Strasbourg Court Decisions' (2016) Revista Universul Juridic vol. 7, 5–14; B Mladen, 'Actual (de facto) Expropriation on the Area of the City of Novi Sad' (2018) Zbornik Radova vol. 3, 1393–1410; A-I Opritoiu, 'Protection of the Right of Property and de Facto Expropriation According to the Jurisprudence of the European Court of Human Rights' (2012) International Conference Education and Creativity for a Knowledge-Based Society, 187–193, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229435> accessed 1 Feb 2023.

17 See M Gdesz, 'Wywłaszczenie planistyczne' [Planning Expropriation] (2014) Samorząd Terytorialny vol. 4, 51–61; for the first time on this issue, see the judgment of the ECHR 7151/75 [1982] HUDOC; for Poland see the judgment of the ECHR 52589/99 [2006] HUDOC; judgment of the ECHR 17373/02 [2007] HUDOC; judgment of the ECHR 38672/02 [2007] HUDOC; judgment of the ECHR 10446/03 [2008] HUDOC; judgment of the ECHR 38185/02 [2008] HUDOC and judgment of the ECHR 27480/02 [2010] HUDOC.

Kasznica, who distinguished a number of types of interference with the right to property, had no doubts about the gradualness of interference. These will be discussed in the paragraphs below.

3. Expropriation

The most far-reaching public law interference with the right to property is its subtraction, which in a lawful state takes place by means of expropriation. Kasznica devotes the most space in his lecture on administrative law to this method of legal subtraction of the right, although he mentions other types of violation of private property:

(1) destruction of an item deemed to be dangerous;
(2) confiscation of the objects of the offence;
(3) infliction of a legal injury triggering a compensation obligation;
(4) cases of overriding necessity.[18]

The above list should be supplemented with nationalisation, whose effects are similar to expropriation, but which is a significantly different institution. Expropriation affects the future, its purpose being to create new facilities serving the public interest, the public purpose must be detailed in a constitutive administrative act. Meanwhile, nationalisation serves to regulate the existing legal relations, in this sense it affects the past, and the transfer of ownership to the state is confirmed by a general act. As it takes place directly by force of law (*ex lege*), only a declaratory administrative decision is required.

Contemporary views are expressed that nationalisation in a democratic state under the rule of law is inadmissible, as a rule,[19] since there are other, less intrusive means of interfering with a property right of constitutional rank. One of these is expropriation. Nevertheless, in an exceptional situation it should not be completely excluded, it may even be an appropriate means of realising the common good.[20] At the same time, it should be noted that during Kasznica's career, nationalisation was regarded as one of the categories of expropriation,[21] and sometimes even as its synonym.

Probably also for this reason – i.e. the pejorative perception of the institution of expropriation, sometimes identified precisely with nationalisation – after independence was regained, in Article 99 of the March Constitution the phrases "abolition of property" or "right of compulsory purchase of land" were used instead of the term "expropriation". Nevertheless, Kasznica had no doubt that in these cases the legislature had expropriation in mind, which,

18 S Kasznica (1946) 150

19 L Cibulka, 'Własność i koncepcje jej ochrony w Konstytucji Republiki Słowackiej' [Property and Concepts of its Protection in the Constitution of the Slovak Republic] in K Skotnicki (ed), *Własność – zagadnienia ustrojowoprawne. Porównanie rozwiązań w państwach Europy Środkowo-Wschodniej* [Ownership – Constitutional and Legal Issues. Comparison of Solutions in Central and Eastern European Countries] (Łódzkie Towarzystwo Naukowe 2006) 149; K Osajda, *Nacjonalizacja i reprywatyzacja* [Nationalization and Reprivatization] (CH Beck 2009) 6; S Pawłowski, 'Wywłaszczenie z mocy prawa (ex lege) a nacjonalizacja – refleksje w przedmiot publicznoprawnych ingerencji w prawo własności' [Expropriation by Operation of Law (Ex Lege) and Nationalization – Reflections on the Subject of Public Law Interference in Property Rights] (2019) Ruch Prawniczy, Ekonomiczny i Socjologiczny vol. 1, 87–100.

20 See 'Niemcy planują znacjonalizowanie Gazpromu Germania' [Germany Plans to Nationalize Gazprom Germania] (2022), <https://www.bankier.pl/wiadomosc/Niemcy-planuja-znacjonalizowanie-Gazpromu-Germania-8410436.html> accessed 26 Sept 2022.

21 WL Jaworski, *Nauka prawa administracyjnego. Zagadnienia ogólne* [Learning Administrative Law. General Issues] (Instytut Wydawniczy "Bibljoteka Polska" 1924) 166–167.

according to the first sentence of this provision, could be used for reasons of higher necessity and with compensation.

In doing so, he divided expropriation law into substantive and formal law, which is not commonly done in the doctrine today, although it does occur. Substantive expropriation law is the legislation which indicates the specific purposes for which expropriation may be carried out. The contemporary expression of this division is Article 6 of the Act on Land, in which the legislature decided to collect the majority of undertakings that justify expropriation. At the same time, Kasznica pointed out that the substantive provisions are contained in numerous legal acts.[22] Due to the reference in Art. 6(10) of the A.G.N., this principle also applies today, and public purposes are indicated in other acts in parallel to the said article.[23] Formal expropriation law, on the other hand, includes provisions regulating expropriation proceedings.

In the interwar period of the 20th century, the subject of expropriation was understood differently in the *lex generalis* than it is today. This is because nowadays, according to Article 112(2) of the A.G.N., it refers only to rights on real estate, whereas the Law on Expropriation Proceedings of 1934[24] took a much broader view of this issue. According to Article 2, expropriation was

(1) seizure of movable property – deduction of ownership of materials necessary for the construction of facilities for the defence of the State, land and waterways and railways
(2) temporary occupation of real estate.

Such a broad understanding of expropriation is also presented by Kasznica. It should be added that the above enumeration still provokes discussion on the essence of expropriation, because the Constitution of the Republic of Poland of 1997 does not provide for expropriation of the ownership right, or any other limited right on real estate, as the Act on Real Estate Management does, but for expropriation of of law in general. Thus, the contemporary constitutional concept of expropriation also goes beyond public law interference relating exclusively to real estate.[25] An important question is whether expropriation can be applied to all material rights, including e.g. the right to CO^2, and whether it can violate personal rights,[26] including *pretium affectionis*.[27]

However, what was very important for Kasznica was that expropriation was undoubtedly not only

22 S Kasznica (1946) 151.

23 See Article 4 of the ustawa z dnia 2 grudnia 2021 r. o wsparciu przygotowania III Igrzysk Europejskich w 2023 r. [Act of 2 December 2021 on Support for the Preparation of the 3rd European Games in 2023] [2022] JoL 1550 as amended; Article 3 of the ustawa z dnia 29 czerwca 2011 r. o przygotowaniu i realizacji inwestycji w zakresie obiektów energetyki jądrowej oraz inwestycji towarzyszących [Act of 29 June 2011 on the Preparation and Implementation of Investments in Nuclear Energy Facilities and Accompanying Investments] [2021] JoL 1484 as amended, or Article 3(2) of the ustawa z dnia 29 października 2021 r. o budowie zabezpieczenia granicy państwowej [Act of 29 October 2021 on the Construction of State Border Security] [2021] JoL 1992 as amended.

24 Rozporządzenie Prezydenta Rzeczypospolitej z dnia 24 września 1934 r. – Prawo o postępowaniu wywłaszczeniowym [Regulation of the President of the Republic of Poland of 24 September 1934 – Law on Expropriation Proceedings] [1934] JoL 86, 776 as amended.

25 L Garlicki, M Zubik in L Garlicki, M Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary] (Wydawnictwo Sejmowe 2016) commentary on art. 21 of the Constitution of the Republic of Poland para 15; M Szalewska, *Wywłaszczenie nieruchomości* [Expropriation of Real Estate] (TNOiK "Dom Organizatora" 2005) 125.

26 See judgment of the ECHR 46044/99 [2003] HUDOC.

27 Article 47 of the Spanish law on compulsory expropriation (Ley de 16 de diciembre de 1954 sobre expropiación forzosa [The Spanish Expropriation Law of 16 December 1954] [1954] BOE 351) provides for a bonus of 5% for emotional damages (*como premio de afección*), quoted by M Gdesz, 'Zasada korzyści w prawie wywłaszczeniowym' [The principle of Benefit in Expropriation Law] (2022) Zeszyty Naukowe Sądownictwa Administracyjnego 1(100), 47.

a subtraction of a right (*sensu stricto* understanding), but also its restriction (*sensu largo* understanding), which had to manifest particular features. Due to the wording of Art. 2(1) of the Law on Expropriation Proceedings of 1934, it was further specified as a temporary or permanent restriction of rights *in rem* on real estate. This position is particularly important today for the reason that, despite the literal wording of Article 112(2) of the A.G.N., the existence of the so-called "expropriation by restriction" is often overlooked,[28] also by the judicature.[29] Of course, the correct positions also appear, and Articles 124–126 of the A.G.N. are sometimes referred to as "small expropriation" or a special type of expropriation.[30] In the legal scholarship, in addition to views that do not perceive this dualism, there is also a strong current that *accentuates* this complexity, with the clarification that this is an expropriation that violates the essence of the property right (expropriation *sensu largo*),[31] and therefore is not the kind of restriction referred to in Article 31(3) of the Constitution of the Republic of Poland. The complexity of such limitations and their perception through the lens of expropriation are present in other legal systems. Here, it is worth pointing to the solution adopted in the Swiss Constitution, where Article 26(2) explicitly states that "[e]xpropriations and restrictions on property that amount to expropriation shall be fully compensated".[32]

Kasznica also advocates the view that whilst in certain circumstances an individual (private law subject) cannot protect themselves from expropriation, the overall value of their property should not be reduced. This position corresponds to the considerations of Zimmermann that whilst the ownership of a thing can be taken away, its value cannot be taken away.[33] In his view, the rules of equity and equality require that the material damages caused should be "as fully compensated as possible".[34] In doing so, he refers to the concept of a special sacrifice in favour of the public interest, a concept strongly present today in French legal culture.[35] A reflection of these views can be seen in the initial jurisprudence of the Constitutional Court after the political transformation, in which it was strongly emphasised that the constitutional "just" compensation of Article 21(2), was compensation that allows for the restoration of the thing taken,[36] full,[37] and equivalent.[38] Unfortunately, this line of jurisprudence became relativised in subsequent years.[39]

28 E.g. K Tomaszewski states that "[t]he restriction of the ownership right to real estate under Article 124 of the Act on Real Estate Management is an independent administrative law institution which does not have legal consequences either with regard to the expropriation of real estate or with regard to the creation of rights in rem to the land (K Tomaszewski, 'Charakter prawny ograniczenia prawa własności nieruchomości, określonego w art. 124 ustawy o gospodarce nieruchomościami' [The Legal Nature of the Restriction of Ownership of Real Estate, Specified in Art. 124 of the Real Estate Management Act] Rejent vol. 4, 108.

29 E.g. the judgment of the Regional Administrative Court in Olsztyn II SA/Ol 408/22 [2022] Lex 3406394 or the judgment of the Supreme Administrative Court I OSK 2980/19 [2022] Lex 3349608.

30 Judgment of the Court of Appeal in Warsaw VI ACa 1218/13 [2014] Lex 1483875.

31 See S Pawłowski (2018) 117, 138, 680; Z Leoński, M Szewczyk, M Kruś, *Prawo zagospodarowania przestrzeni* [Space Development Law] (Wolters Kluwers 2019) 661.

32 Z Czeszejko-Sochacki (ed), *Konstytucja Federalna Szwajcarskiej Konfederacji z 1999 r.* [Federal Constitution of the Swiss Confederation of 1999] (Temida 2000).

33 M Zimmermann (1933) 82–98.

34 S Kasznica (1946) 152.

35 See also F Fleiner, *Institutionen des deutschen Verwaltungsrechtes* (Mohr Siebeck 1928) 308 et seq.; O Mayer, *Deutsches Verwaltung* (Duncker & Humblot 1986) 3, <http://www.deutschestextarchiv.de/book/view/mayer_verwaltungsrecht02_1896?p=15> accessed 26 Sept 2022.

36 Judgment of the Polish Constitutional Tribunal of 8 May 1990, K 1/90 (1990) OTK 2.

37 Judgment of the Polish Constitutional Tribunal of 19 June 1990, K 2/90 (1990) OTK 3.

38 Judgment of the Polish Constitutional Tribunal of 14 March 2000, P 5/99 (2000) OTK 60.

39 See judgments of the Polish Constitutional Tribunal of 20 July 2004, SK 11/02 (2004) OTK-A 66; of 15 September 2009, P 33/07 (2009) OTK-A 123; of 16 October 2012, K 4/10 (2012) OTK-A 106 and others.

4. Restrictions on the right to property not requiring compensation

Kasznica, like Zimmermann, was aware that the right to property is not an absolute right (*ius infinitum*),[40] on the contrary, as mentioned above, it was obvious to him that it would be increasingly harnessed to the public service. If restrictions on this right were to follow by law, they would be of a general nature, shaping the content of the right to property. In such a case, the obligation to compensate would not materialise, as the principle of equality before the law – or as stated in Article 32(1) of the Polish Constitution, equal treatment by public authorities – would not be violated. As Kasznica directly pointed out, referring to Article 99 of the March Constitution,[41] the free use of land, mineral waters and other "treasures" of nature may be subject to limitations – this is a reference to statutory limitations[42] – and not through acts of law application. He also gave a number of examples of such restrictions: in particular, those under agrarian laws, water laws or mining laws. Consequently, he argued that "whoever acquires and holds such property possesses and acquires it already encumbered by these restrictions, with the *reduction* of its content in advance".[43]

The relevance of the above theses is not in doubt today. Firstly, a similar understanding is contained in the current Constitution of the Republic of Poland, and it is generally expressed in Article 64(3), which is a kind of development of its Article 31(3). It deals exclusively with restrictions on the use of real estate and not on its possession or disposal. However, just after the political transformation, in its ruling of 28 May 1991 the Constitutional Tribunal – on the basis of the new system of values – stated that due to their essence, purpose and social sense, certain limitations of the right to property do not always require compensation and, in fact, the owners of the affected property are not always compensated.[44] Indeed, the above-mentioned restrictions include such obligations of the owner that could be qualified as arising from the social function of property,[45] in particular the Law on the Protection of Monuments.[46] This knowledge has been developed subsequently. It is worth pointing out the position of the Constitutional Tribunal of 30 January 2001, which states that "not every influence of the legislature on the property situation of an individual is tantamount to interference in the sphere of property rights. It is not interference in the sphere of the right to property (it is not a restriction of property within the meaning of Article 64, paragraph 3) to oblige relevant entities to bear certain public burdens (tributes) for public purposes".[47] Furthermore, restrictions on the right to property must comply with the principle of proportionality.[48]

40 It is also appropriate to mention that such a right has never been in place.

41 Ustawa z dnia 17 marca 1921 r. – Konstytucja Rzeczypospolitej Polskiej [Act of 17 March 1921 – Constitution of the Republic of Poland] [1921] JoL 44, 267.

42 S Kasznica (1946) 155.

43 Ibid.

44 Judgment of the Polish Constitutional Tribunal of 28 May 1991, K 1/91 (1991) OTK 4; this theme is strongly present in the German doctrine, which holds that the greater power the legislature has to shape and interfere with property rights, including the imposition of restrictions, the more the right in question fulfils social functions – D Hesselberger, *Das Grundgesetz. Kommentar für politische Bildung* (Hermann Luchterhand Verlag 2001) 153.

45 L Garlicki, S Jarosz-Żukowska (2016) commentary on art. 32 of the Constitution of the Republic of Poland para 37.

46 See the judgment of the Polish Constitutional Tribunal of 8 October 2007, K 20/07 (2007) OTK-A 102.

47 Judgment of the Polish Constitutional Tribunal of 30 January 2001, K 17/00 (2001) OTK 4.

48 In its judgment of 8 October 2015, SK 11/13 (2015) OTK-A 144, paragraph III.4.6), the Constitutional Tribunal held that "the finding of an infringement of the principle of proportionality, resulting from Article 31(3) of the

The validity of Stanisław Kasznica's position is confirmed today not only by judicial opinions, as cited above, but also by legislative measures. The Act of 23 July 2003 on the Protection and Care of Historical Monuments, specifically its chapter III, outlines numerous obligations for owners of buildings recognised as historical monuments, which influence how ownership rights are exercised. Article 25 meticulously regulates issues related to the use of such properties, including the requirement to coordinate conservation works with the voivodeship conservator of monuments. It also mandates the agreement on the development programme for the monument and its surroundings and its future use, whilst considering its significant value. Additionally, such buildings may be subject to conservation recommendations.

Alongside these substantial obligations, there are less burdensome ones. Specifically, the owner or possessor of an immovable monument or a property possessing the characteristics of a monument must allow access for research purposes, thereby tolerating the presence of third parties on the monument's site. In cases of refusal, the law permits the issuance of a binding order for such conduct through an administrative decision. Furthermore, Article 36 of the Act on the Protection of Monuments exemplifies administrative regulation by listing activities that require the voivodeship conservator's permission, with a mandate that research and works be carried out by qualified individuals. If these obligations are violated, an order can be issued to restore the monument or its surroundings to their previous state.

Another instance of regulating the exercise of ownership rights that does not warrant compensation is the restrictions on constructing large commercial facilities, as established by the Act of 27 March 2003 on Spatial Planning and Development (u.p.z.p).[49] Such a restriction is all the more justified because, as the TK stated, it may be justified by the need to protect other constitutional values, particularly public order, state security, the environment and cultural heritage.[50] The way that the right to property in the u.p.z.p. is exercised is also shaped in many other areas, starting with the possibility to determine the purpose of the land by indicating the admissibility of its development, including the maximum and minimum level of development as the ratio of the total developed area in relation to the total area of the building plot,[51] the minimum percentage of minimum biologically active surface, the maximum height of structure, the lines of the development and the size of the objects,[52] down to the minimum number of parking spaces[53] (Article 15(2)(6) of the u.p.z.p.).[54] One should consider whether the ban on

Constitution, means at the same time that there has been an infringement of the general guarantee of protection of property rights, i.e. Article 64(1) of the Constitution". See also the judgment of the Polish Constitutional Tribunal of 1 July 2014, SK 6/12 (2014) OTK-A 68); the judgment of the Polish Constitutional Tribunal of 29 July 2013, SK 12/12 (2013) OTK-A 87.

49 Articles 10(3a) and 15(2a) of the ustawa z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym [Act of 27 March 2003 on Spatial Planning and Development] [2003] JoL 80, 717. See also R Krupa-Dąbrowska, 'Nie wszędzie będzie budowany supermarket' [Not Everywhere a Supermarket Will be Built] (2015) Rzeczpospolita vol. 11, 10.

50 Judgment of the Polish Constitutional Tribunal of 7 February 2001, K 27/00 (2001) OTK 29, para III.7.

51 See judgment of the Regional Administrative Court in Poznań II SA/Po 954/05 [2006] Lex 448123.

52 See judgment of the Regional Administrative Court in Szczecin SA/Sz 447/18 [2018] Lex 2563773.

53 Judgment of the Regional Administrative Court in Rzeszów II SA/Rz 523/17 [2017] Lex 2359631.

54 See P Burski, 'Doprecyzowanie pojęcia powierzchni całkowitej zabudowy przez organ planistyczny w świetle orzecznictwa sądów administracyjnych i rozstrzygnięć nadzorczych' [Clarification of the Concept of Total Development Area by the Planning Authority in the Light of the Jurisprudence of Administrative Courts and Supervisory Decisions] (2017) Public Law Review vol. 6, 73–81.

erecting fences introduced by so-called advertising (landscape) resolutions falls within this set.[55] However, the above-mentioned restrictions are established by local laws in the formal sense, i.e. not "by means of a statute" as provided for in Article 64(3) of the Constitution of the Republic of Poland, but on the basis thereof.

Many restrictions of a differential nature various the way in which property rights are exercised relate to land that borders public waters and the use of the water itself, which are regulated by the Act of 20 July 2017 – Water Law (u.P.w.)[56]. These restrictions or orders do not always derive directly from the Act, but often require its concretisation by means of an administrative decision is an example of the concretization of a law. This is the case with the order to remove trees or bushes in order to ensure the flow of flood waters in areas of special flood hazard (Article 175), the prohibition against works or activities affecting the tightness or stability of flood embankments (e.g. driving over embankments, cultivating the land or constructing facilities) (Article 176) or the order to remove trees or bushes in order to ensure the flow of flood waters in areas of special flood hazard (Article 176). In all of these cases, the legislature explicitly prohibits works or activities that affect the integrity or stability of flood control features (e.g. driving over embankments, cultivating the land or building on it) (Article 176) or imposes a temporary ban on driving on an embankment if there are statutorily defined circumstances (Article 177). In all of these cases, the legislature explicitly stipulates that no compensation is payable for damages resulting from the relevant decisions. Nonetheless, these restrictions directly follow from the Act and establish obligations to act on an ongoing basis or to refrain from certain activities (334 point 6, Art. 410(2) u.P.w.).

Similarly, the administrative law regime of nature and environmental protection also generates many restrictions. For example, the Act of 27 April 2001 – Environmental Protection Law provides the basis for the enactment of the so-called anti-smog law, empowering the provincial assembly to introduce restrictions or bans on the operation of facilities at which fuels are burnt (Art. 96).[57] This is part of the broader issue of Air Protection Programmes, also regulated by this Act. In this respect, the possibility of establishing Clean Transport Zones has recently been introduced into Polish law,[58] which are also not connected with an obligation for compensation. On the other hand, many more restrictions that shape the way the ownership right is exercised have been introduced by the Act of 16 April 2004 on nature protection (u.o.p.),[59] i.e. establishing areas for natural protection, referred to in Article 6 of this Act. For example, Article 15 of the u.o.p. introduces a number of prohibitions applicable to national parks and nature reserves.[60] Particularly vivid examples, but with regard to landscape parks, are the prohibition of building new structures within 100 m of the shoreline of rivers, lakes and other natural water reservoirs

55 See T Bąkowski, 'Wywłaszczenie krajobrazowe' [Landscape Expropriation] (2019) Nieruchomości@ vol. 2, 48.

56 Ustawa z dnia 20 lipca 2017 r. Prawo wodne [Act of 20 July 2017 Water Law] [2021] JoL 2233.

57 See P Zacharczuk, 'Administracyjnoprawne aspekty ograniczania emisji zanieczyszczeń do powietrza pochodzących z eksploatacji instalacji spalania paliw stałych w budynkach mieszkalnych' [Administrative and Legal Aspects of Reducing Air Pollutant Emissions from the Operation of Solid Fuel Combustion Installations in Residential Buildings] (2017) Studia Prawnicze KUL vol. 1, 153–178.

58 Articles 39–40 of the ustawa z dnia 11 stycznia 2018 r. o elektromobilności i paliwach alternatywnych [Act of 11 January 2018 on Electromobility and Alternative Fuels] [2022] JoL 1083.

59 Ustawa z dnia 16 kwietnia 2004 r. o ochronie przyrody [Act of 16 April 2004 on Nature Protection] [2022] JoL 916.

60 See also Article 17 u.o.p.; K Czajkowska-Matosiuk, 'Realizacja inwestycji budowlanych a utrudnienia wynikające z prawa ochrony przyrody i prawa wodnego' [Implementation of Construction Investments and Difficulties Resulting from Nature Protection Law and Water Law] (2014) Prawo i Środowisko vol. 3, 88–99.

or the extent of the water surface in artificial water reservoirs situated on flowing waters at the normal level of accumulation specified in the water permit – with the exception of structures serving water tourism, water management or fishing (Art. 17(1)(7) u.o.p.) – or the prohibition of locating buildings within 200 m of the edge of cliff shores and in the technical strip of the sea shore (Article 17(1)(8) u.o.p.). Such prohibitions are also indicated in the Act with regard to other forms of nature preservation.[61] It is also worth quoting Article 119 of the u.o.p., which prohibits in the vicinity of the sea, lakes and other water reservoirs, rivers and canals the erection of construction facilities preventing or hindering human and wild animal access to water, with the exception of facilities serving water tourism, water management or fishing and those related to general security and national defence.

Some of the above restrictions are classified by Kasznica as statutory or administrative easements, the essence of which is the encumbrance of various types of property. In this case, he is probably referring to those situations in which there is a prohibition of using it "in a certain direction"[62], i.e. refraining from certain actions.

Finally, limitations of the right to property are introduced by the Civil Code, which provides in its Article 140 that it may be used only in accordance with its social and economic purpose, but also within the limits specified by law and the principles of social co-existence. Also, the Neighbourhood Law constitutes an example of regulations limiting the right to property, though they do not entail the obligation to compensate for such limitations, as long as they do not exceed the so-called "average measure" (Article 144 of the Civil Code).

5. Restrictions on property rights requiring compensation

Contemporary commentators on Article 64 of the Constitution of the Republic of Poland express the view that in the case of "more severe limitations, the lack of compensation would be in contradiction with the principle of proportionality, thus preventing the proper balancing of public interest and individual interest". At the same time, the jurisprudence of the Constitutional Tribunal presents the view that "the legitimacy of the existence of mere limitations on property rights[63] cannot justify the owner bearing their burden to a predominant extent."[64] A similar position is also presented in French doctrine and jurisprudence, where it is stated that restrictions on the right to property cannot lead to the "degeneration of the right to property" (*dénaturer le droit de propriété*), the deprivation of this right of content (*vider de son contenu*) or the imposition of an "unbearable burden" (*une gene non supportable*) on the owner.[65] The national constitutional courts cite as an example of undue interference the situation of a so-called "land freeze", allocating private property for public purposes without proceeding to formal acquisition. In this case, moreover, as early as 1984, the ECtHR expressed its negative position on such a practice and

61 E.g. Articles 24, 33, 51, 52 u.o.p.; see also W Radecki, *Prawna ochrona przyrody w Polsce, Czechach i Słowacji* [Legal Protection of Nature in Poland, the Czech Republic and Slovakia] (Wolters Kluwer 2010).

62 S Kasznica (1946) 155.

63 L Garlicki, S Jarosz-Żukowska (2016) commentary on art. 64 of the Constitution of the Republic of Poland para 41.

64 See judgment of the Polish Constitutional Tribunal of 8 October 2007, K 20/07 (2007) OTK-A 102, para III.6; see also judgment of the Polish Constitutional Tribunal of 18 December 2014, K 50/13 (2014) OTK-A 121, para III.3.1.3 and 3.2.4.

65 See e.g. decision of the Constitutional Council rulings of 13 December 1985 [1985] 85-198 DC and decision of the Constitutional Council rulings of 9 April 1996 [1996] 96-373 DC, no. 22. See also L Favoreu, L Philip, *Les grandes decisions du Conseil constitutionnel* (Editions Dalloz 1997) 477–478.

described it as de facto expropriation.[66] The benchmark for the compensation mechanism in the case of particularly severe interference with the exercise of the right to property should be related to the expropriation of the right and not its restriction. This indicates that the line between the depth of interference, here between expropriation by restriction and proportional restriction, may be difficult to grasp. It should therefore be emphasised that in expropriation, the essence of the right to property is violated, which cannot occur in the case of a constitutionally permissible restriction, which must be proportionate. As rightly stated by Dybowski, "statutory provisions cannot nullify the basic rights constituting the content of the right to property",[67] i.e. the right to possess, use and dispose of it.

Examples of restrictions on the exercise of ownership rights that warrant compensation include orders, prohibitions and limitations on land and water use resulting from the protection of water intakes and inland water bodies through the establishment of protection zones and areas. Protection zones are established by a decision of the relevant authority of the Polish Water Authority, whilst protection areas are created by a local law issued by the provincial governor, as stipulated in Article 135 of the Act on the Protection of Inland Waters. Additionally, protection areas are designated by the voivode through a local law at the request of the Polish Waters. Article 142 u.P.w. explicitly provides that damages incurred due to these measures are subject to compensation, according to the principles outlined in Article 471 u.P.w. Compensation is also applicable when the owner is subjected to prohibitions under Article 192(1) u.P.w., particularly those that prevent impeding the flow of water due to the construction or maintenance of water facilities or activities affecting such facilities.

Furthermore, in cases involving the construction of water reclamation facilities under the procedure referred to in Article 199(2) u.P.w., the landowner is entitled to compensation for any damages caused during the works on these facilities. Compensation for actual damages is also due to the owner of real property adjacent to public inland surface waters, who is obliged to allow access to the waters for maintenance works and for setting navigational signs or hydrological and meteorological measuring devices (Article 233(4)).[68] They are also owed for damages incurred in connection with the construction of state measuring devices and the imposition of prohibitions, orders or restrictions on land use or water use in the protection zone of state measuring devices (Article 382(9) u.P.w.).

66 Judgment of the ECHR 7151/75 [1982] HUDOC; S Jarosz-Żukowska, 'Wywłaszczenie faktyczne w orzecznictwie europejskiego trybunału praw człowieka' [De Facto Expropriation in the Jurisprudence of the European Court of Human Rights] in A Bator, M Jabłoński, M Maciejewski, K Wójtowicz (eds), *Współczesne koncepcje ochrony wolności i praw podstawowych* [Contemporary Concepts of Protection of Freedom and Fundamental Rights] (Prawnicza i Ekonomiczna Biblioteka Cyfrowa 2013) 83–99, <https://www.bibliotekacyfrowa.pl/dlibra/publication/42457/edition/43827?language=pl> accessed 26 Sept 2022.

67 T Dybowski, 'Własność w przepisach konstytucyjnych wedle stanu obowiązywania w 1996 r.' [Property in Constitutional Provisions as in force in 1996] in A Jankiewicz, J Trzciński (eds), *Konstytucja i gwarancje jej przestrzegania, Księga pamiątkowa ku czci Prof. Janiny Zakrzewskiej* [Constitution and Guarantees of its Observance, Commemorative Book in Honor of Prof. Janina Zakrzewska] (Wydawnictwa Trybunału Konstytucyjnego 1996) 321.

68 In the judgment of the Regional Administrative Court in Gdańsk III SA/Gd 857/19 [2020] Lex 2939056, it was argued, inter alia, that "[t]he entity notifying the lack of access to water is not a party within the meaning of Article 28 of the Code of Administrative Procedure and cannot determine in a binding manner the plots of land where this access will take place, i.e. in accordance with its factual interest. Indeed, it is only the administrative body acting ex officio guided by the principle of universal use of water and the public good that is competent to designate specific plots of land providing access to water".

The Act on the Protection and Care of Monuments also includes a provision based on which the compensation obligation is updated directly by virtue of the Act. This happens when damage is caused as a result of making an immovable monument or property with the features of a monument available for the purpose of *in situ* conservation research (Article 29(3) and Article 30(3)). It is worth noting that their compensation is full, as it takes place according to the principles specified in the Civil Code. In turn, Article 46(1) of the Act of 13 October 1995 – Hunting Law[69] provides for compensation for damage to crops caused by wild boar, elk, deer, fallow deer and roe deer, as well as during hunting. A similar regulation is contained in the u.o.p., whose Article 126 regulates the issues of liability for damage caused by wild animals, particularly bison, wolves, lynx, bears and beavers.

Notwithstanding the above, it should be noted that in the legal system it is possible to decode a certain general premise of compensatory liability, which is related to the conferment of a public law regime on specific land, which is most often associated with the enactment of the applicable local law. It is formulated so that the use of the real property or a part thereof in the previous manner or in compliance with the previous purpose becomes impossible or is significantly restricted (Articles 27a, 36(1), 472, 129 and 18(3) of the Act on the Public Use of Land). In the indicated cases, there may be a justified assumption that these restrictions infringe the essence of the right to property, taking the form of *de facto* expropriations. Thus, it would be advisable to examine *casu ad casum* the depth of this interference and the effects caused by it. As it is rightly pointed out in the case law of the planning authority, "a local plan, by introducing specific conditions for the development of land and restrictions on its use, including the prohibition of development, directly modifies the right to property in the areas where these specific rules, restrictions and prohibitions are to be applied".[70] The scope of these modifications is gradual and not rigidly indicated in the Act.

All this makes the correct use and understanding of the notion of "restriction" and its dual nature, as well as distinguishing whether it is referred to in the context of the principle of proportionality or expropriations *sensu largo*, a difficult task. In the judicature, there are also such positions that the notion of restricting property may also be "exceptionally referred to the provisions which allow, under certain conditions, the deprivation of property, wholly or in part". Such positions can hardly be regarded as appropriate.[71]

6. Conclusions

Stanisław Kasznica's analysis of interwar Poland's legislation concerning public law interference in property rights – legislation that was in force over a century ago – remains relevant for evaluating contemporary legal systems based on the rule of law and the principle of equality before the law. Although the considerations in this study primarily pertain to the Polish legal system, the concept of a democratic state governed by law is a common thread across European legal systems. Consequently, the thesis concerning the gradation of state interference in property rights remains applicable.

As Kasznica aptly noted, such interference may, in extreme cases, take the form of expropria-

69 Ustawa z dnia 13 października 1995 r. Prawo łowieckie [Act of 13 October 1995 Hunting Law] [2022] JoL 1173.

70 See the judgment of the Supreme Administrative Court II OSK 175/16 [2017] Lex 2328678.

71 See e.g. judgment of the Polish Constitutional Tribunal of 25 May 1999, SK 9/98 (1999) OTK 78, or the abovementioned judgment of the Polish Constitutional Tribunal of 8 October 2007K 20/07.

tion *sensu stricto* – and in rare cases, nationalisation. More subtle and often harder to identify are instances of interference that violate the essence of property rights by preventing or "freezing" the ability to use a property – this is referred to as expropriation *sensu largo*, or expropriation by restriction. The difficulty in legally characterising such interference, as well as the legislative tendency to avoid labelling these restrictions as expropriation, both complicate this issue. Nevertheless, the perspective that property rights are increasingly subordinated to public service remains valid. Depending on the degree of interference, this may necessitate compensation or be viewed as a regulation of property rights that is equal for all and, at least formally, non-damaging.

In conclusion, a notable trend in Polish legislation is the introduction of property right limitations not directly through statutes but through statutory authorisations, allowing for such limitations to be imposed via acts of local law: locally binding general regulations.[72] Although from a pragmatic point of view this seems reasonable, it is not necessarily in compliance with Article 64(3) of the Constitution of the Republic of Poland, which states that "property may be restricted only by way of a law". This issue has still not been clearly settled in the doctrine.

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72 See Articles 87(2) and 94 of the Polish Constitution.

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Contemporary Central & East European Law

Public Administration and Criteria of Good Administration in the Works by Professor Stanisław Kasznica

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Abstract
The subject of analysis in this article is Professor Stanisław Kasznica's reflections on public administration. His postulates concerning the functioning of public administration with the criteria of "good administration" are compared with the current understanding of the matter. The main intention is thus to demonstrate the validity of the theses put forward by the professor. In conclusion, it can be stated that the main thesis of the article has been confirmed, that most of the assumptions in the relationship between the administration and the individual were previously known and inspired the postulates raised by contemporary authors. These demands were a harbinger of the adoption in the EU of one of the fundamental rights of the EU – the right to good administration.

Keywords
public administration; administrative law; good administration; standards of good administration; principles of administration and administrative law

1. Introduction

Professor Stanisław Kasznica was a patriot, an academic and a man who made the idea of a university a reality – and the Poznań *alma mater* owes him a great deal. His exceptional devotion to the matters of the faculty was emphasised by Kazimierz Kolańczyk[1]. In the literature, he is also credited with the role of an outstanding creator and architect of the Second Polish Republic, and among his personal characteristics, his great internal discipline, consistency in action and clearly defined worldview are emphasized[2]. These qualities are fully visible in the work he left behind.

1 K Kolańczyk, 'Wydział Prawa Uniwersytetu Poznańskiego (1919–1959)' [The Faculty of Law of the Poznań University at the Time from 1919 to 1959] (1959) Ruch Prawniczy i Ekonomiczny vol. 2, 17.

2 JW Ochmański, 'Stanisław Kasznica. Rektor w latach 1929–1931' [Stanisław Kasznica. Rector in the years 1929–1931] in R Budzinowski, J Haberko, K Kokocińska, M Materniak-Pawłowska, T Nieborak (eds), *Myśląc o przyszłości nie*

The purpose of the research preceding the writing of this paper and the guiding idea of this article was first of all to remember the eminent scholar that Professor Stanisław Kasznica was. Secondly, the author's intention was to popularise the thoughts contained in the studies published by Professor Kasznica. The third aim – and probably most important from the perspective of science – was to answer the main research question of what concept of public administration Professor Kasznica had and what requirements he set for its operation. The subject of the article is issues concerning "good administration". Thus, the main research task was to determine, elaborate on and then compare Professor Kasznica's main studies with the present requirements for public administration. The idea for such an approach to the topic arose from a thesis previously expressed by the author. First and foremost, the point is that the current state of knowledge about administration, as well as the range of requirements placed on it, is the result of a process influenced by previous generations of scholars, including jurists and specialist in administrative science[3]. Thus, the current shape and set of standards for good administration "is the result of evolutionary changes that have occurred in a historical context"[4].

It is worth emphasising that Professor Kasznica's work can be assessed highly from the perspective of not only administrative law, but also of the science of administration. The latter discipline is *ex definitione* orientated towards the accumulation of knowledge about administration[5], but it should also strive to establish model action (standards). A preliminary analysis of Professor Kasznica's oeuvre shows that the author has repeatedly searched for and described such laws. At the same time, they are expressed authoritatively, dictated by the choice of solutions to which the author himself arrived and which he considered the most accurate[6]. Professor Stanisław Kasznica was writing at a time when outstanding works of administrative science were emerging, written by such figures as Max Weber, Henry Fayol and Otto Mayer – and in Poland, Antoni Okolski, Franciszek Longchamps de Bérier and Józef Olszewski. The author also made no secret of the fact that his works were influenced by the work of another eminent Swiss scholar: Frederick Fleiner[7].

This article uses three research methods. The dominant method is the analysis of the content of Professor Stanislaw Kasznica's oeuvre. This method leads to a synthesis and evaluation of the main output. In addition, the dogmatic legal method and the historical legal method were used as auxiliaries.

zapominamy o przeszłości. Księga jubileuszowa 100 lat Wydziału Prawa i Administracji Uniwersytetu im. Adama Mickiewicza w Poznaniu [When Thinking about the Future, we do not Forget about the past. Anniversary Book of 100 Years of the Faculty of Law and Administration of the University of Adam Mickiewicz in Poznań] (Wydawnictwo Naukowe UAM 2019) 33–39.

3 M Princ, *Standardy dobrej administracji w prawie administracyjnym* [Standards of Good Administration in Administrative Law] (Wydawnictwo Naukowe UAM 2016) 65.

4 I Lipowicz, M Princ, 'Paneuropejska zasada dobrej administracji' [The Pan-European Principle of Good Administration] in I Lipowicz (ed), *System prawa samorządu terytorialnego. Samorząd terytorialny: pojęcia podstawowe i podstawy prawne funkcjonowania* [The Local Government Law System. Local Government: Basic Concepts and Legal Basis for Functioning] (Wolters Kluwer 2022) 533.

5 Z Leoński, *Nauka administracji* [Learning Administration] (Wolters Kluwer 2000) 20.

6 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 5.

7 Ibid.

2. Contemporary criteria of good administration

Modern public administration is shaped under the influence of different centres. It can be said that it is multicentric, as it is subjected to regulations coming from various centres, including supranational ones[8]. First of all, attention should be paid to the findings of centres of science, institutions (e.g. courts, EU bodies and institutions or the Council of Europe) and NGOs. These centres create legal, non-legal, organisational and ethical requirements leading to concepts such as the principles of bureaucracy, New Public Management, New Public Service, good governance, republicisation, smart administration or responsive administration. As Supernat points out, one cause of public administration being made uniform is "internal pressures related to decentralisation, industrialisation, scientific management, new public management, modernisation or good administration". He assesses that "the emphatic names of these movements and concepts are meant to emphasise their innovativeness"[9].

When it comes to setting criteria for good administration, authors refer with varying degrees of emphasis to a very extensive catalogue of rules, postulates and principles. For example, Lipowicz and Princ consider that:

> administration depends on the existence not only of the assumptions of a legal state but also of a state of good administration. A state which respects the hierarchically established system of sources of law and a state which functions in accordance with such values as truth, trust, justice, keeping agreements, predictability, openness, openness and equality. A state that is oriented towards the realisation of the common good, while respecting every individual in different social contexts (including the healthy, the sick, the migrant, the minor, the senior citizen). A state in which the civil servant manifests qualities such as individuality, knowledge of the realities of life, social commitment, courage and self-reliance in the application of the law, which are an expression of his freedom.[10]

Meanwhile, in the literature, authors such as Stelkens and Andrijauskaitė have begun to highlight the existence of a pan-European principle of good administration, which they argue is not a loose bundle of different rules in administrative matters, but forms a common whole: a true package of good administration[11]. It is emphasised that the multilateral context of the principle includes the organisation of administration (administration and government, division of competences, privatisation and local self-government), the status of civil servants and employees of public institutions, administration and law (sources of administrative law, legality of public administration action and discretion), legal certainty and the protection of legitimate expectations, administrative decision-making, administrative procedures and procedural rights

8 B Kowalczyk, 'Europeizacja prawa administracyjnego' [Europeanization of Administrative Law] in J Blicharz, P Lisowski (eds), *Prawo administracyjne. Zagadnienia ogólne i ustrojowe* [Administrative Law. General and Systemic Issues] (Wolters Kluwer 2022) 546. See also E Łętowska, 'Multicentryczność współczesnego systemu prawa i jej konsekwencje' [Multicentricity of the Modern Legal System and its Consequences] (2005) Państwo i rawo vol. 4, 3–10.

9 J Supernat, 'Tendencje w badaniu porównawczym administracji publicznej i prawa administracyjnego' in J Blicharz, P Lisowski (eds), *Prawo administracyjne. Zagadnienia ogólne i ustrojowe* [Administrative Law. General and Systemic Issues] (Wolters Kluwer 2022) 73.

10 I Lipowicz, M Princ (2022) 551–552.

11 U Stelkens, A Andrijauskaitė, *Good Administration and Council of Europe: Law, Principles, and Effectiveness* (Oxford University Press 2020) 821.

(including spatial planning procedures), administrative sanctions, local public services and their users' rights, freedom of information, transparency and protection of personal data, administrative justice and administrative supervision and state accountability[12]. It is also assessed that the pan-European principle of good administration now constitutes a common European heritage.

In order to establish the criteria for good administration, it is more least debatable to refer to the standards (benchmarks) of good administration formulated at the national as well as the European level. Here, Recommendation R(2007)7 of the Committee of Ministers to Member States on Good Administration is most relevant. It is there that nine principles of good administration are identified: legality, equality, impartiality, proportionality, legal certainty, timely action, participation, respect for privacy and transparency. In addition, the Recommendation sets standards for administrative decision-making, appeals against decisions and redress. There is no doubt that there are many more sources for setting benchmarks. An excellent example is the European Charter of Local Self-Government[13] or the European Code of Good Administrative Behaviour. Perhaps the most momentous one to date has been the adoption of the right to and principle of good administration in the EU Charter of Fundamental Rights. The main task of the principle of good administration, and in particular the right to good administration, is to create protection against unlawful acts of public administration. Thus, it is assigned the role of a so-called umbrella right.[14] These concepts, as well as *good governance*, although difficult to define, must be recognised and analysed, in particular their transformative effects.[15]

The criteria of good administration formulated in the literature can be divided according to their addressee or the sphere of activity of the administration. Thus, for the purposes of this study, and on the basis of the preliminary research on Professor Kasznica's work, the concepts were divided into postulates related to the organisation of public administration and concerning the main principles of its functioning, criteria relating to civil servants, postulates referring to administrative acts and rules of administrative procedure preceding their issue.

3. Organisation of the administration and the main principles of its operation

According to Professor Stanisław Kasznica, "all administration carried out by the state and by public law associations is called public administration, in contrast to private administration carried out by individuals and voluntary associations of individuals, who have no authority"[16]. In the Professor's works, one can easily find very different indications concerning the ways in which an administration operates and exercises its authority. First of all, it should be noted that the concept of public administration is firmly rooted in the assumptions of the rule of law. In this respect, the role of legal rules, in particular those contained in administrative law, is important. As Professor Kasznica states, "administrative law is for the administration a means which

12 Ibid.

13 European Charter of Local Self-Government, drawn up in Strasbourg on 15 October 1985 [1994] JoL 124, 607 as amended.

14 J Mendes, *Good Administration in EU Law and European Code of Good Administrative Behaviour* (2009) EUI Working Paper vol. 9, 4.

15 E Schmidt-Assmann, *Verwaltungsrechtliche Dogmatik* (Mohr Siebeck 2013) 147 et seq.; cf I Pernice, 'Europarechtswissenschaft oder Staatsrechtslehre? Eigenarten und Eigenständigkeit der Europarechtslehre' (2007) Die Verwaltung vol. 7, 246 et seq.

16 S Kasznica (1946) 8.

delineates the limits of its activity, indicates how far it is allowed to go, to invade the sphere of life of individuals, to restrain them or impose something on them"[17].

Addressing the issue of the administrative relationship, the author maintains that "in a state governed by the rule of law, norms bind not only the citizen but also the state".[18] In turn, the activity of the public administration should always be based on a law, and "every intrusion of the public administration into the sphere of freedom and property of a citizen requires statutory authorisation".[19] As he continues, "if the administration wants to restrain him in something or impose something on him, it must invoke some legal provision authorising it to do so. In cases where the law is silent, the authorities are not allowed to invade the sphere of citizens' freedom".[20] However, the author allowed and gave examples of the use of discretionary acts. At the same time, he recognised that "free discretion is included in legal framework".[21] Indeed, he wrote that:

> the administrative authority in the territory, left to the discretion of the localities, is not allowed to dispose of itself arbitrarily. In each concrete case, the authority must, of course, be guided exclusively by the public interest – if it did not do so, it would commit an abuse of power – but otherwise it must be guided only by those motives which the legislature had in mind when giving it this power.[22]

In the monograph entitled *Polish Administrative Law: Concepts and Basic Institutions*, the author assesses that the lack of a general part containing basic concepts, guiding principles and other important provisions of administrative law is particularly unfavourable.[23] As he observes, "its norms flow in a constant abundant stream from numerous sources, scattered over various official publications, overloaded with a mass of technical details, often unclear due to their faulty formulation".[24] In this legislative chaos, the author not only sees problems of comprehension, but fears the return of a police state, a totalistic state, characterised by disregard for legal norms and based on free discretion.[25] Professor Kasznica gives the example of the proliferation of decrees that herald the influence of the bureaucracy, "and this all-encompassing spread of rationing without any barrier takes place outside the influence and control of society".[26]

One of the principles on which the public administration of the time was built was the principle of hierarchy, which means that a superior official may issue a binding directive on how a norm should be interpreted. Kasznica described this organisational principle as the right of superiors, a principle on which the administrative apparatus of the modern state is built.[27] This principle was established in order to "organise the protection of citizens against the abuse of authorities".[28] The bureaucratic system based on the principle of hierarchy allows the modern state to be "able to develop its activities to such an immeasurably broad extent, to encompass an intransigent mass

17 Ibid., 10.
18 Ibid., 116.
19 Ibid., 116–117.
20 Ibid., 117.
21 Ibid., 118.
22 Ibid.
23 Ibid., 21.
24 Ibid., 23.
25 Ibid.
26 Ibid., 26.
27 Ibid., 11.
28 Ibid., 46.

of affairs while maintaining unity of direction".[29] The inspiration of the principles reported by Weber is clear in this respect. The same is true for the principle of competence and the possibility of using coercion.[30] As an aside, it may be noted that Kasznica considers them an important guarantee of the rule of law.[31]

Another of the principles of organisation described in Kasznica's studies is centralism. The author appreciated the approval of this principle in the era of organising states.[32] However, its negative features later became apparent, including:

> detachment from life, lack of understanding of its needs, consideration of the differences existing between individual territories, conscious obliteration of them levelling tendencies, paralysing the individual development of territories and the creative initiative of individuals, templated arrangements, costly proceedings, proliferation and predominance of bureaucracy".

The professor was a supporter of deconcentration and, above all, of the idea of self-government. However, the process of transferring tasks to self-governing bodies did not take place without resistance from "central authorities and ministers, who jealously guard the whole mass of competences that has been concentrated in their hands and are reluctant to cede any of them to subordinate authorities".[33] By means of territorial self-government the citizens gain a share in the execution of the tasks of the government administration, "thereby exploiting the civic institutions which already exist and avoiding new elections".[34]

The author assumed the existence of self-government in its various forms. Behind this term was the original assumption that "in addition to this main one, there is a whole series of other separate centres that perform administration on their own".[35] Self-government assumes that those concerned also have the right to take part in administration themselves, either directly or indirectly.[36] The trump card of self-government is first and foremost that it is "a dam against the omnipotence of the state and on its behalf the ruling bureaucracy or party. It is one of the most important bulwarks beyond which civic freedom can take refuge and be maintained". Self-government is a civic school where "the broad strata of society become practically acquainted with public affairs, awaken their interest in them, expand their spiritual spectrum beyond the sphere of their own selfish interests, and grow up to comprehend state-wide affairs and interests".[37]

Professor Kasznica was not in favour of transferring selected tasks of government administration to some self-governing bodies. He assesses that such a step would be recognised as a kind of experiment, not sustainable and fraught with risk. First of all, he points out that these tasks should be transferred "in relation to those self-governments which have demonstrated their vitality and efficiency thanks to the selection of people working in them", which will contribute to rivalry

29 Ibid., 61.
30 Ibid., 12–14.
31 Ibid., 14.
32 Ibid., 58.
33 Ibid.
34 S Kasznica, *Polskie prawo administracyjne. Notatki z wykładów Prof. Dr. St. Kasznicy r. akad. 1928/1929* [Polish Administrative Law. Lecture Notes by Prof. Dr. St. Kasznicy, Academic 1928/1929] (Koło Prawników i Ekonomistów 1929) 6.
35 S Kasznica (1946) 62.
36 Ibid., 68.
37 Ibid., 79.

and jealousy.[38] The author also predicts that "At the very most aforementioned 'assignation' will probably stop in the East, where it will be counteracted by considerations of low culture and, to some extent, political considerations".[39] He also warns against the possibility of cancelling the decision to delegate tasks to self-governments, which may then result in the need to roll back "the entire administrative apparatus in terms of people and material resources which self-governments had to assemble beforehand in order to perform the tasks entrusted to them".[40]

Professor Kasznica's work also recognises the issue of citizens' participation in general administration tasks. The author expressed the view that the constitutional provisions had not been implemented, and the adopted legal solutions were sometimes illusory.[41] For example, this is how the professor assesses the cooperation with the voivode of the voivodship self-governing bodies and with the district *starost* of the district self-governing bodies: "This is the simplest and most practical solution from the structural point of view, with its implementation facing serious difficulties in view of the fact that, apart from the former Prussian district, there is still no voivodship self-government anywhere". He described the *powiat* self-government in some parts of Poland as "so long not renewed, that it has almost died out".[42] However, Kasznica positively assesses the creation of voivodship councils, which are to be mixed bureaucratic and civic bodies and which the legislature intends to be permanent and not provisional institutions.[43] On the other hand, the author is critical of certain obligations, such as the obligation of the provincial governor to submit a report to the Council. He was concerned that this would lead to adverse effects.

4. Demands on civil servants

Among the criteria of modern good administration are demands relating to civil servants. The European Code of Good Administration is an excellent example in this respect. The final assessment of an administration depends not only on the shape of the regulations under which it operates, but also on the way in which the staff employed within its structures act. Professor Kasznica's work also contains threads relating to the requirements placed on civil servants.

In Professor Kasznica's studies, an official is supposed to be the executor of legal norms. However, this executor does not fit into the Weberian concept of the official, performing his duties like a machine. The officials described in the administrative law textbook were supposed to be independent and critical.[44]

It is worth noting the conditions for the performance of the civil service cited by the professor, where the civil servant relationship is clearly based on the law, is voluntary and has not only a legal but also a moral character.[45] On the other hand, an official should give themselves wholly to the service at all times, they are subject to official authority, their public service is their life's work, they require professional preparation and the proper performance of their duties is ensured by

38 S Kasznica, 'Władze administracji ogólnej po reorganizacji dokonanej Rp. P.R.19/1.1928' [The General Administration Authorities After the Reorganization Carried out by the Republic of Poland. P.R.19/1.1928] (1928) Ruch Prawniczy, Ekonomiczny i Socjologiczny vol. 2, 159.

39 Ibid.

40 Ibid.

41 Ibid., 150.

42 Ibid.

43 Ibid., 151.

44 S Kasznica (1946) 12.

45 Ibid., 88.

the provisions on official (disciplinary) responsibility.[46] The author also seeks a solution in the dispute over the permanence of employment. He argues for relative permanence in the employment of civil servants[47] and even demands that they be decently compensated. One excerpt from the handbook attests to this: "civil servants' salaries are at starvation level; they do not fulfil their purpose because they do not provide the civil servant with a sufficient, decent livelihood".[48]

Official activities, in the professor's opinion, should be supervised by administrative courts, in which he saw one of the main institutions for the legal protection of individuals. Three motives were decisive for this.[49] Firstly, "for a civil servant, the main guideline he is guided by when dealing with matters is the public interest [...]. It is therefore necessary to subject acts of administration to the control of a body which would be able to maintain the balance between the public interest and legitimate private interests, and ensure full protection of subjective rights".[50] Secondly, the author draws attention to the link between the official corps, which is of a negative nature. "The whole mass of civil servants – independent of their hierarchical ranking and their distribution in the various authorities – constitutes a single body (the bureaucracy), animated by a sense of solidarity of professional commonality, of the importance of the role it plays in society and by a spirit of corporate connectivity (*espirit de corps*)".[51] Thus, "[t]he official who handles an appeal at a higher administrative instance is bound, as a rule beyond his consciousness, with knots of unity and solidarity with the other official who handled the case at the adjudicating instance, and tends to uphold the position taken by the latter in the name of the 'solemnity of authority', and to oppose the position of some other individual, belonging to the administered mass. In this way one can speak of the principle of being a judge in one's own case (*judex in re sua*)".[52] The third argument is related to the fact that every official is subordinate to a minister and owes the minister absolute obedience, being their highest hierarchical superior.[53] In view of the above arguments, Professor Kasznica concludes that safeguarding the interests of the individual can only be done by a hierarchically independent entity.[54]

5. Criteria relating to administrative acts and proceedings

The central phenomenon in administrative law, as can be read from the lecture notes published thanks to the efforts of the Circle of Lawyers and Economists of the University of Poznań, is the administrative act, although it is not the issuing of acts that is the main purpose of administration,[55] but the production of practical values.[56] Prominent among the objections to administrative acts was the fact that they must be issued on some legal basis, hence the postulate that they should always begin by citing the legal provision that authorises them.[57] As can be read later in the notes:

46 Ibid., 89.
47 Ibid., 91.
48 Ibid.
49 Ibid., 165.
50 Ibid.
51 Ibid.
52 Ibid., 166.
53 Ibid.
54 Ibid.
55 S Kasznica (1929) 14.
56 Ibid.
57 S Kasznica (1946) 97.

"In a primary state, it is required that the administrative act is legal", i.e. issued by the competent authority, that its content is in accordance with the law (laws and regulations) and that it does not contradict any law or regulation.[58] In addition, it is important that the authority issuing individual act adheres to certain rules assigned by the act not only related to administrative procedure, that the external form of the act is respected when it is issued and that the act is purposeful, i.e. it achieves the state for which it was created.[59] According to Kasznica, the preservation of these conditions secures "the interests of citizens and the rule of law of the state".[60] The authority, the professor argues, "while keeping the public interest first and foremost in mind, is at the same time obliged to protect the subjective rights and legally protected interests of the parties, and this in principle ex officio, without waiting for their applications".[61]

The issuance of the act should be preceded by "even the most summary proceedings aimed at determining whether in this particular case the essential conditions under which the norm authorises the very issuance of this act exist".[62] The act should meet the criteria of legality under which it is understood: it should be possible for it to be issued by a material and territorially competent authority, it should be issued in the proper form ascribed by law, it should be issued in compliance with the relevant provisions of administrative procedure; and its content should not contradict any statutory provision – "the act should not prescribe anything that would be actually or legally unenforceable".[63]

Professor Kasznica devotes a separate place in the book to the form of the decision. Each decision should contain a reference to the legal basis, date, operative part of the decision, an indication of its type, the signature of the authority and the instruction of the legal centre. A decision, in whole or in part, should have a legal and factual justification. He adds that "justification of a decision is superfluous when issuing it was left to the discretion of the authority".[64] The decision should contain an instruction providing information on the remedy indicated to the appeal authority, the time limit for appeal and the procedure to be followed. The author instructs that an erroneous instruction must not leave the party in the wrong.[65] The above-mentioned arguments on the conditions for issuing administrative acts were dictated by the adopted legal solutions.[66]

Professor Stanislaw Kasznica also describes the conditions for conducting administrative proceedings in which an administrative act is issued. The purpose of the rules is to ensure that the act has the essential qualities that determine its validity (i.e. legality and expediency), and at the same time to protect the rights of those affected by it.[67] The monograph highlights the following principles of administrative procedure: it "is basically oral free of any formalism" and yet should consolidate what "has been established in the course of oral communication between the authority and the party"[68]. According to the established assumptions, simple matters should be

58 S Kasznica (1929) 14.
59 Ibid.
60 Ibid.
61 S Kasznica (1946) 109.
62 Ibid., 97.
63 Ibid., 101.
64 S Kasznica (1929) 29.
65 S Kasznica (1946) 109.
66 Rozporządzenie Prezydenta Rzeczypospolitej z 22 marca 1928 r. o postępowaniu administracyjnym [Regulation of the President of the Republic of Poland of 22 March 1928 on Administrative Proceedings] [1928] JoL 36, 341 as amended.
67 Ibid., 105
68 Ibid., 106–107.

clarified immediately, if possible orally. The written form is reserved for cases clearly indicated by the regulations. Furthermore, the author stresses that administrative proceedings are in principle open, although, as he points out, this principle has not been fully implemented. It is proposed to amend the provisions so that the authority is obliged to notify the parties of the dates of the evidence proceedings, allowing the party to find out the status of the case. According to Kasznica, the hitherto haphazardness does not correspond with the solemnity of the office.[69] Furthermore, it is argued that the interests of the parties should be taken into account when dealing with a case, and that the authorities are supposed to support the parties with advice and instruction.[70] In addition, no-one should be taken by surprise by the authorities: everyone should be informed in advance of what the authorities want from them so that they can respond in advance.[71]

6. Measures to protect the individual against the power of public administration

A very interesting part of Professor Stanisław Kasznica's handbook is the chapter on legal protection. This is because the author recognised what an all-powerful organisation the public administration is, illustrated by the following quotation: "Nowadays no-one's administration can even approximately enter into comparison with the state administration, both because of the vastness of the fields covered by it and because of the intensity and power of the action".[72] The law, which officials should be guided by, "does not protect the citizen from lawlessness, does not prevent administrative bodies from carrying out unlawful acts".[73] The reason for this state of affairs is the officials who put the law into practice: "they – like people usually do – all too often make mistakes, are sometimes careless, act arbitrarily, are not always disinterested and – worst of all – succumb to political influence or bend the law to party requirements".[74]

The author meticulously presents the legal devices and measures developed by the state for organising public administration so as to guarantee the legal protection of individuals. Among these he primarily includes[75] the separation of powers, the strict definition and delimitation of the competences of administrative authorities, "the formation of those manifestations of the will of the administrative authority which are intended to produce legal effects into an administrative act with all its definiteness and strictness", shaping administrative proceedings to be similar to court proceedings, the qualification of officials, particularly their legal training, the granting of an important place to self-government in the organisation of public administration, the participation of the civic factor in the process of administration and "the principle of obedience only to lawful orders and decrees of the authorities", in which it is the authority, and not the individual, that must demonstrate the lawfulness of its actions.

A special role in the system of human legal protection, according to Professor Kasznica, is played by administrative courts, which were established to settle disputes between individuals and administrative authorities.[76] According to the author, the idea of subjecting the activity of

69 Ibid., 107.
70 Ibid.
71 Ibid., 108.
72 S Kasznica (1946) 7.
73 Ibid., 155.
74 Ibid.
75 Ibid., 155–157.
76 Ibid., 164.

public administration to control by the court had met with very strong resistance. It was argued that the existing hierarchical control and the principle of legality on the basis of which officials act should be sufficient to safeguard the interests of the individual. Likewise, according to critics, the introduction of an administrative judiciary would unnecessarily prolong proceedings and burden the state budget with additional costs.[77] Professor Kasznica strongly advocated the functioning of judicial supervision of public administration.

The last of the safeguards mentioned by Professor Kasznica, and at the same time a means of legal protection of the individual, was civil liability for damages caused by the administration. The author advocated a solution in which both the official and the state would have to make reparation jointly and severally for the damages caused. This would not only involve compensation for material damage, but also moral damage for unlawful action, and this should be decided by the courts. Interestingly, Kasznica supported the claiming of compensation by all citizens as well as foreigners. In the latter case, he allowed the application of the principle of reciprocity, which was then the key to understanding the legal situation of foreigners.[78]

7. Conclusions

The analysis of Professor Stanisław Kasznica's oeuvre makes it possible to present several conclusions, which also constitute a synthesis of thought. First of all, it should be noted that the arguments contained in all works are interesting and at the same time balanced. What needs to be emphasised is the modernity and topicality of the thoughts. The language of the studies is firm and precise. A very interesting part of the output is the extended arguments on the rights of the individual. They have been dictated by concern for the human being and the protection of the individual from an all-powerful public administration. In this respect, they are closely linked to the contemporary idea of the emergence of law and the principle of good administration, i.e. the protection of the individual entering into a relationship with the administration. The author, who should be regarded as "ahead of his time", was very much grounded in the theory of local self-government, postulating that independence in performing tasks should be guaranteed within the framework of the existing state. The professor's work is full of well-thought-out concepts and, most importantly, was accompanied by numerous comments and proposals for change. It is worth noting that the findings are important not only for administrative law, but also for the science of administration. I share the assessment expressed by Czartoryski that reading the work makes it possible to emphasise one's "own reflections, highly personal original and timeless being an expression of deep experiences and reflections, and presented in a rigorously disciplined and logically ordered form".[79]

What kind of model of administration is painted on the basis of Professor Stanisław Kasznica's work? First and foremost, one should emphasise the very strong grounding in the assumptions of the rule of law. Public administration is supposed to operate on the basis of the law, and should be firmly bound to it. It is worth noting that the modern concept of good administration is also based on this foundation. Moreover, public administration should be purposeful, impartial, focussed on the public interest, supervised, decentralised and based on the work of educated officials, and it should justify its decisions and enable the participation of citizens in its decisions

77 Ibid.

78 L Babiński, *Prawo cudzoziemców w Polsce: (Teksty z komentarzem)* [Foreigners' Law in Poland: (Texts with Commentary)] (Księgarnia F Hoesicka 1925) 11.

79 P Czartoryski, 'Wstęp' [Introduction] in S Kasznica (ed), *Władza* [Power] (1996) Analecta 5/1(9), 7.

and listen to their voices. The work also highlights themes that see the need to limit public administration by using solutions to protect individuals. It can be said that those who believe that the contemporary criteria of "good administration" are not new are correct. In my view, however, what is new is the transformation of the demand for good administration into the right to good administration.[80] This postulate, however, was not reported in the professor's works.

What is compelling about Kasznica's work is its relevance, especially given the current sociopolitical climate. This assertion is exemplified by two quotations concerning functioning of the press and the judiciary. Firstly, Kasznica notes that "[i]n countries where there is freedom of the press, it is one of the most important and effective tools for controlling the administration. An honest, independent press, which does not recklessly hurl unproven allegations and accusations at the administration, is a strong brake against the abuses and lawlessness of administrative authorities".[81]

Secondly, Kasznica addresses judicial irremovability: "However, the real blow to the judiciary in general, and to the Supreme Administrative Court, was the suspension of judicial irremovability on several occasions since 1926. This has left a deep, permanent, fatal mark on the psyche of judges, shaking their sense of internal independence. There can be no question of real, truly effective judicial control over the administration if a judge lives in acute fear that at any moment his irremovability may be suspended again and then scores will be settled with him for judgments issued without the government's attention".[82]

These excerpts from Kasznica's administrative law textbook, along with his other arguments, underscore the enduring relevance of his works. They are timeless.

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

80 See also A Szpor, 'Odwaga służenia dobru wspólnemu' [Courage to Serve the Common Good] in Z Niewiadomski, Z Cieślak (eds), *Prawo do dobrej administracji. Materiały ze Zjazdu Katedr Prawa i Postępowania Administracyjnego, Warszawa–Dębe 23–25 September 2002* [The Right to Good Administration: Materials from the Congress of Departments of Administrative Law and Procedure, Warszawa-Dębe 23–25 September 2002] (Uniwersytet Kardynała Stefana Wyszyńskiego 2003) 547–558.

81 S Kasznica (1946) 158–159.

82 Ibid., 171.

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Administrative Fines as Instruments of Legal Influence

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Abstract

Administrative power is an attribute of public administration which is a reflection of state power. Thanks to it, the administration can unilaterally shape the legal situation of the administered persons, exercising the powers granted to it. However, the scope and manifestations of power must be regulated in statutes, which is a prerequisite for exercising control over the administration in a democratic state ruled by law. The functions, goals and tasks of the administration evolve, the intensity and manifestations of administrative power also change, yet it is still a permanent feature of administration and there is no indication that this will change.

The article shows the evolution of power in various manifestations of administration activity, both in legal and factual activities. The changing models of the administrative procedure and, consequently, the degree of intensification of the authoritative actions in the classical sense of authority in the issuance of administrative acts were analysed. The characteristic types of authority were also indicated, such as: planning authority, statutory authority, organizational and functional authority, plant authority.

Keywords

state authority; planning authority; statutory authority; organizational and functional authority; company authority; administrative coercion; administrative sanctions

1. Introduction

For modern administration, it is necessary to have legal instruments that serve to implement the legal order regulated by normative acts. This affects the way administrative law is conceived, which must be oriented towards its efficiency and effectiveness. Administrative fines can be seen as tools that allow the objectives set by public policymakers to be achieved through the implementation of a specific regulation. This places the administration in an important position in terms of the legislature, as its actions are determined by the legislature, which, due to its institutional design, is unable to enforce them itself[1].

1 G Jellinek, *Ogólna nauka o państwie* [General Science of the State] (Księgarnia F. Hoesicka 1924) 225–231.

By contrast, the conditions or assumptions under which a regulation is effective or efficient are dealt with by the science of administration[2]. In order to achieve the effectiveness of law, as well as administrative policy, an important element is the regulatory instruments and the way they work[3]. These include administrative sanctions, which are analysed in the doctrine of Polish administrative law from the perspective of their concept, constitutional legitimacy, limitations in the application and exercise of the sanctioning power. The subject of interest is also their function, which makes it possible to distinguish administrative fines from similar sanctions on the grounds of criminal, criminal-tax and misdemeanour law. The subject of analysis in this article is the latter issue – the function and purpose of administrative fines. It is already apparent to the naked eye that the first objective in the enactment of administrative fines is to achieve compliance of the administered behaviour with normative acts as well as general and individual acts.

It is therefore important to approach the functions of administrative penalties through the prism of the functions of administrative law[4]. The functions of administrative sanctions, including fines, should be derived from the functions of public administration and administrative law[5]. They are characterised by their incentive effect. Administrative law is a part of the legal order, established to ensure the implementation and protection of social interest. According to S. Kasznica, it is an important goal for administration to induce in the external world certain phenomena considered beneficial from the point of view of public interest, social values, order and a sense of security[6]. H. Maurer, on the other hand, identifies three goals to which good administration should be guided. These are: shaping society, dealing with community affairs and being guided by the public interest[7]. Administrative law has been shaped in the interest and for the needs of the administered, who is at the same time subject to supervision, control and sanctions in order to fulfil the legitimate public interest. This makes it possible to adopt a functionalist approach to public law with regard to these measures of administrative penalties[8].

The underlying function and objectives of administrative fines constitute the theory explaining the power of regulatory bodies to impose sanctions. As S. Kasznica pointed out, it is necessary for the administration to have tools enabling it to act and facilitating the realisation of the established public objectives imposed by the legislator[9]. In addition, the article attempts to test whether this way of understanding an administrative fine has dogmatic support in

2 See E Schmidt-Aßmann, 'Zum Stand der Verwaltungsrechtsvergleichung in Europa: Wissenschaft' (2012) Die Verwaltung vol. 45, 264–277.

3 B Lozano Cutanda, 'Sanciones administrativas: el peligroso protagonismo de un ius puniendi alternativo' (2018) Revista Andaluza de Administración Pública vol. 102, 22.

4 Z Duniewska, 'Rola, cele i funkcje prawa administracyjnego' [The Role, Goals and Functions of Administrative Law] in Z Duniewska, R Hauser, M Jaśkowska, M Matczak, Z Niewiadomski, A Wróbel (eds), *Instytucje prawa administracyjnego* System Prawa Administracyjnego [Institutions of Administrative Law, Administrative Law System] (CH Beck 2010) 105.

5 M Wincenciak, *Sankcje w prawie administracyjnym i procedury ich wymierzania* [Sanctions in Administrative Law and Procedures for Imposing Them] (Wolters Kluwer 2008) 256.

6 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 11.

7 H Maurer, *Ogólne prawo administracyjne* [General Administrative Law] (Kolonia Limited 2003) 21–22.

8 More extensively L Staniszewska, *Administracyjne kary pieniężne. Studium z zakresu prawa administracyjnego materialnego i procesowego* [Administrative Fines. Study in the Field of Substantive and Procedural Administrative Law] (Wydawnictwo Naukowe UAM 2017) 165.

9 S Kasznica (1946) 135.

domestic positive law. In order to achieve these objectives, this article is structured as follows: firstly, it presents the various levels on which the discussion around administrative sanctions takes place, highlighting their function in relation to other criminal sanctions. Next, the dynamics of introducing successive administrative sanctions in Polish law as effective measures, especially as a result of the implementation and enforcement of the law made by the organs of the European Union, are explained. Against this background, the Polish model for the application of administrative fines is presented.

2. The role of administrative fines and the main points of discussion about them in the Polish doctrine

The discussion around administrative sanctions at the national level has focused on several issues that operate at different discursive levels: the legitimacy of their enactment and constitutionality as well as the conceptual level, i.e. the model of imposition, what functions they are supposed to perform.

Given the numerous doubts about the constitutionality of imposing sanctions by the administration, it should be pointed out that, starting with the principle proposed by Charles Louis Monteskius of a tripartite division of powers into executive, legislative and judicial, discussions began about the limits of the powers of these authorities to impose sanctions by the public administration, in the context of whether the imposition of such measures does not constitute the exercise of the administration of justice, especially when the authority is acting within the scope of administrative discretion[10]. Indeed, the function of administering justice must, in principle, be entrusted to independent and autonomous courts. There can be no strict separation of powers in any state, as executive, legislative and judicial powers are always mixed to some extent. The imposition of fines by the administration, although it raises certain reservations concerning the violation of the principle of separation of powers and procedural guarantees for the addressees of sanctions, has become common not only in Poland, but throughout Europe[11]. The Constitutional Tribunal in Poland has repeatedly stated that one of the means of securing the implementation of public law norms contained in normative, general or individual acts may be through administrative fines[12]. Thus, also in the doctrine I. Niżnik-Dobosz pointed out that each branch of law should have legal instruments with which to punish legal entities for a violation of obligations, orders and prohibitions arising from the norms of law belonging to this branch, because where regulations impose obligations on natural or legal persons, there should also be a provision specifying the consequences of not carrying out the obligation[13]. The judicial and administrative case law is also uniform in this respect.

The issue of the relationship between criminal sanctions and administrative fines is also related to the issue of the concurrence of criminal and administrative liability, as consequenc-

10 L Dubel, *Historia doktryn politycznych I prawnych do schyłku XX wieku* [History of Political and Legal Doctrines Up to the End of the 20th Century] (Wolters Kluwer 2007) 233–234.

11 P Soto Delgado, 'A Conservative Turn on Administrative Sanctions in Chile: Transforming the Administration Into a Judge to Unprotect the Public Interest' (2018) Revista de la Facultad de Derecho vol. 45, 350.

12 Judgments of the Polish Constitutional Tribunal of: 15 January 2007, P 19/06 (2007) OTK-A 2; 5 May 2009, P 64/07 (2009) OTK-A 64.

13 I Niżnik-Dobosz, 'Aksjologia sankcji w prawie administracyjnym' [Axiology of Sanctions in Administrative Law] in R Lewicka, M Lewicki, M Stahl (eds), *Sankcje administracyjne. Blaski i cienie* [Administrative Sanctions. Lights and Shadows] (Wolters Kluwer 2011) 129.

es of the same behaviour being a violation of a norm of administrative substantive law[14]. With regard to this situation, the Constitutional Court has generally assumed that it is not subject to qualification in the context of a violation of the *ne bis in idem* principle derived from Article 2 of the Constitution of the Republic of Poland, because these penalties perform different purposes and functions, but it may lead to a violation of the prohibition on "excessive repressiveness" and the disproportionality of imposed penalties[15]. Therefore, the procedural act of the APC regulates two institutions aimed at protecting entities punished for the same infringement with different sanctions, i.e. one of the directives for the assessment of penalties in Article 189d(3) APC covers situations where the perpetrator has previously been punished for the same behaviour for a criminal offence, a fiscal offence, a misdemeanour or a fiscal offence. This institution applies to penalties subject to mitigation and therefore determined relatively, and not to rigid penalties[16]. The second instrument mitigating the non-applicability of *ne bis in idem* is the institution of refraining from imposing a penalty and contenting oneself with instructing the perpetrator in the circumstances where, for the same conduct, an administrative pecuniary penalty has been previously imposed on a party by another authorised public administration body by a valid decision, or a party has been validly punished for a misdemeanour or fiscal misdemeanour, or validly convicted of an offence or fiscal offence, and the previous penalty fulfils the purposes for which the administrative pecuniary penalty was to be imposed. This institution applies to both rigid penalties and those specified in a wide range.

It is worth noting that the jurisprudence of the Constitutional Court in Spain is shaped differently. The Constitutional Court deliberated and then ruled that the re-imposition of sanctions is prohibited in those sanctioning procedures where, due to their complexity and the sanction that can be imposed, their "nature and size" can be equated with a criminal process, and therefore administrative sanctions are repressive in nature[17]. It should therefore be emphasised that the assessment in terms of the benchmark in the form of the prohibition on double punishment has to be carried out whenever the "accompanying" criminal sanction is an administrative fine – a legal measure of a repressive nature.

14 More extensively on. B Majchrzak, 'Problematyka prawna administracyjnych kar pieniężnych w orzecznictwie Trybunału Konstytucyjnego i sądów administracyjnych' [Legal Issues of Administrative Fines in the Jurisprudence of the Constitutional Tribunal and Administrative Courts] in M Błachucki (ed), *Administracyjne kary pieniężne w demokratycznym państwie prawa* [Administrative Fines in a Democratic State of Law] (Biuro Rzecznika Praw Obywatelskich 2015) 63.

15 Judgments of the Polish Constitutional Tribunal of: 14 October 2009, Kp 4/09 (2009) OTK-A 134; 29 April 1998, K 17/97 (1998) OTK-A 30; 27 April 1999, P 7/98 (1999) OTK 72; 9 October 2012, P 27/11 (2012) OTK-A 104.

16 A different view is presented by R Suwaj, *Zasady nakładania administracyjnych kar pieniężnych* [Rules for Imposing Administrative Fines] (Wolters Kluwer 2022) 210, who states that all administrative monetary penalties specified in substantive law – apart from cases where a separate provision stipulates otherwise – are subject to mitigation under the principles of Article 189d of APC, regardless of the manner in which they are shaped.

17 Judgment of the Constitutional Court in Spain No. 334/2005 ES:TC:2005:334, <https://hj-tribunalconstitucional-es.translate.goog/es-ES/Resolucion/Show/5594?_x_tr_sch=http&_x_tr_sl=es&_x_tr_tl=pl&_x_tr_hl=pl&_x_tr_pto=sc> accessed 24 Jul 2023.

3. Motivation of the legislator to legislate and the Dynamics of the development of administrative fines in Polish law

It is increasingly accepted in Polish law that sanctions applied by the administration are ideal tools for protecting the public interest and enforcing the requirement of compliance with administrative obligations by both natural persons and legal entities. Administrative sanction law is an important aspect of the process of executing and applying the law in Poland. The increase in the popularity of administrative penalties is a response to the shortcomings of misdemeanour and penal procedures in the form of: the lengthiness of proceedings, the high costs (too often the effect does not justify the expenditure incurred by law enforcement bodies) and the stigmatisation of the perpetrator for years. However, it is under the criminal procedure that a defendant charged with a criminal offence enjoys guarantees such as:

(a) having the case heard by an independent court;
(b) the right to a defence, also ex officio;
(c) the separation of the functions of prosecution and adjudication.

However, it is extremely difficult to draw a clear line between an administrative tort and an offence. As the Constitutional Court has emphasised, the boundary between the two is fluid and its definition depends on the discretion of the Polish legislator[18]. Only the legislator ultimately decides which procedure will apply in a given situation, which does not change the fact, however, that the legislator is obliged to observe the principle of proportionality and to be consistent in the choice of the form of liability for violations of a similar nature[19].

Unfortunately, a blurring of the boundary between criminally and administratively sanctioned acts is perceptible in Polish legal regulations; although the punishment for a crime and for a misdemeanour is primarily intended to be repressive and administrative penalties are assigned primarily a preventive, as well as a restitutionary purpose, this does not negate the fact that they fulfil a repressive function. In order to make administrative penalties for torts of a serious nature effective and to ensure that operators subject to public law regulation do not find it more profitable to violate the law than to comply with it, administrative fines are imposed at a serious level[20]. It is also important to note that no regulation specifies the possibility of assigning specific functions to specific administrative penalties.

The negative phenomenon of transforming misdemeanour liability into administrative liability is dealt with in Poland by W. Radecki and D. Danecka[21] with the omission of a number of procedural guarantees belonging to criminal cases. The purpose of this transformation is faster proceedings due to the lack of establishing the offender's guilt, relieving the burden on criminal divisions in common courts as well as speeding up the enforcement of imposed penalties. It also favours the implementation of sanctions for violations of EU law, which leaves the national legislator free to choose sanctions that are effective, proportionate and dissuasive.

18 Judgment of the Polish Constitutional Tribunal of 15 January 2007, P 19/06 (2007) OTK-A 2.

19 D Szumiło-Kulczycka, *Prawo administracyjno – karne* [Administrative and Criminal Law] (Zakamycze 2004) 72.

20 Ibid., 155–156.

21 W Radecki, 'Kilka uwagi o zastępowaniu odpowiedzialności karnej odpowiedzialnością administracyjną' [A few Comments on Replacing Criminal Liability with Administrative Liability] in M Bojarski (ed), *Współczesne problemy nauk penalnych. Zagadnienia wybrane* [Contemporary Problems of Penal Science. Selected Issues] (Wydawnictwo Uniwersytetu Wrocławskiego 1994) 24; D Danecka, *Konwersja odpowiedzialności karnej w administracyjną w prawie polskim* [Conversion of Criminal Liability into Administrative Liability in Polish Law] (Wolters Kluwer 2018) 2.

4. Model for imposing administrative fines in Polish law

It is worth taking a closer look at the concept of administrative fines in the context of what guarantees there are for their application under Polish law. At a conceptual level, the doctrinal contribution of administrative law is momentous.[22] For years, the doctrine has called for the introduction of a definition of an administrative sanction, currently succeeding only in the area of pecuniary sanctions in Article 189b of the APC, which states that an administrative pecuniary sanction is understood as a pecuniary sanction specified by law, imposed by a public administration body by way of a decision, following a violation of the law consisting of a failure to perform an obligation or a violation of a prohibition imposed on a natural person, a legal person or an organisational unit without legal personality. However, more broadly, it can be pointed out that any administrative sanction is a negative compensation foreseen by the legal system and imposed by the public administration for the commission of an administrative tort, resulting from the recognition of liability for the consequences resulting from committing an administrative tort. Two points should be emphasised here. Firstly, the retributive purpose of the administrative sanction, according to which it aims to punish non-compliance with certain behaviour; and secondly, the demarcation of administrative sanctions from other actions of the administration that have negative consequences for those administered. A sanction cannot be applied to any situation that is not preceded by an administrative tort having been committed, even if it generates damage or adverse legal effects in the public interest. Both criminal and administrative sanctions are therefore on the same conceptual level. The question here focuses on whether both types of sanctions are of the same nature. In this respect, what is known as the quantitative difference thesis is the dominant idea in criminal and administrative doctrine. According to this thesis, both are manifestations of the state of *ius puniendi*.

Many representatives of the doctrine have questioned whether the model of adjudication in cases of administrative fines is uniform, since in Polish law we have sanctions where judicial review is fragmented into administrative courts and common courts, and whether the administration can unify the application of sanctions when, in many cases, the authority applies several laws at the same time, i.e. the provisions of Section IV A of the APC, the Tax Ordinance and the special law constituting the basis for imposing them. Even a cursory analysis reveals significant discrepancies that may contribute to the feeling of a violation of equality before the law of the addressees of decisions on the imposition of administrative penalties in the form of fines.

The legislator regulated the general provisions on the adjudication of administrative fines in Section IVA of the Code of Civil Procedure. They constitute institutions such as:

(a) the rationale for administrative fines;
(b) waivers on imposing an administrative fine or giving an instruction;

22 J Jendrośka, 'Administracyjne kary pieniężne' [Administrative Fines] (1980) Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji vol. 14, 7–14; J Jendrośka, 'Kary administracyjne' [Administrative Penalties] in R Mastalski (ed), *Księga jubileuszowa Profesora Marka Mazurkiewicza* [The Jubilee Book of Professor Marek Mazurkiewicz] (Oficyna Wydawnicza "Unimex" 2001) 44–55; M Wincenciak, *Sankcje w prawie administracyjnym i procedura ich wymierzania* [Sanctions in Administrative Law and the Procedure for Imposing Them] (Wolters Kluwer 2008) 7; M Błachucki, 'Wytyczne w sprawie nakładania administracyjnych kar pieniężnych (na przykładzie wytycznych wydawanych przez Prezesa UOKiK)' [Introduction and Guidelines on the Imposition of Administrative Monetary Penalties (on the Example of Guidelines Issued by the President of UOKiK)] in M Błachucki (ed), *Administracyjne kary pieniężne w demokratycznym państwie prawa* [Administrative Fines in a Democratic State of Law] (Biuro Rzecznika Praw Obywatelskich 2015) 42–62.

(c) limitation periods for imposing an administrative fine;
(d) interest on unpaid administrative fines;
(e) granting relief from administrative fines.

In addition, a legal construction is provided for excluding punishability when the infringement of the law occurred as a result of force majeure, or the application of a law more favourable to the infringer if the legal situation has changed between the date when the tort was committed and the date when it is assessed by the public administration.

With the help of these legal constructions, the administrative authority, in the absence of regulations in this respect contained in separate provisions, and as long as that the general provisions are comprehensively applied to each fine, assesses the adequacy of the sanction in relation to the breach of a public-law obligation by the addressee, shaping the final amount of the sanction using the directives of penalty mitigation as legally permissible instruments for applying the principle of proportionality by the public administration. Thanks to this regulation, the authority can carry out the requirement of a proportionate state response to unlawfulness in the performance of public-law obligations.

However, for example, when Provincial Environmental Protection Inspectorates impose administrative fines for violations of the Waste Act, they apply the provisions of: the Act on Environmental Protection Inspection of 20 July 1991,[23] the Waste Law of 14 December 2012,[24] the Environmental Protection Law of 27 April 2001,[25] the Code of Civil Procedure and sometimes also the Tax Ordinance Act of 29 August 1997,[26] causes numerous complications in the application of individual instruments mitigating the penalty. To a large extent, therefore, it is the jurisprudence of the administrative courts controlling the application of administrative fines by public administration bodies that shapes the model of sanctioning with this legal measure.

5. Functions of administrative fines under Polish law

Administrative fines applied by law have primarily a preventive significance. By announcing the negative consequences that will follow in the event of a breach of the obligations set out in the law or in an administrative decision, they motivate the addressees to fulfil their statutory obligations. The basis for applying such penalties is the objective infringement of the law itself. However, it cannot be overlooked that they also perform functions of both repression, restitution and compensation. The more flexible the sanction, the better it can be adapted to the circumstances of the case and the less repressive it will be; in the case of rigid sanctions, they will have a more repressive function. In the case of rigid sanctions, the legislator has provided for the possibility of waiving them. This institution corresponds to the postulate of taking into account the individual circumstances of a given case and has been regulated by Article 189f of the APC Procedure. The norm allows for waiving the imposition of an administrative fine in special cases, for example where the gravity of the infringement of the law is negligible and the party has ceased to infringe the law. They provide sufficient protection for those committing an

23 Ustawa z dnia 20 lipca 1991 r. o Inspekcji Ochrony Środowiska [Act of 20 July 1991 on Environmental Protection Inspection] [2023] JoL 995.
24 Ustawa z dnia 14 grudnia 2012 r. o odpadach [Act of 14 December 2012 on Waste] [2023] JoL 699.
25 Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska [Act of 27 April 2001 the Environmental Protection Law] [2023] JoL 1219.
26 Ustawa z dnia 29 sierpnia 1997 r. – Ordynacja podatkowa [Act of 29 August 1997 – Tax Ordinance] [2002] JoL 2651.

administrative tort in those cases where this is justified by the circumstances of the case, while not depriving the authorities of the possibility to impose administrative fines where there is abuse that could lead to the assumption that an administrative fine may be imposed on the perpetrator of an administrative tort not from the date of initiating the proceedings, but only from the date of notifying the perpetrator. The legislator, in the wording of Article 189f § 1(1) of the APC, has not clarified which violations of the law can be considered negligible. The literature distinguishes between degrees of infringement of the law: qualified infringements, infringements that do not have the burden of qualification, but are important for the preservation of the legal order, and insignificant infringements of the law[27]. In particular, an infringement of the law that has not had negative consequences for the values to be protected is deemed to be an insignificant infringement. An insignificant infringement of the law meets the condition for waiving the imposition of a fine, as the seriousness of the infringement of the law must be deemed to be negligible. When determining what circumstances should be taken into account when assessing the seriousness of the infringement of the law, the content of Article 189d(1) of the APC is also helpful, in which the legislator indicated that, when imposing an administrative fine, the public administration body takes into account: the seriousness and circumstances of the infringement of the law, in particular the need to protect life or health, to protect property of significant size or to protect an important public interest or an exceptionally important interest of a party, and the duration of the infringement. Against the background of this standard, it is assumed in the doctrine that, taking into account the directive of the seriousness of the violation of the right, the public administration body should assess the importance (significance and seriousness) of the violated prohibition and the seriousness of the violation of the prohibition. On the other hand, in the jurisprudence it is indicated that, in light of Article 189f § 1(1) of the APC, determining whether the infringement of the law is sufficiently trivial to justify abandoning the imposition of an administrative fine requires some kind of proportionality test, i.e. the balancing of the hierarchy of goods (values) protected by the law against the background of a specific factual situation[28].

However, it is pointed out that the repressive function should not dominate the other functions. The protective function of the administrative order takes priority, followed by the redistributive function and finally the repressive function.

An exhaustive analysis of the essence of administrative fines was presented in the judgment of the Supreme Administrative Court of 16 May 2016, ref. II GPS 1/16[29]. Among other things this judgment stated that the effectiveness of the solutions adopted in the discussed scope, when it comes to the effectiveness of a given administrative sanction and its functions, is measured by the degree of its impact on the obliged entity. This means it is related to such factors that, in terms of the degree of seriousness of the sanction and its proportionality to the type of infringement of the law – including the amount of the administrative fine – and, in particular, the inevitability and speed of its imposition, would sufficiently motivate the addressee of the legal norm to behave accordingly. These factors, especially the way in which the legislator emphasises the importance of each of them, are not without influence on the nature and type of function that should be associated with a given administrative sanction. The judgment mentioned above also

27 B Adamiak, J Borkowski, *Kodeks postępowania administracyjnego. Komentarz Komentarze Kodeksowe* [Code of Administrative Procedure. Commentary, Code Comments] (CH Beck 2017) 969.

28 See the judgment of the Regional Administrative Court in Warsaw of 27 July 2021 V SA/Wa 566/21 [2021] Lex 3347424.

29 Judgment of the Supreme Administrative Court of 16 May 2016 II GPS 1/16 [2016] Lex 2039440.

indicates that, among the functions of an administrative sanction, a basic distinction is made, in principle, between a preventive and a repressive function constituting an ailment addressed to the subject towards whom it is applied. A distinction is also made between the protective function, consisting in the protection of the values of administrative law, and the function of measuring the importance of the protected good, assessed by the degree of seriousness of the administrative sanction in relation to the social importance of the protected values. On the other hand, the motivational function of the administrative sanction, which is related to its preventive impact in both individual and general terms, refers to the impact on the behaviour of the subject against whom it is applied, and in respect of which it is intended to create incentives for lawful behaviour and to counteract undesirable behaviour. The restitutive function, on the other hand, is associated with the effect of restoring the actual state of affairs to its conformity with the state resulting from the law in force and the legal norm of an injunction or prohibition established on its basis. On the other hand, the redistributive function of an administrative sanction may lead to a transfer of property and granting or depriving certain tangible or intangible benefits[30].

It follows from the above that the restitutive function of restoring the actual state of affairs to its conformity with the state resulting from the law in force and the legal norm of injunction or prohibition established thereunder is only one of the functions performed by an administrative fine. The other functions – protective, repressive, redistributive and motivational – are no less important. It will not be possible for a fine to fulfil these functions if the authority is deprived of the ability to effectively impose it. There are no grounds to give primacy to only one function over the others.

6. Effectiveness of administrative fines under Polish law

In the case of an effective sanctions regime, the very existence of sanctions often leads to compliance without the need to formally invoke them. Thus, it can be said that the existence of administrative sanctions is "co-extensive" with the substantive law norms setting out behavioural standards for their addressees in regulatory laws[31]. However, in order for the system of punishments to be effective, public administration bodies should first develop plans for checks preceding the imposition of administrative fines and shape a coherent policy on the application of sanctions. In Poland, these issues of administrative science are only just developing, as can be seen in the preparation of plans for inspections of regulatory or environmental authorities, but the policy of penalties is still not linked to deliberate actions, but is undertaken *ad hoc* according to guidelines coming from central authorities or special purpose funds which gain the proceeds from enforced sanctions. Meanwhile, it would be appropriate to create a programme, along with a set of recommendations, on how best to apply sanctions in each public administration body endowed with the power to impose them. An analytical approach to sanctioning should also be linked to the protection of guarantees for the parties to administrative proceedings. It is essential that such a sanctioning policy or scheme is known to the businesses subject to sanctions liability, so that they are able to shape their behaviour in accordance with the law without the use

30 Cf P Przybysz, 'Funkcje sankcji administracyjnych' [Functions of Administrative Sanctions] in M Stahl, R Lewicka, M Lewicki (eds), *Sankcje administracyjne. Blaski i cienie* [Administrative Sanctions. Lights and Shadows] (Wolters Kluwer 2011) 170–171; M Kobak, R Sawuła, 'Problematyka stosowania sankcji administracyjnych' [The Issue of Applying Administrative Sanctions] in M Stahl, R Lewicka, M Lewicki (eds), *Sankcje administracyjne. Blaski i cienie* [Administrative Sanctions. Lights and Shadows] (Wolters Kluwer 2011) 523–524.

31 R Baldwin, J Black, 'Really Responsive Regulation' (2008) The Modern Law Review 71(1), 59.

of sanctions or enforcement coercion. It is therefore necessary to link not only the lawful use of administrative forms of action, such as sanction decisions, but also the development of administrative methods of action, such as sanction policies, since administrative sanctions are tools aimed at modifying the behaviour of regulated entities in order to achieve objectives pursued by administrative law. It is necessary to address the motivation and incentives of businesses to comply with the rules in force. Empirically, of course, it can be argued that not everyone is driven by the same motivations, as some comply with the law out of rationality, aimed at maximising profits, while others may be driven by reputation, social responsibility, religious values or membership of a particular community[32]. However, the authority should make a kind of analysis of its sector in order to identify the most effective incentives that will shape compliance with the law in a given community and thus adapt its methods of action to these circumstances. The condition for the effectiveness of sanctions is, therefore, not only their repressiveness, manifested in the severity of the penalty, but also the availability of a wide range of intervention mechanisms, organised hierarchically, by the administrative body. The authority should start with persuasive actions towards compliance with the law by responsible parties on the basis of instructions, frequent inspections, and drastic sanctions should only appear as *ultima ratio*. This is particularly evident in the field of sanctions applied by the environmental authorities, imposing penalties on businesses using the environment in a particular way, imposing high fines on them at the beginning or depriving them of permits appears to be drastic and disproportionate in the context of the fact that such businesses generally operate legally, while criminals subject to criminal law are often punished with lower penalties or are not identified as offenders at all. Constitutional and business law principles, such as the rule of law, legal certainty, non-discrimination and guarantees of rights, should be applied to those entities that consistently strive to operate in the best possible manner and in compliance with EU and national business regulations.

A well-functioning system should consist of punitive measures alongside other non-sanctioning instruments that promote compliance.

7. Conclusions

It follows from the above analysis that the legislator, on the one hand, and the administration, on the other, are pursuing the objectives that the legislation has set out, and one of the tools for this is administrative sanctions. These, together with other non-criminal measures, must be applied taking into account procedural guarantees as well as proportionality. This is particularly important given the fact that more and more competence norms are being legislated in which the legislator refers to the power of the administration to impose sanctions in order to guarantee more effectively the social interests threatened by violations of public law.

It does not seem correct to refer to the principles of criminal law in matters of administrative fines, as the intentions and objectives that the legislator had in mind when resorting to these measures are different from those of criminal law. This does not change the fact that the authorities should be guided not only by the better suited guaranteed nature of the regulation, but also by the adoption of an appropriate policy for their application that is not subordinated solely to the fiscal objectives of the state or the motives of the media, i.e. situations in which the media – the press or television – place pressure on supervisory authorities due to reports of crimes, for example

32 R Alexy, 'Normativity, Metaphysics and Decision' in S Bertea, G Pavlakos (eds), *New Essays on the Normativity of Law* (Hart Publishing 2011) 220–228.

about fires at landfills or abandoning hazardous waste in public places, which should not affect the repressive approach to businesses operating on the basis of permits and in a legal manner.

This way of using administrative sanctions as instruments to achieve the objectives established by the legislator, without equating administrative sanctions with criminal ones, is necessary, otherwise there is a risk of equating criminal and administrative law and nullifying those aspects of administrative fines that justify their application.

Administrative sanctions should be legislated and applied responsibly. This means that the regulator must be equipped with the tools to go through the options, from persuasion to the application of sanctions. In short, this means that administrative sanctions are a type of administrative compliance tool used as a last resort.

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Contemporary Central & East European Law

Reflections on the Nature of an Energy Company: Inspirations from Stanisław Kasznica

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Abstract
In his manual *Polish Administrative Law* Stanisław Kasznica dedicates a section to public institutions, which can be categorised into public establishments (e.g. public schools) and public undertakings (e.g. state-owned banks) based on their purpose and the governing law. The author explores how Kasznica's insights can aid in understanding the nature of a public undertaking, as regulated by contemporary law and discussed in case law and doctrine. He concludes that it is worth considering whether the legal definition of an energy company should reflect its fundamental role in the economy and society, given the universal good it provides in the market. Furthermore, he suggests that defining public undertakings legally would be valuable.

Keywords
energy law; energy company; public utility; public undertaking; public enterprise

1. Introduction

It is widely acknowledged among administrators that Stanisław Kasznica's magnum opus is the book *Polish Administrative Law*. The fact that it was written during the occupation, coupled with the author's advanced age at the time (approximately 70 years old), suggest that he aimed to document only the most pertinent information for future officials. This information was drawn from his extensive experience, knowledge and wisdom, without delving into controversies regarding the concepts he discussed. Indeed, in the preface, Kasznica states that he "restricts himself to presenting, in each case, only one solution that he has reached or that, among the existing ones, he considers most pertinent."[1] The content of the handbook confirms the author's intent and exemplifies clarity of communication, devoid of any trivialisation of the issues being presented. In this respect alone, Kasznica serves as an inspiration.

1 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 5. Whenever quoting the handbook, I refer to the second edition, i.e. the one published just after the Second World War, mainly due to the lack of access to the first edition, which was published under a pseudonym and during the occupation.

When I first encountered his handbook as a doctoral student, I was struck by the directness with which he addressed the issues at hand. This approach was particularly striking given that such a style was not commonly practiced in the teaching of administrative law at least 20 years ago. However, rather than dwelling further on the commendable form, I wish to focus on aspects of Kasznica's work that may be particularly inspiring for a lawyer specialising in energy law. Although Kasznica did not specifically address energy issues, his observations on public institutions – including public enterprises – may still be relevant today. To this end, I employ the following approach. First, I summarise Kasznica's views on public institutions, particularly as they pertain to the concept of an energy enterprise. Next, I outline the current state of law and legal scholarship concerning energy enterprises as of 2022. Finally, I draw conclusions from the juxtaposition of Kasznica's thought with contemporary perspectives, with the hope that this comparison will yield valuable scientific insights.

2. Public institutions in Kasznica's handbook

Chapter III – *Public Administration Authorities of the handbook Polish Administrative Law* includes paragraph 10, titled *Public Establishments and Enterprises (Public Institutions)*. According to the author, a public institution is defined as "a group of persons and material resources, established by the state or another public-law entity, forming an organisational and technical unit, intended to serve a specific, well-defined purpose on a permanent basis."[2] A public institution is established by a public association, most often by the state or municipalities on the basis of a "constitutional act". Public institutions are divided as follows:

(1) non-self-reliant – when they do not have legal personality, e.g. power plants and gasworks;
(2) self-contained – when they have legal personality, e.g. state railways.

Another criterion for the division of public institutions is their purpose and the law by which they are governed. According to this criterion, the division is as follows:

(1) public establishments – governed by public law and meeting some well-defined public need;
(2) public enterprises – subject to private law and pursuing a commercial purpose, although, as the author notes, "there are undoubtedly state enterprises which serve more than just fiscal purposes. And, on the other hand, there are establishments which, thanks to their exemplary organisation and the successful selection of their personnel, make in some countries even very serious profits"[3].

Further on, the author splits the consideration into two parts, describing separately public establishments and public enterprises. He characterises public establishments as institutions in which "creative activity, i.e. the production of certain goods or the provision of certain services, comes to the fore".[4] The relationship between the users (destinators) and the establishment is determined by public law, including the establishment regulations. Thus, regardless of whether the use of the establishment's services is compulsory (e.g. a public school) or voluntary (e.g. a museum or a library), the legal relationship between the user and the establishment does not arise from a contract, but is created on the basis of an administrative act allowing the use of the establishment. In doing so, Kasznica emphasises that the consequence of an administrative legal relationship is that the destinators must be treated equally: It is immediately apparent how advan-

2 Ibid., 80.
3 Ibid., 81–82.
4 Ibid., 82.

tageous such a state of affairs is for the general public: the factory authorities cannot make any differences between applicants, favouring some and pushing others away, guided by incidental considerations or perceptions. And after all, this is sometimes about essential needs![5] Another consequence of such a legally formed relationship is that "the claim for admission to a public establishment often – but not always – has the character of a subjective right".[6]

Public enterprises, on the other hand, are governed by private law and their purpose is profit, although not exclusively. Indeed, Kasznica divides such enterprises into two sub-types: public enterprises with fiscal purposes (e.g. salt, tobacco, lottery or alcohol monopolies) and public utility enterprises, whose "main purpose is to perform a special public service".[7] The latter include state-owned banks. The purpose of the enterprise is therefore somewhat "fuzzy". It is therefore not so much the fiscal purpose of the enterprises in each case, since there are some among them that pursue a public utility purpose. What certainly characterises all of them, on the other hand, is economic self-sufficiency.

The legal consequences of the circumstances of public enterprises being subject to private law are as follows: "there is no compulsion to use the company's services – nor do private individuals have a legal claim to be allowed to use the services – the relationship between the company's bodies and its users is based on the principle of equivalence – the fees, paid for the company's services, are by nature private fees and are collected through judicial enforcement – the company's liability is carried out through private law"[8]. This clear distinction between what is private and what is public is engaging and is reminiscent of the "grumblings" of professors from my university years about the mixing of the public and the private in law. For Kasznica, apparently "seeing me" when choosing a contractor was possible in private law, whereas in public law it was out of the question.

Finally, the last relevant section of the Handbook's consideration of public institutions was devoted to concessionary enterprises. These are private enterprises that have been given a public utility character, including a number of administrative and legal powers. Such an enterprise is most often a public limited company. "The act by which an enterprise is given the character of a public utility – the concession act, the concession – is an administrative act", he said: "On the basis of this act, the enterprise – the concessionaire – is granted the public subjective right to establish and operate the enterprise. This granting is at the discretion of the authority"[9]. Why does the state not independently carry out such an activity by establishing a public institution? Kasznica answers: "The state, however, considers it more expedient in certain cases not to carry out this monopolised activity with the help of its own bodies, creating state establishments, but to contract it out precisely to a private enterprise, hoping that it will manage more economically".[10] Examples of such activities were the telephone concession companies (in Kasznica's time it was the famous PASTa – this example also comes from him), radio broadcasting, aviation, railways etc. Importantly, the powers enjoyed by concessionaries are analogous to those enjoyed by public establishments. A concessionary undertaking could not cease to operate: "Once started, an undertaking cannot be abandoned"[11].

5 Ibid., 83.
6 Ibid., 84.
7 Ibid., 86.
8 Ibid., 85.
9 Ibid., 86.
10 Ibid., 86.
11 Ibid., 87.

The summary of Kasznica's views on public institutions presented above will hopefully give us a better understanding of the nature of energy companies.

3. Energy companies in Polish law

The legal definition of an energy company is contained in Article 3(12) of the Energy Law,[12] being consistent with the requirements of Directives 2009/73[13] and 2019/944.[14] According to it, an energy company is an entity which carries out economic activity in generating, processing, storing, transmitting, distributing or trading fuels or energy, as well as transmitting carbon dioxide or handling liquid fuels. This definition draws attention to the need to perform energy-related activities and to conduct them in a manner that fulfils the characteristics of economic activity. Thus, when it comes to the first element of the definition, let us call it subject matter, it is explained in the Energy Law itself. This is where the definitions relating to concepts such as transmission, distribution, fuels and energy are contained. In short, an energy company is one whose objective is to carry out various activities related to fuels, energy and carbon dioxide.

In contrast, the second element of the definition, the functional one, refers to the concept of economic activity without defining it. According to a practice that has already been established for years, in such cases where a public law does not explain the concept of economic activity, the definition contained in the basic law for economic law is used. Currently, this is the Business Law.[15] In Article 3 of this Act, a business activity is an organised profit-making activity performed on its own behalf and in a continuous manner. Thus, an energy company is such an entity that conducts organised, profit-making, continuous activity on its own behalf. The absence of these characteristics means that an entity producing energy or fuels, e.g. for its own use, will not be considered an energy enterprise.[16]

The prominence of an energy undertaking's objective and commercial nature within the definition has some obvious consequences. An energy company by its legally defined nature is engaged in economic activity, and therefore its purpose is profit. The social purpose is not included in the definition at all. It is therefore not surprising that the representatives of the doctrine, when writing about the energy company, do not mention its role as an entity providing services that are universally available[17] or essential for human life. In addition, the fact that a large group of energy companies are organised into joint stock companies whose shares are listed on the public stock market – which in turn gathers investors whose aim is to multiply their capital – further emphasises the commercial nature of the activities of these entities.

However, the picture of an energy company would be incomplete, and thus untrue, were it not for two necessary additions. Firstly, a huge part of the regulation of energy law is the series of obligations

12 Ustawa z dnia 10 kwietnia 1997 r. – Prawo energetyczne [Act of 10 April 1997 – Energy Law] [2022] JoL 1385.

13 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market in electricity and amending Directive 2012/27/EU [2019] OJ L 158, 125. The provision of Article 2(57) of Directive 2019/944 indicates the definition of an energy undertaking.

14 Ibid.

15 Ustawa z dnia 6 marca 2018 r. – Prawo przedsiębiorców [Act of 6 March 2018 – Entrepreneurs' Law] [2021] JoL 162 as amended.

16 M Stoczkiewicz, *Pomoc państwa dla przedsiębiorstw energetycznych w prawie Unii Europejskiej* [State Aid for Energy Companies in European Union Law] (Wolters Kluwer 2011) 75.

17 Cf M Swora in M Swora, Z Muras (eds), *Prawo energetyczne. Komentarz* [Energy Law. Comment] (Wolters Kluwer 2016) 304; M Kraśniewski, B Pikiewicz, M Ziarkowski in M Czarnecka, T Ogłódek (eds), *Prawo energetyczne. Komentarz* [Energy Law. Comment] (CH Beck 2020) 36.

imposed on energy companies in order to subject it to its social mission, which is to provide basic goods and services to the public. There are arguably few entities on the market that are subject to such far-reaching regulation as energy companies. This is recognised in both the literature on the subject and case law. The most emblematic ruling, partly due to its being extensively cited in the literature, is the judgment of the Polish Constitutional Tribunal,[18] in which it ruled on the obligation to purchase electricity from unconventional and renewable sources.

It is worth quoting at this point the longer passages from this judgment and the relevant literature: "The Energy Law introduces, in the field of energy management, numerous restrictions of an administrative nature, characteristic of a regulated market, consisting in the fact that »the state encroaches in a sovereign way on the economic activity of energy enterprises, regulating this activity by granting concessions, approving tariffs, multi-faceted control of enterprises and imposing fines«, although the legal relations linking an energy enterprise with other energy market participants »are primarily civil law relations linking this enterprise with the recipient of services«"[19]. Legal scholars expressed the conviction that energy enterprises are not *de jure*, but *de facto* public utility enterprises and as such should be subject to more far-reaching rationing than other entrepreneurs[20]. Furthermore, the Polish Constitutional Tribunal stated that energy law as a part of public economic law is not detached from the axiology of economic activity: "it is not free from assessments in general categories of social justice, it serves not only as an instrument for controlling economic processes, but also for securing social interests, coextensively with setting permissible limits restricting the basic values of the market economy in the public interest"[21].

Thus, the role of the law in the implementation of social justice by means of obligations imposed on energy companies is not questioned, and at the same time they are referred to as *de facto* public utilities, despite the fact that the law does not explicitly call them such and the very attribute of a public utility is currently applied essentially to local government units and their subsidiaries. However, it is argued in the literature that municipal entities are governed by the rules of private law when performing municipal management, and when providing public utility services.[22]

Secondly, it is important to acknowledge, albeit not as a principle established by law, that the largest entities in the energy market today are state-owned enterprises (joint stock companies with majority ownership by the Treasury or under its decisive influence). These entities are public entrepreneurs not by legal designation, but because the Treasury's shareholding enables it to significantly influence their activities through private law mechanisms. This factor has a considerable impact on their operations, decision-making processes and associated risks. Consequently, the public's expectations of these entities are elevated, particularly concerning the quality of services, pricing and accessibility.

18 Judgment of the Polish Constitutional Tribunal of 25 July 2006, P24/05 (2006) OTK-A 87.

19 So H Palarz, *Prawo energetyczne z komentarzem* [Energy Law with Commentary] (Ośrodek Doradztwa i Doskonalenia Kadr 2004) 18.

20 A Walaszek-Pyzioł, 'Kształtowanie i realizacja polityki energetycznej państwa na gruncie ustawy Prawo energetyczne (podmioty, instrumenty)' [Shaping and Implementing the State Energy Policy under the Energy Law (Entities, Instruments)] (1999) Acta Universitatis Vratislaviensis. Prawo vol. 266, 419

21 So K Strzyczkowski, *Prawo gospodarcze publiczne* [Public Economic Law] (LexisNexis 2005) 26. Cf C Kosikowski, *Polskie prawo gospodarcze publiczne* [Polish Public Economic Law] (LexisNexis 2003) 245.

22 C Banasiński, K Jaroszyński, *Ustawa o gospodarce komunalnej. Komentarz* [Municipal Economy Act. Comment] (Wolters Kluwer 2017) 39.

To further clarify the nature of an energy company, it is noteworthy that under Article 32 of the Energy Law, economic activity in the energy sector requires a licence. Although the distinction between permits and concessions has become less pronounced than in Kasznica's time, the concession authority, represented by the President of the Energy Regulatory Authority, still wields considerable discretionary power in granting concessions. However, this discretion does not imply that the authority operates as part of a state monopoly.

4. Conclusions

What would Kasznica say about the modern energy enterprise? It is certainly not a non-autonomous public institution of a municipal nature, as power and gas plants were organised in his time. Perhaps the shift towards distributed energy, with significant participation from municipalities forming energy clusters, represents a return to the origins of energy as a more localised initiative rather than a centralised professional energy system. However, this is only a potential future direction, and it seems unlikely that the energy industry will be organised into entities resembling non-autonomous public institutions.

Kasznica might initially find modern energy law perplexing. The legal landscape he described was simpler, with a clear distinction between public and private law. In public law, obligations to the state and users predominated, and activities were fundamentally orientated towards the public interest. In contrast, private law, even when applied to public enterprises, maintained its inviolability, free from interference by competition law. Concepts such as the essential facilities doctrine or the abuse of a dominant or monopolistic market position were unknown, allowing entrepreneurs significant discretion in choosing their counterparties, setting prices and engaging in differentiated treatment.

Today, however, energy companies involved in distribution, transmission, storage, liquefaction and regasification are obligated to provide equal access to the network, storage or installations. Even energy companies involved in generation and trading face significant restrictions in the private legal sphere, particularly in areas such as tariff formation.

In exploring suitable concepts to describe contemporary reality, Kasznica might attempt to define public enterprises and other entities in the private sector that fulfil a specific social mission. A public enterprise, using Kasznica's terminology, is neither a public establishment nor a public entrepreneur, as it does not assume legal-administrative powers from the state concerning users. However, it remains a special entity because it provides essential services, despite operating in the private sector.

The challenges that emerged with the significant increases in gas and electricity prices in Poland and Europe during 2021 and 2022 underscore the crucial role energy companies play in the economy, individual living conditions and public perception. The quality and pricing of services and goods are often viewed through a political lens rather than as purely private matters. This situation calls for reconsidering the organisational and legal framework of energy companies, their position within the economy and the state and the nature of concessions.

Drawing on Kasznica's approach, which favoured simplicity in describing reality, it would be worth reconsidering the definition of an energy company, potentially incorporating a social component. This would clarify that energy companies are not merely commercial entities pursuing their own or shareholders' objectives. A more comprehensive proposal would involve re-evaluating the general regulation of public entrepreneurs, regardless of their organisational and legal forms.[23]

23 Attempts to specify companies – companies with a public mission in Article 9 of the ustawa z dnia 16 grudnia 2016 r. o zasadach zarządzania mieniem państwowym [Act of 16 December 2016 on the principles of management of state property] [2021] JoL 1933.

Above all, Kasznica's life and attitude should serve as an inspiration. He was not only a clandestine university instructor during the occupation, but also a dedicated public servant. As a member of the elite, he believed in subordinating his talents to the common good. This was evident not only when he defended Dublany near Lviv in 1918, but also when he helped establish the university in Poznań and taught clandestine classes during the occupation. Kasznica was also a man of deep faith, living a life marked by modesty and commitment. His faith enabled him to find meaning in the immense personal suffering caused by the loss of his wife and two sons – Jan, who perished in the defensive war of 1939 and Stanisław, who was tortured in the Office of Security's prison and executed after a show trial in 1948.

It is particularly noteworthy, especially in a time when faculty councils pass resolutions without significant risk, that when Kasznica was forcibly retired in 1947, his colleagues from the Poznań law faculty honoured him with a letter of gratitude. The letter stated: "You have devoted your knowledge, warm heart and unwavering character to the service of science, youth, the university and your colleagues. [...] Today, as you are retired by the authorities' order, the Council of the Faculty of Law and Economics expresses its deepest respect and gratitude for your dedicated work, offers a heartfelt assurance of our unwavering feelings and requests that you continue to regard us as your trusted and kind friends." Only those familiar with academic life can fully appreciate the significance of such a heartfelt gesture to someone condemned to infamy.

The success of us all, particularly in the fields of academia and legal practice – including energy law – depends on how many choose to embody the values and attitude represented by Kasznica.

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Contemporary Central & East European Law

Tort Liability of Public Authorities in Light of the Legal Doctrine of Stanislaw Kasznica's Era and Contemporary Doctrine: The Remarks of a Civil Law Specialist

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Abstract
The author of the text notes that the development of administrative law and its science at the turn of the 19th and 20th centuries was related to the development of the law on tort liability of public authorities. This is most evident in the example of French law. It is one of the few cases where the science of administrative law and administrative court judgments contributed to the development of civil law and its science. It is about the issues of tort liability of legal persons characterized by an extensive organizational structure. Therefore, it makes sense to analyze the issue of tort liability of public authorities in connection with the analysis of the scientific achievements of Stanisław Kasznica, an outstanding Polish specialist in administrative law. The author claims that the publications of Stanisław Kasznica, especially his textbook *Polish Administrative Law*, first edition 1943). influenced the development of both Polish administrative law and the law on tort liability of public authorities. In particular, i.a. under the influence of this author's position, the opinion that the tort liability of public authorities is of a civil law and not administrative law nature has become established in Poland. The author of the text tries to show that the issue of tort liability of public authorities generates legal problems in every epoch. The problems that exist today differ from those that existed in the times of Stanisław Kasznica. Concluding his arguments, the author puts forward the thesis that the issue of tort liability of public authorities tends to elude the standards of classical civil law. Therefore, these issues should be dealt with by both civil and administrative law specialists.

Keywords
tort liability of public authorities; scientific achievements of Stanisław Kasznica; Stanisław Kasznica; civil law; administrative law

1. Introduction

It might appear that, by choosing this topic, I am aligning my interests with the theme of the conference dedicated to Stanisław Kasznica. This is particularly relevant as Kasznica did not focus his studies specifically on the liability of public authorities for damage, making it challenging to claim it as his specialisation.

However, I aim to demonstrate the legitimacy of addressing this topic in a book dedicated to Stanisław Kasznica. While he did not specialise in this area, he could not overlook it. During his time, the evolution of the regime of public authorities' liability for damage was closely intertwined with the development of administrative law and its scholarship. This connection was not incidental, but marked a profound relationship between these branches of the legal system.

It can be argued that Stanisław Kasznica's life coincided with the formative period of modern administrative law and its scholarship, as well as the development of the regime of compensatory liability of public authorities. In Poland, he stands out as one of the foremost figures contributing to the shaping of administrative law and, to some extent, as I will endeavour to illustrate, to the development of the regime of public authorities' compensatory liability.

Born in 1874, his lifetime overlapped with significant milestones in the evolution of administrative law, such as the landmark Blanco ruling by the French Court of Competence (*Tribunal des Conflits*) in 1873, which played a pivotal role in shaping French administrative law.[1] As is well known, French administrative law exerted a significant influence on the development of administrative law, not only in Romance countries but also in Germany, and to some extent indirectly influenced Polish administrative law. Stanisław Kasznica passed away in 1958, just two years after the enactment of Poland's first comprehensive law – excluding legislation from the partition era on Polish territory[2] – during the period known as the "Gomułka Thaw". This law fundamentally regulated the state's liability for damage caused by its officials.[3]

The 1956 law introduced the principle of state liability for damage, irrespective of whether the damage occurred during the exercise of commanding or non-commanding actions. However, the practical application of this law was initially quite restrictive, contrary to its principles, with significant obstacles to claiming damages for harm caused by administrative acts and court decisions. Additionally, the lack of an administrative judiciary at that time significantly hindered the pursuit of claims against the administration.

2. Administrative law and the administration's liability for damage

On a highly abstract level, it could be argued that the Blanco judgment marked the inception of French administrative law and, more precisely, initiated the process of distinguishing administrative law as a distinct field within the French legal system. This field is characterised by significant autonomy, especially in relation to civil law and civilian traditions, encompassing a wide range of norms that cover virtually all aspects of administrative functioning, including liability for damage. The system of legal

1 See the judgment of the Tribunal des Conflits No. 00012 [1873], <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007605886/> accessed 1 Aug 2024.

2 This refers in particular to the Prussian law of 1 August 1909 on liability for officials and the law of 22 May 1910 on the liability of the Reich for its officials.

3 See ustawa z dnia 15 listopada 1956 r. o odpowiedzialności Państwa za szkody wyrządzone przez funkcjonariuszów państwowych [Act of 15 November 1956 on State Liability for Damage Caused by State Officials] [1956] JoL 243.

sources in French administrative law is notably unique in Continental Europe, with a pronounced reliance on judicial law ("droit prétorien") established by the Council of State (Conseil d'Etat), widely recognised as the first modern administrative court in Europe.

In essence, the Blanco judgment can be seen as the foundational act of French administrative law. It effectively removed the regime of administrative liability for damage from the constraints of civil law and the prevailing civilian legal principles of that era.[4] The regime of indemnity liability of public authorities has indeed become one of the most significant and foundational aspects of French administrative law.

With this in mind, it is worth revisiting the pivotal aspects of the Blanco ruling. At its core was a jurisdictional dispute between the Council of State and the civil (ordinary) courts. The issue at stake was whether cases seeking compensation for damage caused by administrative actions should be adjudicated by ordinary or administrative courts. Importantly, the case did not involve injury resulting from a typical sovereign act, such as an administrative decision. Instead, it concerned a child, Agnès Blanco, who was struck and injured by a wagon from a state-owned tobacco factory operating under a state monopoly. The Court of Conflicts of Jurisdiction determined that such cases should fall within the purview of the administrative judiciary, reasoning that they involved actions carried out in the public interest – termed "public service" – even if not necessarily through traditional sovereign methods.

This judgment was groundbreaking on a European scale. By transferring cases involving compensation for damage caused by administrative actions to the Council of State and the administrative courts, it reflected the assumption that all actions of the administration possess a certain specificity. Consequently, cases of this nature should not be adjudicated by ordinary courts under the Civil Code.

The Council of State's assumption of jurisdiction over compensation claims from public authorities spurred the development of innovative legal solutions and institutions in substantive law as part of French administrative law. The Council of State, through its jurisprudence, played a pivotal role in shaping these institutions.

However, the Blanco judgment marked only the beginning of a lengthy evolution in French Praetorian administrative law. The Council of State proved to be an exceptionally creative institution, decisively abandoning the distinction between commanding (*actes d'autorité*) and non-commanding (*actes de gestion*) actions. This shift included the development of the concept of "service public", which departed from the prevailing European principle that administrations were not liable for damage caused by authoritative acts at the time.

To this day, France remains a leader in the field of public authorities' liability for damage, thanks to the enduring influence of the Council of State's jurisprudence. Some of the legal solutions pioneered by the Council of State more than half a century ago are still not generally available in Polish law. For instance, unlike in French law, there is currently no comprehensive legal basis in the Republic of Poland for claiming compensation for lawful acts of the administration when no personal injury has occurred.[5]

4 See for example S Rosmarin, *O roszczeniach odszkodowawczych z powodu bezprawia urzędnika administracyjnego* [On Claims for Compensation Due to the Unlawfulness of an Administrative Official] (Zakład Prawa Politycznego i Prawa Narodów UJK 1933) 57, 73, 74. For more on this subject see J Kosik, *Zasady odpowiedzialności państwa za szkody wyrządzone przez funkcjonariuszów* [Principles of State Liability for Damage Caused by Officers] (Ossolineum 1961) 30, note 32.

5 The Council of State, in this type of case, allows the public authority to be liable for damage based on the principle of social solidarity. See the judgment of the Council of State No. 50438 [1963], <https://www.revuegeneraledudroit.eu/blog/decisions/conseil-detat-section-22-fevrier-1963-commune-de-gavarnie-requete-numero-50438-rec-113/> accessed 1 Aug 2024.

In highlighting the achievements of the Council of State, it becomes evident that its impact extends far beyond the borders of France, and even beyond the realm of administrative law in a broad sense. Across Europe, influenced by French solutions, the autonomy of administrative law as an independent branch, especially in relation to detailed legal doctrines of civil law, has been significantly reinforced.

What stands out, particularly from a civil law perspective, is the Council of State's role in advancing civil liability, particularly in complex cases involving large corporations. During the period, the concept of tort liability for legal entities was considered questionable within civil law scholarship. However, the Council of State's jurisprudence helped shape and develop this concept, contributing to the evolution of civil law principles and enhancing the regime of tort liability for legal entities.

Thus, the Council of State's contributions not only elevated administrative law to a position of autonomy and significance, but also influenced the broader legal landscape across Europe, including developments within civil law regarding liability for legal entities. This underscores the Council's profound impact on legal thought and practice beyond national boundaries.[6] In civil law doctrine during that period, there was a notable tendency towards rigidity and a restrictive interpretation of key concepts such as fault and subordination. The Council of State's jurisprudence played a crucial role in breaking away from these entrenched perspectives, often referred to metaphorically as "civil stilts".[7] It was the Council of State that broke with the subjective notion of fault in favour of what it called objectified fault, also known as organisational, nameless or anonymous fault. Consequently, it was no longer necessary to identify the specific officer whose unlawful conduct had caused the damage in order to award damages. This case law also essentially broke with the civilian classical concept of subordinate, in favour of the concept of officer. Thus, the requirement of a strict understanding of subordinates was abandoned. As a result, it also began to abandon, for the purposes of tort liability of legal entities, the classic distinction between organs and those subordinate to them.[8] This marked a fundamental change in thinking and a new perspective on the issue of the tort liability of legal entities, especially those with a very complex organisational structure. In summary, the described output of the Council of State became an inspiration for civilians, who could finally deal with the indicated dilemmas of tort liability of legal entities in the middle of the 20th century.

This is undoubtedly one of the few cases where the development of the science of administrative law, so intensive under Kasznica, resulted in the development of civil law. For it was usually the other way round. As a rule, it was civil law and civilian science that inspired the luminaries of administrative law. At the turn of the 19th century, one of the more widespread methods of developing administrative law was the creation of what were called parallels, i.e. institutions of administrative law modelled on those of civil law. In this way, the idea of administrative-law declarations of intent, administrative-law contract, public subjective rights and, in particular, public-law property or public-law unjust enrichment developed.[9]

6 On the subject of these doubts, W Czachórski wrote extensively in the monograph entitled Liability of legal persons for damage caused by a tort. W Czachórski, *Odpowiedzialność osób prawnych za szkody wyrządzone czynem niedozwolonym. Studium z zakresu prawa obligacyjnego* [Liability of Legal Persons for Damage Caused by Tort. Study in the Field of Obligation Law] (Biblioteka Wydziału Prawa i Administracji Uniwersytetu Warszawskiego 1948).

7 See for example S Rosmarin (1933) 57, 73, 74. For more on this subject see J Kosik (1961) 30, note 32.

8 These postulates have still not been fully achieved in Polish law, see Z Radwański, A Olejniczak, *Zobowiązania – część ogólna* [Liabilities – General Part] (CH Beck 2005) 180.

9 On the development of administrative law through the mechanism of parallelism, see R Szczepaniak in R Szczepaniak, K Kokocińska, M Krzymuski (eds), *Constitutional Barriers to the Applicability of Private Law in the Public Sector. A Comparative Study with Particular Emphasis on Polish and German Law* (Wydawnictwo Naukowe UAM 2020) 91, 512.

3. The research attitude of Stanislaw Kasznica

Stanisław Kasznica wrote relatively little. This may be one reason why his texts are considered deeply thoughtful and had their own weight.

In 1943, in Warsaw, i.e. during the occupation, the first edition of his textbook *Polskie prawo administracyjne* was published in a secret printing house.[10] This textbook should undoubtedly be regarded as part of the achievements of the science of administrative law of the Second Republic. It is significant that, in his textbook, which is not very extensive by today's standards, he devoted a separate section to the issue of the liability of administration for damage (§ 27[11]). This is clear evidence of the recognition of this problem as one of the most important legal issues of the functioning of the administration. The influence of French law and French science can be discerned here. However, it is also significant, and even rather problematic, that this section of the textbook was entitled "Civil liability for damage caused by the administration". The following conclusions can be drawn from this fact:

(1) Stanisław Kasznica thus gave expression to the fact that, being an administrativeist, he was nevertheless inclined to ascribe a civil law nature to the issue of the administration's liability for damage. This is important. The civil law nature of the liability for damage of public authorities was not yet determined in Poland at that time. In the period of the Second Republic of Poland, almost the same number of jurists were of the opposite opinion, i.e. they were inclined, under the influence of French science, to give this problem an administrative character.[12] It is worth noting at this point that, in his textbook, Kasznica presented in a summary of the features of the French regime of public authorities' liability as a fragment of administrative law. It should be assumed, therefore, that his advocacy of the civil law nature of this compensation regime was fully conscious. As can be seen, Stanislaw Kasznica was not familiar with the "battles over affiliation" of particular legal institutions between civilists and administrativists, typical for some lawyers of that epoch. In particular, the administrativists were active in these battles as the representatives of a relatively new, still developing detailed science of law. However, for Stanislaw Kasznica, evidently more important than these battles were efforts "to improve the conceptual and normative system of the law in force"[13];

(2) Stanisław Kasznica was free from "absolutizing"[14] the division into private and public law so characteristic of some representatives of science at the turn of the nineteenth and twentieth centuries.

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

11 Ibid., 181–184.

12 W Zylber, in his monograph entitled *Wynagrodzenie szkód spowodowanych przez działalności władz publicznych według prawa polskiego* presented many views of Polish lawyers on the nature of the problem of the indemnity liability of public authorities from the 1880s to the early 1930s. This presentation shows that almost half of the jurists were in favour of the public-law nature of this liability. See W Zylber, *Wynagrodzenie szkód spowodowanych przez działalności władz publicznych według prawa polskiego* [Compensation for Damage Caused by the Activities of Public Authorities under Polish Law] (Księgarnia Prawnicza 1932).

13 On the subject of these "battles over affiliation" see J Boć, 'Formy prawne w sferze działań zewnętrznych' [Legal Forms in the Sphere of External Activities] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Prawne formy działania administracji* System Prawa Administracyjnego [Legal Forms of Administration. Administrative Law System] (CH Beck 2011) 258.

14 The phrase "absolutisation of the division between public and private law" occurs in German literature to denote the phenomenon of exaggerating the importance of this division; see H de Wall, *Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht. Dargestellt anhand der privatrechtlichen Regeln über Rechtsgeschäfte und anhand des Allgemeinen Schuldrechts* (Mohr Siebeck 1999) 61.

when administrative law and its doctrine were still in their infancy; this "absolutizing" was an attitude characterised by the assumption that the whole sphere of administrative functioning would be subject exclusively to administrative law, which was to form a closed and self-sufficient legal system. Administrative law understood in this way was to be the core of public law. In its extreme form, this attitude manifested itself in a refusal to apply civil law to administrative actions regardless of the nature of those actions; instead of civil law institutions, at most the indicated parallels were to be applied, i.e. administrative law institutions that were merely the equivalents of civil law institutions. This attitude is also noticeable nowadays; it leads to the creation of "walls of autonomy" of particular branches of the legal system[15];

(3) In Stanisław Kasznica's attitude, one can also discern manifestations of a distinction between administrative law and law of administrative. An expert in administrative law should not only study administrative law *sensu stricto*, but also the law of administration, e.g. the law governing the liability for damage of the administration; this does not mean, of course, that this subject matter cannot be the subject of analyses by civilians, since it is a civil law matter; however, cooperation between civilians and administrators would be advisable here;

(4) Stanislaus Kasznica's stance thus clearly departed from the French paradigm based on the assumption of a strong autonomy of even totality and self-sufficiency of administrative law as a law regulating, as a rule, all or almost all manifestations of administrative activity. As a result, he unquestionably contributed to shaping the Polish model of administrative law, characterised by a weaker autonomy than French or even German law. Therefore, in Polish administrative law, to a much weaker degree than in France and even Germany, there are a number of parallels, i.e. administrative law institutions that are equivalents of civil law institutions, such as administrative liability for damage, public law property, unjust enrichment of public law and administrative law contract. The principle of unity of civil law is definitely stronger in Polish law. This principle appears in Polish law even in a directive (normative) sense, i.e. as an order to qualify as civil law all institutions that have a civil law provenance. In other words, there is a presumption that a given institution has a civil law nature if there is an equivalent under civil law. For example, one can refer to an unspoken presumption in the Polish legal system that a contract is a civil law contract. Consequently, the concept of an administrative-legal contract is still poorly developed in Poland.[16] Related to this principle is another regularity consisting in the relatively frequent attribution of a civil law nature to social relations. There is, in fact, a feedback loop here. Since the legislator refers to the institution of civil law provenance, there is a presumption that the legislator is regulating a relationship of a civil law nature.[17] It is reasonable to conclude that the principle of unity of civil law understood in this way is already an element of Polish legal culture. Therefore, one may risk the claim that Stanisław Kasznica's textbook has contributed to the formation of this principle in Polish law. This is because Stanisław Kasznica's thought concerned an aspect of the functioning of public administration that was already exposed at the time, namely its liability for damage.

15 See M Zirk-Sadowski, 'Problem autonomii prawa podatkowego w orzecznictwie NSA' [The Problem of the Autonomy of Tax Law in the Jurisprudence of the Supreme Administrative Court] (2004) Przegląd Orzecznictwa Podatkowego vol. 2, 123. The author aptly argues against such a wall dividing public and private law. On the causes of this absolutisation and its manifestations at the turn of the nineteenth and twentieth centuries, see R Szczepaniak (2020) 52.

16 *In statu nascendi*.

17 On the evolution of this principle and the reasons for its strength in Polish law, see R Szczepaniak (2020) 87–92.

However, it should be noted that the principle of unity of civil law is still evolving in Poland. One can even see some manifestations of its weakening as a result of the development of the science of administrative law. Consequently, certain parallels, i.e. institutions of administrative law that are counterparts of civil law institutions, are taking shape, although this development is not yet completed as a rule. As an example, one can point to the issue of the administration's liability for damage for legal acts.[18]

4. The current state of development of regimes of administrative liability for damage

The question should be raised as to how the regime of administrative liability for damage in Poland is currently shaped against the background of the legal state of Stanislaw Kasznica's era.

There has certainly been progress when it comes to the possibility for a private individual to claim damages. As a rule, public authorities are also liable for damage for sovereign acts. It can even be said that liability for sovereign acts is in some respects even more severe for public authorities; for it has been made independent of fault by Article 77(1) of the Polish Constitution.[19] Unexpectedly, however, the entry into force of the Constitution of the Republic of Poland of 1997 in some sense revived the old division into commanding and non-commanding actions. This is because an internal stratification of the responsibility of public authorities emerged. According to the still strongly held view, the provisions of Articles 417-421 of the Civil Code apply only to damage caused by acts of authority ("in the exercise of public authority"), for the rest, the administration is to be liable on general principles (Articles 45-416 of the Civil Code), so the requirement of fault should apply to damage caused by non-commanding actions.[20] Of course, this division is no longer invoked today to justify the non-compensatory liability of public authorities for acts of authority.

In each epoch, lawyers have had to face problems that are typical of the period. Even today, one can point to phenomena that were unknown to lawyers living in Stanislaw Kasznica's time. The author of this text draws attention to two such phenomena.

Firstly, since the second half of the twentieth century, there has been a luxuriant development of regimes of liability for damage. Undeniably, this issue is one of the most important issues

18 On the formation of the public-legal regime of compensation liability of the administration for legal acts, see P Wszołek, *Kryteria wyodrębnienia prawa administracyjnego* [Criteria for the Separation of Administrative Law] (Wolters Kluwer 2016) 175–176; M Kruś, 'Publicznoprawny charakter roszczeń odszkodowawczych za wywłaszczenie nieruchomości' [Public Law Nature of Compensation Claims for Expropriation of Real Estate] (2016) Ruch Prawniczy, Ekonomiczny i Socjologiczny 78(2), 96; these authors advocate granting this regime a public law character largely for utilitarian reasons, in order to avoid the plea of limitation of the claim; see on this subject R. Szczepaniak (2020) 282–284.

19 See the judgment of the Polish Constitutional Tribunal of 4 December 2021, SK 18/00 (2021) Lex 50257.

20 Critically on such an interpretation R Szczepaniak, *Odpowiedzialność odszkodowawcza gminy* [Compensatory Liability of the Commune] (Wolters Kluwer 2018) 133. Even the Polish Constitutional Court cannot decide how broadly Article 77(1) of the Constitution applies. It is significant that in its judgment of 4 December 2021 (SK 18/00), it refers to the French experience: "There can be no doubt that all cases in which the actions of state organs related to imperium (or even more broadly, related to the performance of a public function, to which the notion formed in French doctrine against the background of the jurisprudence of the Council of State of the »actes de services« corresponds well), leading to damage caused by the functionaries, fall within the field of liability for damage so defined common to Article 77(1) of the Constitution and Article 417 of the Civil Code". This proves that the jurisprudential output of the Council of State from a century and more ago, cited in this text, continues to inspire contemporary courts.

in civil law. Torts as sources of obligations now play an equal role in terms of theoretical and practical importance with legal acts, including contracts. In doing so, new theoretical concepts justifying liability for damage are constantly emerging.[21] As indicated above, this development has been significantly influenced by the jurisprudence of the French Council of State. One of the manifestations of this development is the tendency observed for many years to broaden the scope of the indemnity liability of public authorities. There is an argument that such a tendency has a deep justification in the principles of the Polish Constitution, such as the principle of a democratic state of law or the principle of legalism.[22]

This fact raises questions about the limits of the effectiveness of public authorities' compensation liability regimes, particularly concerning liability for mass events. Such mass events are typical of the functioning of public authorities, which employ a wide range of forms in their activities, including normative acts. Additionally, their activities have macro-level effects. At times, one might perceive that information about successful compensation lawsuits against the state or other public authorities, for example, for statutory violations or omissions, generates a sense of admiration for the effectiveness of the contemporary legal system. It has been suggested that the liability regime of public authorities, along with the system of protection of human rights, has reached an advanced stage of development, particularly in European countries. This advanced stage allows individuals to claim compensation from the state for various sophisticated forms of damage that seemed impossible or unimaginable just a few years ago. Moreover, it is suggested that we may have reached a peak stage in the development of legal consciousness among citizens, who have become aware of the state's real obligations towards them. A natural consequence of this awareness is the proposition that we should consider which other inconveniences of daily life result from state or public authority negligence. Once identified, individuals would be entitled to seek compensation from the state or other public authorities on these grounds. As an example of this trend, we can cite the reparations awarded in recent years by the state to residents of major Polish cities for living in polluted environments.[23]

However, a fundamental question arises as to whether such suggestions and assumptions are indeed accurate. Perhaps it is the other way round, i.e. that the claims for compensation from the state and local governments due to the occurrence of mass events and the judgements handed down are not so much the result of the maturity of modern man's legal consciousness and the effectiveness of the legal system, but, on the contrary, are the result of the growth of an entitlement attitude as well as a manifestation of the dominance of certain trends of thought displaying the characteristics of fashions and ideologies. The question arises as to whether, by recognising such claims as legitimate, we do not go far beyond the framework of

21 In France, under the influence of jurisprudence, for example, the concept of tort liability for loss of a chance of cure began to take shape, see M Nesterowicz, 'Utrata szansy wyleczenia lub przeżycia w prawie francuskim' [Loss of Chance of Cure or Survival under French Law] (2010) Państwo i Prawo vol. 3, 32; E Bagińska, 'Tendencje rozwojowe odpowiedzialności deliktowej w Europie w końcu XX i początkach XXI wieku' [Development Trends in Tort Liability in Europe at the End of the 20th and the Beginning of the 21st Century] in M Nesterowicz (ed), *Czyny niedozwolone w prawie polskim i prawie porównawczym* [Torts in Polish and Comparative Law] (Wolters Kluwer 2012) 72.

22 L Bosek, P Grzegorczyk, K Weitz in M Safjan, L Bosek (eds), *Konstytucja RP. Komentarz do art. 1–86* [Constitution of the Republic of Poland. Commentary on art. 1–86] (CH Beck 2016) commentary to the art. 77 point 18.

23 For more on this topic, see R Szczepaniak, 'Smog a odpowiedzialność odszkodowawcza władz publicznych' [Smog and the Compensation Liability of Public Authorities] (2020) Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu 2(66), 26–48.

the classic mechanism of liability for damage developed by civilian science. It seems that at least sometimes such transgressions takes place.[24]

Admittedly, the argument put forward back in the first half of the twentieth century, whereby a public authority should not be held liable for damage, as this would result in its financial ruin and, consequently, its inability to perform its basic public tasks, has long since been discredited. Nevertheless, the attempt to hold the public authority responsible for the consequences of mass phenomena must inspire the question of the limits of the effectiveness of the compensation liability regime. The public authority (state or local government) is the embodiment of the whole society, or at least a large part of it. Is it therefore possible to talk meaningfully about damage when, as a result of mass events, all the members of society, or a large part of it, are affected? Such a question arises, for example, in the case of a claim for compensation for living in a polluted environment.[25] These questions impose themselves with particular force at the present time, when geopolitical uncertainty, threats to world order and the onset of a global economic crisis as a result of the coronavirus pandemic and Russia's aggression against Ukraine, among other things, are emerging.

Secondly, the case law of the CJEU has had a significant impact on the regimes of liability for damage of public authorities for many years now. A system of supranational European law such as EU law obviously did not exist during Kasznica's time. Under the influence of this jurisprudence, among other things, the view has become established that a public authority may also be liable for normative acts, including statutory unlawfulness as well as for statutory omissions. This liability exists in particular if a Member State has failed to implement an EU directive on time or has implemented it incorrectly. Among other things, this is so because the tortious liability of public authorities is intended to be one more instrument to ensure the effectiveness of EU law (known as the *effet utile*)[26] and its primacy over national law. This effectiveness and primacy is to be manifested, among other things, through the direct and horizontal application of EU law, i.e. in relations between private entities and also as a basis for a private entity raising claims against the state for damages for a breach of EU law, including the non-implementation or incorrect implementation of EU directives. The state's liability for damage towards an individual for a breach of EU law is intended to be, especially with regard to directives, a substitute for this horizontality and an expression of the primacy of EU law.[27]

One may get the impression that in this type of state compensation liability, the compensation of the damage caused is in the background, the most important being the political objective, i.e. confirming the primacy of EU law over national law. This, in turn, results in the liability for damage regime being used for purposes other than those for which it was created. This may lead to certain aberrations and anomalies.[28]

24 Ibid.

25 Ibid.

26 This was perhaps most bluntly expressed by the CJEU in its judgment in joined cases C-6/90 and C-9/90 (EU:C:1991:428, para. 34 of the grounds), where it stated that an award of damages from a Member State is primarily necessary where the full effectiveness of the provisions of Community law depends on the activity of the authorities of that state and consequently the individual, as a result of a breach by the state of obligations imposed on it by Union law, is deprived of the possibility of exercising his rights conferred by Community law before the national courts.

27 See S Walkila, *Horizontal Effect of Fundamental Rights in EU Law* (Europa Law Publishing 2016) 178; E Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) European Law Journal 21(5), 664. see also the judgment of the CJEU in joined cases C-6/90 and C-9/90, as well as the judgment of the CJEU C-282/10 EU:C:2012:33, para. 43.

28 They consist in the fact that, in order to ensure the effectiveness of Union law, certain breaches of Union law by Member State authorities give rise to liability for damage, whereas other similar breaches of Member State public

This last observation can be given a more general dimension. The regime of compensatory liability is indeed characterised by a certain universality. It can be said to be one of the most important mechanisms of restitution as well as the repartition of goods or obligations. This universalism has begun to be realised with redoubled force in connection with the exuberant development of the institution of liability for damage in recent decades. Legislators sometimes want to use it as a universal, inter-branch mechanism. It happens, for example, that the regime is used as an instrument of state social policy, which in itself is rather bizarre.[29] Once again, then, the question arises, albeit in a slightly different sense, about the limits of the effectiveness of this civilian-formed mechanism.

5. Conclusion

The functioning of the regimes of compensatory liability of public authorities, both in Stanislaw Kasznica's time and today, generates problems, although their nature has changed over time.

There are still fundamental questions about the legal nature of the regime of compensatory liability of public authorities. The regime of compensatory liability of public authorities has always shown a tendency to elude the framework of classical civilianism. At the forefront is the fact that the subject under discussion is strongly linked to political doctrines attempting to describe and explain the role of the state and its relations with citizens and other individuals, and influencing the scope of duties and tasks attributed to public entities. The shape of the regime is in some sense dependent on these prevailing doctrines. This was already noted several decades ago by Adam Szpunar, when he wrote that the interpretation of the existing rules governing the liability for damage by public entities cannot be carried out completely independently of the position taken in the dispute as to the theoretical justification of the liability of those entities.[30]

To conclude, the thesis should once again be that it is not the battles over affiliation that are

authorities which do not relate to Union law may not give rise to such liability. See FG Jacobs, 'Some Remarks on Community and Member State Liability' in J Wouters, J Stuyck (eds), *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune* (Intersentia Publishing 2001) 131. For example, the need for a Member State to pay compensation for damage caused by a failure to implement an EU directive does not necessarily mean that the state will be so liable for other instances of legislative omission. An analogous divergence may apply, for example, to the consequences of an infringement by national courts. An example is the judgment of the CJEU C-224/01 EU:C:2003:513, in which the CJEU, based on the guiding principle of the effectiveness of EU law and contrary to Austrian law, held a national court liable for damage for a decision of a national court in breach of EU law (para. 32 of the grounds). A more glaring case in this genre is the judgment of the CJEU C-453/00 EU:C:2004:17 and the judgment of the CJEU C-234/04 EU:C:2006:178, in which the CJEU held that a finding by that court that a national law is incompatible with EU law may give rise to an obligation on the Member State to set aside earlier final judicial decisions or final administrative decisions which have been made on the basis of that national law. In doing so, the CJEU ruled that even the absence of appropriate procedures in national law in the light of which such revocation would take place could not relieve the state of such an obligation. For more on these judgments, see A Kubas, 'Deliktowa odpowiedzialność odszkodowawcza Skarbu Państwa (wybrane zagadnienia)' [Tortious Liability for Damages of the State Treasury (Selected Issues)] (2011) Transformacje Prawa Prywatnego vol. 3, 65.

29 A prominent example of this is Article 18(5) of ustawa z dnia 21 czerwca 2001 r. o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego [Act of 21 June 2001 on the Protection of Tenants' Rights, Municipal Housing Resources and Amending the Civil Code] [2001] JoL 1360. For more on this subject, see R Szczepaniak (2020) 285–287.

30 See A Szpunar, *Odpowiedzialność Skarbu Państwa za funkcjonariuszy* [Liability of the State Treasury for Officers] (Państwowe Wydawnictwo Naukowe 1985) 90. For more on this subject, see R. Szczepaniak (2020) 267–273.

most important. Attributing a civil or administrative character to an institution is frequently the result of a certain convention. It is not a problem that in France the regime of liability for damage by public authorities is assigned an administrative-legal character and in Poland a civil-legal one. These conventions are a fragment of the legal culture and legal traditions of individual states that should be respected. The specific nature of public entities can be respected by making one assumption or the other. One can speak here of a kind of functional equivalent.[31] Problems arise when a country does not respect this specific nature, i.e. it lacks solutions to take sufficient account of the specific characteristics of the state and other public actors in the process of applying institutions of civil law provenance, such as the liability for damage regime. Various types of abuse and manipulation may then occur.[32] The peculiar nature of this environment, which is the public sector, makes the legal institutions applied in this environment, even if we attribute to them a civil law character, at least partially modified, and thus escaping the framework of classical civilianism. It seems that Stanisław Kasznica understood this well.

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31 The functional method continues to dominate the science of comparative law, at the core of this method is the conviction that all states, as well as societies, have essentially similar or even identical problems. Consequently, measures applied in one legal system to eliminate these problems are functional equivalents of instruments found in other legal systems. Of course, these counterparts or equivalents may have varying degrees of effectiveness. See O Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) Brooklyn Journal of International Law 32(2), 409; R Michaels, 'Comparative law' in J Basedow, K Hopt, R Zimmermann (eds), *Oxford Handbook of European Private Law* (Oxford University Press 2011) 1, <https://scholarship.law.duke.edu/faculty_scholarship/2388> accessed 1 Aug 2024; A Doczekalska, 'Comparative Law and Legal Translation in the Search for Functional Equivalents – Intertwind or Separate Domains?' (2013) Comparative Legilinguistics vol. 16, 63.

32 See R Szczepaniak (2020) 639.

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Remonstration as a means of simplifying administrative procedure in selected jurisdictions

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Abstract

Remonstration has long been present in Polish legislation and the practice of law application. It also has a long tradition in other countries, especially the legal systems of the German-speaking area. The genesis of this institution indicates that it was an imperfect (legal) measure, since its consideration depended solely on the goodwill of the ruler or the authority authorized by him. Remonstrance generally "goes hand in hand" with the institution of self-verification, being part of the various forms of self-verification, in many legal systems. Undoubtedly, it is part of the system of self-control, since it allows for the verification of a previously made decision by the same administrative body that made it.

Simplification of administrative procedures is a very attractive slogan. For many years, the legal systems of various countries have been looking for legal solutions and systemic solutions to reduce bureaucracy in administration. Simplification of procedures in administration is aimed at reducing excessive and unnecessary formalities in the area of public administration functioning. Achieving this goal is possible in various ways. One of them is the introduction of appropriate legal measures into the system of administrative procedures. An example of these is the institution of "administrative silence"/"tacit settlement of a case by an administrative body". Remonstration is another example of a legal measure through which a final resolution of a case can be obtained quickly and without unnecessary costs. The legal remedy of remonstration is perfectly in line with the current administrative policy of many countries, striving – on the basis of individual normative solutions – to ensure that each case is resolved quickly, efficiently, effectively and with the least possible involvement of public funds. And it is indisputable that the fastest way to eliminate defects in administrative decisions is to correct them by the same body that issued the decision. Mobilizing the resources at the disposal of a higher level authority, or an administrative court, requires the involvement of greater forces and resources. In contrast, the activation of the internal verification procedure, as a rule, makes it possible to speed up the settlement of the case and avoid many of the inconveniences, including costs, resulting from continuing the appeal procedure. An important advantage of self-monitoring is that it leads to faster handling of the case, and therefore serves to implement the principle of speed of proceedings, as well as promotes

the efficiency of proceedings before public administration bodies. Undoubtedly, the use of remonstration also promotes the efficiency of administrative proceedings, since the inclusion of remonstration makes it possible to quickly and efficiently remove the indicated deficiency. This, in turn, reduces the cost of the proceedings, since obtaining a decision by the interested party in this way – which takes into account the applicant's request – makes it most often unnecessary to continue the proceedings through an appeal or administrative court.

Keywords
simplification of administrative proceedings; remonstration

1. Introduction

One of the authors who referred to the concept of "remonstrance" (synonymously referred to in the Polish legal literature as "representation") in the early post-war period was Professor Stanisław Kasznica. In his work, *Polish Administrative Law: Basic Concepts and Institutions* (*Polskie prawo administracyjne: pojęcia i instytucje zasadnicze*), published in Poznań in 1946, he indicated that remonstrance is a measure whereby an interested party applies to the authority that issued an order (the adjudicating authority) with a request to revoke or change that order. This authority has the right to grant this request but is not obliged to reopen a case it has already decided, nor is it required to respond to the interested party's request[1].

Remonstrance has long been a feature of Polish legislation and legal practice, and it also has a longstanding tradition in other countries, particularly within German-speaking legal systems. Remonstrance originates from the prerogatives of rulers who exercised supreme authority within the state. Historically, subjects could make a polite request to the ruler or an authorised representative to apply clemency, potentially leading to a change in a previous decision. This institution of remonstrance was inherently imperfect, as it depended solely on the goodwill of the ruler or authorised body.

In modern times, particularly within the context of the Polish legal system, remonstrance has developed distinctive features, especially following the sociopolitical changes. Since the end of the Second World War, the significance of remonstrance has been notably marginalised. This shift is attributed to the growing emphasis on formal legal remedies, which must be addressed and considered. As a result, remonstrance has been overshadowed by the institution of complaints, influenced by Soviet legal doctrine of that period. However, it should be noted that remonstrance was never entirely replaced by the institution of complaints and applications, from which it significantly differs[2].

2. The concept of remonstration

Remonstration generally aligns with the institution of self-verification and is part of various forms of it in many legal systems. The primary value of self-verification is to expedite and streamline proceedings wherever possible – typically when certain conditions are met, such as the inclusion of all the applicant's claims – without compromising the procedural guarantees afforded to other participants.

1 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 162.

2 E Szewczyk, *Remonstracja w prawie administracyjnym procesowym* [Remonstration in Administrative Procedural Law] (CH Beck 2018) 35.

The term *remonstration* derives from mediaeval Latin. The verb *remonstrare* means "to demonstrate", "to present" or "to protest". The form *remonstro* translates as "I point out again" or "I challenge". The prefix *re-* in *remonstrare* signifies the repetition of an action or the act of doing something again[3].

3. Origin of remonstration

As can be inferred, remonstration originates from the prerogatives of those wielding supreme power in the state – powers historically held exclusively by the ruler and not subject to control or limitation. Its origins can be traced back to the institution of pardon, which developed in antiquity as a manifestation of the head of state's generosity and favour. In subsequent centuries, as monarchs also exercised jurisdictional authority, the application of the "law of clemency" was entirely within their prerogative. The monarch, as the highest authority in the realm, held and exercised extensive powers, including the unlimited application of the law and the pronouncement of sentences. It was the monarch's prerogative to have the final say, which could be exercised through granting a request for an "act of clemency", such as revoking or modifying a prior verdict[4]. As can be presumed, in the area of the system of administrative procedures, remonstration has become a relic of the law of grace[5].

"The right of remonstrance" (*droit de remonstrance*) appeared in France as early as the 14th century. It was associated with the right to register legal acts[6]. It was understood as the power of parliaments, at that time organs of judicial power, to refuse to register a legal act if it was incompatible with the principles of existing law[7]. According to Zoller, the use of this type of remonstration contributed to the development of a "culture of prevention", characteristic of the French lawmaking model[8].

An institution similar to remonstrance, operating in the English legal system from the 16th century onwards, was *coram nobis*[9]. The term means "before us" and comes from the phrase *quae coram nobis revident*, used by a ruler communicating their will to their subjects. The legal remedy of *coram nobis* allowed one to apply in writing to the same court that had issued the judgment to have it changed. It was equated with a request to modify a court judgment. The use of this remedy consisted of an attempt to show that the court, in passing its judgment, had committed a cardinal error or gross injustice. Although this institution has almost disappeared over the centuries, the possibility to request *coram nobis* in writing still exists to some extent in the US judiciary[10].

3 M Szymczak (ed), *Słownik języka polskiego* [Polish Language Dictionary] (Wydawnictwo Naukowe PWN 1981) 26.
4 J Bardach, B Leśnodorski, M Pietrzak, *Historia ustroju i prawa polskiego* [History of the Polish System and Law] (Wydawnictwo Naukowe PWN 1993) 167.
5 E Szewczyk (2018) 3.
6 Z Drozdowicz, *Filozofia francuska w epoce oświecenia* [French Philosophy in the Era of Enlightenment] (Wydawnictwo Fundacji Humaniora 2005) 11.
7 'Remonstracja' [Remonstrance] in *Encyklopedia PWN* [PWN Encyclopedia], <http://encyklopedia.pwn.pl/haslo/remonstracja;4009825.html> accessed 6 Jan 2023.
8 E Zoller, *Introduction to Public Law: A Comparative Study* (BRILL 2008) 44–45.
9 E Frank, *Coram Nobis, Common Law – Federal – Statutory* (Newkirk Associates Inc. 1953) 4, 8.
10 See EN Robinson, 'The Writs of Error Coram Nobis and Coram Vobis' (1951) Duke Bar Journal vol. 1, 29 et seq.

4. Remonstration under German law

In the German tradition, remonstration – always seen as opposing something (an exhortation or counter-proposal) – is firmly rooted in public law, where it is derived from the constitutional norm formulating the right of petition (*Petitionsrecht*)[11]. It has a long history in German constitutionalism. Bauer points out that the right of petition ranks among the cornerstones of European legal culture[12]. In the field of administrative law alone, remonstration – understood as the possibility to ask a public administration body to take a position on a matter – comes in two main varieties. *Gegenvorstellung* is understood as remonstration addressed to the same administrative body (*Ausgangsbehörde*) from which the challenged action originated or which committed the omission. On the other hand, remonstration understood as a legal remedy brought before supervisory bodies (übergeordnete *Behörde*) is referred to as *Aufsichtbeschwerde*. In addition, remonstration derived from the constitutionally regulated right of petition occurs in legal proceedings before courts hearing administrative, civil and criminal cases.

At present, all informal (*formlos*) legal remedies in German law are based on Article 17 of the German Basic Law of 23 May 1949 (commonly abbreviated as GG, i.e. *Grundgesetz*), which sets out the "right of petition" (*Petitionsrecht*)[13]. According to this provision, everyone has the right to address individually or jointly with others, in writing, a request (*Bitte*) or a complaint (*Beschwerde*) to the relevant authorities (*zuständigen Stellen)* and to the representation of the people (*Volksvertretung*)[14].

The material scope of informal remedies to which remonstration belongs is very broad. They can be brought against any action of the public administration, including administrative acts (*Verwaltungsakte*) issued by it, as well as directed against inaction of the administration. The only requirement imposed on them by Article 17 GG is that they must be in writing. Apart from this, informal remedies are not bound by legal strictures either as to content or timing. They can therefore be filed at any time, regardless of how much time has passed since the public administration took the contested decision. The fact that they can be filed free of charge is also a sign of their informality. One of the characteristic features of non-formal legal remedies in terms of German law, including remonstrations, is that their filing has neither suspensive nor devolutive effects[15]. This is because these effects have been "reserved" by the legislature for formal remedies.

The real effectiveness of an informal remedy such as remonstration largely depends on its content. A remonstration should include a clear *petitum* outlining the specifics of the request and should provide sufficiently detailed arguments that support the petitioner's claim about revising the challenged act. Merely stating the petitioner's view on the matter may not be adequate. Instead, the remonstrator should aim to persuade the authority by presenting compelling reasons to reconsider the matter.

11 See more extensively H Bauer, *Handbuch der Grundrechte* (CF Müller 2013) 412 et seq.

12 H Bauer, 'Partizipation durch Petition – Zu Renaissance und Aufstieg des Petitionsrechts in Deutschland und Europa' (2014) Die Öffentliche Verwaltung vol. 11, 453 et seq.

13 R Schweickhardt, *Allgemeines Verwaltungsrecht* (W. Kohlhammer GmbH 2018) 372.

14 See H Hoffmann, J Gerke, *Allgemeines Verwaltungsrecht* (Deutscher Gemeindeverlag 2002) 307. In the original version, this provision reads: "Jedermann hat das Recht, sich einzeln oder in Gemeinschaft mit anderen schriftlich mit Bitten oder Beschwerden an die zuständigen Stellen und an die Volksvertretung zu wenden" (see ustawa Zasadnicza Republiki Federalnej Niemiec z dnia 23 maja 1949 [Basic Law of the Federal Republic of Germany of 23 May 1949] [1949] BGBl. 1949 S. 1, <http://libr.sejm.gov.pl/tek01/txt/konst/niemcy.html> accessed 8 Dec 2015.

15 S Glaeser, *Verwaltungsprozeßrecht* (Boorberg 1992) 23.

The German literature stresses that another important feature of remonstration is that it does not constitute the source of any legal claim[16]. The interested party addressing the remonstration is only entitled to a response. This is because the authority is not obliged to reopen the case on its merits. It should be evident from the reply that the authority has taken note of the content of the application and the manner of settlement indicated and contested by the interested party[17]. The remonstration may, of course, result in the applicant's request for this informal remedy being granted, but in any case this depends on the authority's own assessment of the situation. Indeed, the interested party has no claim to demand a specific procedural result (*formelle Entscheidung*) from the authority. For this reason, remonstration is treated as an imperfect (*unvollkommene*) legal remedy[18].

The German literature takes the view that the effectiveness of remonstration is often rated much higher than that of formal remedies with a suspensive and devolutive effect[19], as the inclusion of remonstration makes it possible to remedy the indicated shortcoming quickly and efficiently[20].

Although informal remedies do not give rise to any procedural claim based on which a substantive ruling could be sought from an authority,[21] their practical importance is highly rated[22]. They are often treated as the proverbial "last resort" – especially when a formal legal remedy is submitted after the deadline. In such a case, it may be considered an informal legal remedy and, despite the deadline being missed, the authority may change its own decision[23]. Indeed, in many cases, the filing of a request for remonstrance by the interested party becomes an impetus for the authority to audit its own actions[24]. The above-mentioned motives lead the representatives of the German legal sciences to emphasise what follows from the vast experience of practice, providing numerous examples of the use of informal remedies, which are one of the most frequent objects of control[25]. Their analysis leads to the conclusion that informal legal remedies in some cases can play a more important role than formal legal remedies[26]. Generally speaking, informal legal remedies – including remonstration (*Gegenvorstellung*) – are seen as an important and effective instrument for overseeing the public administration and verifying its decisions[27].

5. Remonstration in Belgian law

The legal remedy of remonstrance can be found in the norms of Belgian administrative law. Under Belgian legislation, citizens can always lodge a remonstrance appeal with the authority that

16 F Giese, *Allgemeines Verwaltungsrecht* (Spaeth & Linde 1929) 114.
17 K Stern, HJ Blanke, *Verwaltungsprozessrecht in der Klusur* (CH Beck 2008) 61.
18 F Fleiner, *Institutionen des Deutschen Verwaltungsrecht* (Mohr 1928) 230.
19 K Suplie, W Finke, W Sundermann, J Vahle, *Allgemeines Verwaltungsrecht, Handbuch für Lehre und Praxis* (Deutscher Gemeindeverlag GmbH 2014) 287.
20 Ibid.
21 R Schmidt, *Verwaltungsprozessrecht. Zulässigkeit und Begründetheit verwaltungsrechtlicher Verfaren* (Schmidt 2011) 3.
22 H Suckow, H Weidemann, *Allgemeines Verwaltungsrecht und Verwaltungsrechtschutz. Grundriss für die Aus und Frotbildung* (Deutscher Gemeindeverlag GmbH 2014) 212.
23 A Wittern, *Grundriß des Verwaltungsrechts* (Kohlhammer Verlag 1965) 177.
24 F Hufen, *Verwaltungsprozessrecht* (CH Beck 2005) 21; D Ehlers, H Pünder, *Allgemeines Verwaltungsrecht* (CF Müller 2016) 58.
25 F Hufen (2005) 20–21.
26 Ibid., 19.
27 Cf HP Bull, V Mehde, *Allgemeines Verwaltungsrecht mit Verwaltungslehre* (CF Müller 2022) 176.

issued the decision, as it is always possible to seek such an administrative review. The authority concerned may either revoke its earlier decision and issue another one, or do nothing. Belgian doctrine refers to this as an "unorganised appeal"[28].

6. Restoration in Czech law

In Czech legislation, the institution of remonstrance is regulated in Section 87 of the Act of 24 June 2004 on Administrative Procedure (*Správní* řád)[29]. According to this provision, "the administrative body that issued the contested decision may revoke or amend it if the appeal is fully merited, where this will not cause harm to any participant, unless all participants to whom the decision applies have given their consent". As in the analogous Polish norm, remonstration in this case is a request to change or revoke a decision from the body of first instance, "hidden" and contained in a formal legal remedy in the form of an appeal[30].

7. Remonstration in Hungarian law

In the Hungarian Code of Administrative Procedure the institution of remonstrance is regulated in provision 119(1)[31]. It states that "(i)n the event that, on the basis of the appeal, the authority establishes that its decision is in violation of the law then it shall amend or revoke that decision". The use of the word "shall" in the above provision indicates that the Hungarian administrative authorities are entitled and not obliged to make use of the possibility regulated therein[32], whilst also confirming that this measure bears the characteristics of remonstration.

8. Remonstration in Australia

The analysis leads to the conclusion that the institution of remonstrance, understood as an imperfect legal measure allowing for an earlier decision to be modified, has developed most strongly and has a well-established basis in the German legal system. However, it is also not alien to other countries, including those outside continental legal systems. In the legal order of Australia, which is characteristic of common law countries, an institution similar to remonstration is the possibility of *reconsidering* a case already decided by administrative decision, referred to as *reconsideration* (*review by the original decision-maker*)[33]. Among the four distinct possibilities of

28 LM Veny, E de Munck, 'Effectiveness of Administrative Appeals within the Framework of Administrative Justice in Belgium' (2011) Transylvanian Review of Administrative Sciences vol. 32, 279–283.

29 Zákon č. 500/2004 Sb., Správní řád, <https://mpsv.cz/documents/20142/225499/z500_2004.pdf/f5f79625-2959-17ec-d768-20268523d31c> accessed 1 Aug 2024.

30 E Szewczyk (2018) 27–28.

31 Act CL of 2016 on the Code of General Administrative Procedure, <https://njt.hu/jogszabaly/en/2016-150-00-00> accessed 1 Aug 2024.

32 B Rozczyński, 'Analysis of the Quality of Decisions Issued in the Course of Self-control by Public Administration Dobies in the Visegrad Group Countries' in M Havelková, L Grešová (eds), *Bratislava Legal Forum 2020. Aspects Affecting the Quality of Administrative Procedure and Decision-Making* (Comenius University in Bratislava, Faculty of Law 2020) 76–83.

33 The discussion on reconsideration in Australian administrative law has heated up in recent years under the influence of the decision of the High Court HCA 11 [2002] 209 CLR 597.

reviewing administrative decisions, *reconsideration*[34] is mentioned in the first place[35]. As a quick, cheap and accessible tool, it should be considered first[36].

In the Australian legal system, the provisions governing the consideration of a request such as reconsideration are not codified in a single normative act. Therefore, the individual provisions providing for the possibility of a decision being reconsidered may differ, for example, as to the time within which this remedy must be exercised, or as to the time available to the authority to take a position on the matter. Irrespective of such differences, reconsideration in any case consists of an application for reconsideration to the same authority that has already decided the case. The authority has a fixed time limit to consider the request, though it is not obliged to issue another decision. It may revoke the previous decision and issue a new one, or amend the previous decision, or it may do nothing. Importantly, the failure of the authority to respond has the value of a presumed decision, as it is understood to uphold the decision being challenged. It must be emphasised that reconsideration is not a remedy available against every administrative decision[37]. For example, in health care matters regulated by the Hearing Services Administration Act 1997, only the decisions listed in section 29 of that Act are subject to reconsideration[38]. Reconsideration is available against any administrative decision that was made as a result of fraud or "dishonesty". In order to benefit from reconsideration, one must make a request via the internet using a form available on the website of the authority concerned. In one of the sections of the form, the reason for the reconsideration measure must be indicated. For health matters, the request should be sent within 28 days of the party being informed of the decision. The new decision should be issued within 90 days of the request being received by the Department of Health[39]. The authority that issued the original decision, when reconsidering the case, may overturn the previous decision, may amend it, or may issue a completely different decision. As mentioned above, failure to issue a decision within the time limit set by Australian law is equivalent to upholding the challenged decision. Thus, in this case, remonstration in the Australian legal system ("reconsideration") has a particularly strong form. This is because even if the authority remains silent as a result of its filing, this is tantamount to a substantive termination of the proceedings by upholding the challenged decision. Many decisions taken under this procedure are subject to appeal before Administrative Appeals Tribunals[40].

34 In addition to reconsideration, the Australian system for reviewing administrative decisions comprises substantive review by administrative tribunals that are part of the administrative apparatus, judicial review by the courts and review by the ombudsman – see more in 'Challenging Administrative Decisions' (2022), <www.lawhandbook.org.au/12_02_01_challenging_administrative_decisions/> accessed 30 Dec 2022.

35 'Legislative process. Review Admin Decision Making', <http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/dro/legislative-process/review-admin-decision-making.pdf> accessed 30 Dec 2022.

36 C Enright, *Federal Administrative Law* (Federation Press 2001) 114.

37 See R Orr, R Briese, 'Don't Think Twice: Can Administrative Decision Makers Change their Minds?' (2002) Aial Forum vol. 35, 11 et seq.

38 Hearing Services Administration Act 1997, <https://www.legislation.gov.au/Details/C2016C00384> accessed 13 Oct 2016.

39 A practical guide to assist in cases involving the review of decisions in health matters, including through the reconsideration measure, is available at: 'Reconsideration and Appeals', <http://hearingservices.gov.au/wps/wcm/connect/04aa7884-6b97-4e35-8236-4b35f743adc6/Reconsideration-and-Appeals+fs.pdf?MOD=AJPERES> accessed 30 Dec 2022.

40 E Szewczyk (2018) 29–32.

9. Remonstration in Serbia

An interesting legal remedy has recently been introduced into the Serbian Code of Administrative Procedure. The Serbian legislature referred to it as *prigovor*, which translates into English as "objection". It is regulated in Articles 147–150 of the Serbian Code of Administrative Procedure. It is a legal instrument that can be used to assess the legality and expediency of all types of administrative action with the exception of an administrative act and an act of guarantee (against which there is an appeal). Thus, an objection can be used in all administrative matters that do not have the character of an administrative act or are not related to the issuance of an administrative act, when the applicant believes that their rights or legal interests have been violated in these administrative matters. The concept of an administrative act in the context of an objection includes administrative contracts, administrative acts (especially the issuance of certificates) and the provision of public services. An objection is a remedy that is brought before the same administrative body that took the challenged administrative action[41]. The mechanism of self-control, within which the legal remedy of *prigovor* functions, is beneficial both for the citizen – whose case can thus be quickly and effectively dealt with – and for the administrative body, which can protect its reputation by correcting the mistake it committed[42].

10. The essence of remonstration

The analysis leads to the conclusion that remonstration is an established part of the legal culture of the various legal systems, both the continental system and the common law system. Having many varieties, it is constantly developing and evolving, sometimes being transformed into a formal legal remedy over time. As can be surmised, this kind of modification may have taken place in the French legal order. The very name of one of the group of *recours* remedies operating in the contemporary French legal system – *gracieux*, meaning "kindly" – suggests that it may represent a relic of the "act of grace" from which the institution of remonstrance draws its genesis. *Recours gracieux* constitutes a kind of internal appeal[43]. The appellant of a *recours gracieux* addresses it to the same authority that issued the decision, e.g. the prefect[44]. It takes the form of a written request which may be used by any individual seeking the annulment or amendment of a decision adversely affecting them. In such a letter, the applicant is entitled not only to indicate objections of a legal nature, but also to raise arguments of a non-legal nature, formulating a polite request for favour (clemency) on the part of the administrative body. This in turn may lead to the conclusion that in the French legal system the measure constituting the prototype of remonstrance has been modified over time and transformed into a formal legal measure.

As a result of such repercussions, the distinction between remonstration and other legal remedies, especially non-devolutive remedies, becomes blurred. This sometimes causes confusion

41 D Vucetić, 'Serbia' in Z Kmieciak (ed), *Administrative Proceedings in the Habsbourg Succession Countries* (Wolters Kluwer 2021) 186–187.

42 V Cucić, 'Administrative Appeal in Serbian Law' (2011) Transylvanian Review of Administrative Sciences vol. 32, 60, 65–66, <https://rtsa.ro/tras/index.php/tras/article/view/256/250> accessed 4 Jan 2023.

43 J Borkowski referred to *recours gracieux* as a "request for reconsideration" – in: J Borkowski, 'Francja' [France] in Z Kmieciak (ed), *Postępowanie administracyjne w Europie* [Administrative Proceedings in Europe] (Wolters Kluwer 2010) 170.

44 M Feyereisen, J Guillot, S Salvador, *Procédure administrative contentieuse* (Larcier Lux 2018) 191.

in qualifying the various remedies and distinguishing them from those which are associated with a procedural claim[45].

From a structural point of view, remonstration can be regarded as an "asymmetrical" remedy. Using it does not give the claimant a procedural claim through which they can demand a specific procedural outcome. In the case of remonstration, the powers are concentrated on the side of the entity to which it is addressed (the administrative authority or the administrative court), which has the freedom to decide the degree of re-engagement with the case. The opposite of remonstration are legal remedies with a "symmetrical" construction (appeals), which (in quantitative terms) are by far the predominant ones. An example of these is the formalised remedy of appeal against a first-instance decision, the filing of which, in two-instance proceedings, entails the obligation to examine the merits of the case, as the beneficiary of this remedy has a legal claim to demand a specific procedural outcome from the administrative body[46].

11. Self-control

Self-control is commonly understood as controlling oneself, one's reactions and refraining from impulsive behaviour[47]. In the science of procedural law it is understood as a public administration body reviewing the correctness of its own actions[48]. As a consequence of remonstration, this body may verify its own decision by remedying the defects raised by the petitioner. Reconsideration is undoubtedly a part of the system of self-control, as it allows for a decision taken earlier to be verified by the same administrative body that issued it.

12. Simplification of administrative procedures

Simplification of administrative procedures is a very attractive slogan. For many years, legal solutions and systemic solutions have been sought in the legal systems of various countries to reduce bureaucracy in the administration[49], promote the efficiency of the administration, reduce the costs of its operation and thus make life easier for citizens[50]. The European Commission Communication of 23 March 2017 identifies "administrative simplification"[51] as one of the important recommendations addressed to administrations. It is suggested that "where possible, public administrations should seek to streamline and simplify their administrative processes by

45 Incidentally, before subjecting the institution of remonstrance to a thorough analysis, the author was not entirely clear in her assessment of remonstrance in her earlier publication – see E Szewczyk (2018) 637 et seq.

46 Ibid., 32–33.

47 M Szymczak (1981) 174–175.

48 B Adamiak, *Odwołanie w polskim systemie postępowania administracyjnego* [Appeal in the Polish System of Administrative Proceedings] (Wydawnictwo Uniwersytetu Wrocławskiego 1980) 67.

49 *From Red Tape to Smart Tape: Administrative Simplification in OECD Countries. Administrative Simplification in the United Kingdom* (OECD 2003), <https://read.oecd-ilibrary.org/governance/from-red-tape-to-smart-tape/administrative-simplification-in-the-united-kingdom_9789264100688-8-en#page> 4 Jan 2023.

50 See JT Silveira, TF de Freitas, G Fabião, MA Raimundo, 'The Simplification of Procedures in Portuguese Administrative Law' (2022) Lisbon Public Law Working Paper Series 12(1), 9–26, <file:///C:/Users/Ewa/Downloads/SSRN-id4259167.pdf> accessed 4 Jan 2023.

51 Commission Working Document of 23 March 2017, annex to the communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions SWD(2017) 112 final, <https://eur-lex.europa.eu/resource.html?uri=cellar:2c2f2554-0faf-11e7-8a35-01aa75ed71a1.0017.02/DOC_3&format=PDF> accessed 4 Jan 2023.

improving them or eliminating any that does not provide public value. Administrative simplification can help businesses and citizens to reduce the administrative burden of complying with EU legislation or national obligations".

In other words, administrative simplification aims to reduce excessive and unnecessary formalities in the functioning of public administration. This aim of simplifying administrative procedures can be achieved in various ways. One of them is to introduce appropriate legal measures into the system of administrative procedures, e.g. the institution of "administrative silence" or "tacit handling of a case by an administrative body" which is present in many legal orders, not only European ones, and has been gaining in importance in recent years[52]. It consists in dealing with an individual case as a result of the expiry of a specific deadline for issuing a decision, or without the need to exhaust this deadline[53].

Remonstration is another example of a legal remedy that can result in a quick final decision on a case without unnecessary costs. The legal remedy of remonstration is perfectly in line with the current administrative policy of many countries, which strives to resolve each case – using particular normative solutions – quickly, efficiently, effectively and with the least possible involvement of public funds. It is indisputable that the fastest way to eliminate defects in administrative decisions is for the same body that issued them to correct them. Mobilising resources at the disposal of a higher level authority or an administrative court requires the involvement of greater forces and resources. On the other hand, launching an internal verification procedure, as a rule, makes it possible to accelerate the handling of the case and to avoid many inconveniences, including costs, resulting from the continuation of appeal proceedings. An important advantage of self-control is that it leads to faster processing of cases, and thus supports the principle of prompt proceedings and makes proceedings before public administration bodies more efficient. The quick, efficient handling of a case is not only important from the point of view of public interest and reducing the costs of administrative proceedings, but is also important for the party to the proceedings. This is because this institution eliminates the need to start (sometimes lengthy) proceedings before an appeal body.

13. Advantages and disadvantages of remonstration

A review of the normative regulations of various countries leads to the conclusion that the institution of remonstration, understood as a polite request to the body that has already dealt with the case to verify its position, is present in both continental law and common law systems. This institution undoubtedly has many advantages. However, one of the few disadvantages noted in the literature regarding remonstration is that this remedy is considered by the administrative authority most involved in the case thus far, and therefore potentially the most biased. On the other hand, the unquestionable advantage is that this authority is the most familiar with the case

52 See more extensively Z Kmieciak, J Wegner, 'Evolution of Tacit Consent in the Polish Administrative Law' in B Lewaszkiewicz-Petrykowska, D Skupień (eds), *Rapports Polonais. XXIst International Congress of Comparative Law. Asunción, 23-28 X 2022* (Wydawnictwo Uniwersytetu Łódzkiego 2022) 269–282.

53 A broad overview of foreign states' norms in this respect is presented by J Wegner, *Instytucja milczącego załatwienia sprawy przez administrację publiczną* [The Institution of Tacit Settlement of a Matter by Public Administration] (Wolters Kluwer 2021) 36 et seq.; see also 'France Law on Administrative Simplification Implemented', <https://www.loc.gov/item/global-legal-monitor/2014-12-02/france-law-on-administrative-simplification-implemented/> accessed 4 Jan 2023.

and possesses the complete set of documents related to it[54]. Undoubtedly, the use of remonstration promotes efficient administrative proceedings, as it allows identified shortcomings to be addressed quickly and effectively. This, in turn, reduces the costs of the proceedings. When the interested party obtains a decision that considers their request through remonstration, the need to continue the proceedings through appeals or administrative court procedures is often removed.

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Current Issues in the Transcription of Birth Certificates for Children of Same-Sex Parents: Selected Remarks in Light of Administrative Court Jurisprudence and Stanislaw Kasznica's Thought on the "Authoritative Interpretation of Legal Norms Contained in Legislative Acts"

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Abstract
One of the problems addressed in Stanisław Kasznica's work was the importance of administrative court rulings in the process of interpreting administrative law. In order to illustrate this in the current state of the law, judgments of administrative courts – the Regional Administrative Courts and the Supreme Administrative Courts – were selected in cases involving complaints against decisions of provincial governors upholding decisions of heads of the civil registry office refusing to transcribe the birth certificate of a child in which people of the same sex were indicated as parents, as well as a specific resolution of a panel of seven judges of the Supreme Administrative Court of 2 January 2019, II OSK 1/19.

Keywords
transcription of birth certificate; civil status registration; judicial and administrative review; interpretation of administrative law

1. Introduction

Among the various problems addressed in Professor Stanisław Kasznica's works, the importance of judicial-administrative jurisprudence emerging in the process of controlling the activity of public administration should be highlighted. He referred to this issue in his publication *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze*, 2nd edition, Poznań 1946. In this work, Professor Kasznica emphasised its strong and beneficial influence on the development of administrative law, as well as its significance in the process of interpretation, and even the

possibility of considering it a separate source of administrative law[1]. Indeed, he pointed out that:

> In fact, (...) the binding force of A.C. judgments extends beyond the specific cases they decide: they regulate administrative activity in general. They are not an autonomous source of administrative law, their role being limited to authoritatively interpreting the legal norms contained in legislative acts. However, where the A.C. is composed of eminent jurists and such a composition is maintained over a long period of time (...), this interpretative activity develops so intensively and comprehensively, complementing and developing the thoughts contained in positive legislation. It has such a pronounced characteristic of independent creativity, and by the power of its intrinsic value, it has such a strong influence on the development of administrative law that, in such a state of affairs, the case law of the A.C. may be regarded as a separate, very important source of this law.[2]

This study aims to show the importance of the judicial-administrative jurisprudence arising within the framework of the control exercised over the activity of the public administration in the field of civil status registration – its role in the process of interpretating the law. In relation to the above, the issue of civil status registration is currently regulated by the Act of 28 November 2014 on Civil Status Certificates (the "CSC Act")[3], which replaced the Act of 29 September 1986 on Civil Status Certificates (the "CSC Act of 86")[4] and implementing acts. Civil status registration constitutes a public task of government administration that is performed by the head of the civil status office or their deputy(s), and outside the country to some extent by the consul or a person appointed to perform those functions. Facts normalised by private law, namely the provisions of the Act of 25 February 1964 – Family and Guardianship Code (the "FGC" Act)[5] are also relevant to this registration, along with the provisions of the Act of 23 April 1964 – Civil Code (the "CC" Act)[6] on civil status as a personal good set out in Article 23 thereof, the provisions of the Act of 17 November 1964 – Code of Civil Procedure (the "CCP" Act)[7], as well as the Act of 4 February 2011 – Private International Law (the "PIL" Act)[8].

Given that civil status is the legal situation of a person, expressed in terms of the characteristics that define them, and is documented in a specific type of primary public document – a civil status certificate confirming legally relevant facts and with a specific evidentiary role in proving a person's civil status, it should be noted that, apart from certain exceptions, all events that determine that status are confirmed in these certificates.

In recent years, as the phenomenon of internationalisation of personal and family relations has intensified, the problem of proving events concerning Polish citizens subject to the registration obligation

1 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 21, 34, 179–180.

2 Ibid., 179–180.

3 Ustawa z dnia 28 listopada 2014 r. Prawo o aktach stanu cywilnego [The Act of 28 November 2014 on Civil Status Certificates] [2023] JoL 1378.

4 Ustawa z dnia 29 września 1986 r. – Prawo o aktach stanu cywilnego [The Act of 29 September 1986 on Civil Status Certificates] [2011] JoL 212.

5 Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy [The Act of 25 February 1964 – Family and Guardianship Code] [2023] JoL 2809.

6 Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny [The Act of 23 April 1964 – Civil Code] [2024] JoL 1061.

7 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [The Act of 17 November 1964 – Code of Civil Procedure] [2023] JoL 1550.

8 Ustawa z dnia 4 lutego 2011 r. Prawo prywatne międzynarodowe [The Act of 4 February 2011 – Private International Law] [2023] JoL503.

that took place outside the borders of the Republic of Poland has gained importance. In connection with this, in Articles 104-107 of the CSC Act, the legislator has provided for the institution of transcription of the civil status certificate otherwise referred to as location[9], carried out by the relevant public administration bodies. Against this background, it should be noted that in the jurisprudence practice of the Polish administration bodies more and more cases of the location of civil status certificates are birth certificates in which same-sex couples (homosexual spouses or people living in a homosexual partnership) are indicated as parents interested in transferring the birth certificates of adopted children, biological children of one of the partners adopted by the other partner or born to a surrogate mother and later acknowledged or adopted by a homosexual couple[10]. The decisions of the heads of the civil registry office refusing the transcription of a birth certificate and the decisions of provincial governors upholding the decisions of those heads of the civil registry office in such cases are subject to the control of administrative courts. The analysis of their rulings will show that, on the grounds of the Act of 30 August 2002 on Proceedings Before Administrative Courts (the "PBAC" Act)[11] and the Act of 25 July 2002 on the System of Administrative Courts (the "SOAC" Act)[12], the problem of the importance of judicial-administrative jurisprudence – its role in the process of interpreting administrative law – remains a topical one. Its presentation, however, needs to be preceded by remarks on the institution of transcription, along with a reference to selected judgments of administrative courts and a resolution of a panel of seven judges of the Supreme Administrative Court.

2. The essence of transcription, i.e. the location of a civil status certificate

The institution of transcription consists in transferring a foreign civil-status certificate that is evidence of an event and registering it in the civil-status register. The content of the document recognised in the country of issue as a civil status document with the authority of an official document, issued by a competent authority, which does not raise any doubts as to its authenticity, is subject to a faithful and literal transfer by the head of the civil registry office, who may not introduce any changes to its content. The function of this institution thus comes down to reproducing – transcribing – the content of a foreign civil status document into the Polish register of civil status in accordance with the official language in force in Poland and in a form appropriate to the national registration of events affecting the civil status of a person[13]. It is there-

9 Cf M Wojewoda, 'Transkrypcja zagranicznego dokumentu stanu cywilnego – kilka uwag na temat ewolucji konstrukcji w prawie polskim' [Transcription of a Foreign Civil Status Document – A Few Comments on the Evolution of the Structure in Polish Law] (2021) Metryka. Studia z prawa osobowego i rejestracji stanu cywilnego vol. 2, 52, footnote 13; M Wojewoda, 'Uznanie rozstrzygnięć organów państw obcych a przesłanki transkrypcji zagranicznych aktów stanu cywilnego' [Recognition of Decisions of the Authorities of Foreign Countries and the Conditions for Transcription of Foreign Civil Status Certificates] (2018) Studia Prawno-Ekonomiczne 2018, vol. 109, 164; P Wypych, 'Charakter prawny transkrypcji aktu stanu cywilnego sporządzonego za granicą' [Legal Nature of Transcription of a Civil Status Certificate Prepared Abroad] (2003) Kwartalnik Prawa Prywatnego vol. 1, 191.

10 M Zachariasiewicz, 'Transkrypcja aktów urodzenia dzieci par jednopłciowych' [Transcription of Birth Certificates of Children of Same-sex Couples] (2019) Studia Prawno-Ekonmiczne vol. 111, 146.

11 Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi [Act of 30 August 2002 on Proceedings Before Administrative Courts] [2024] JoL 935.

12 Ustawa z dnia 25 lipca 2002 r. Prawo o ustroju sądów administracyjnych [Act of 25 July 2002 on the System of Administrative Courts] [2024] JoL 1267.

13 Cf *inter alia* the judgment of the PSC III CSK 380/06 [2007] Lex 457689; decision of the PSC III CSK 296/14 [2015] Lex 1712817. See in the literature: J Jagoda, 'Odmowa dokonania transkrypcji zagranicznego dokumentu stanu cywilnego z powodu sprzeczności z podstawowymi zasadami porządku prawnego' [Refusal to Transcribe a Foreign Civil Status Document Due to Contradiction with the Basic Principles of the Legal Order] (2022) Białostockie Studia Prawnicze 27(3), 143.

fore technical by nature[14]. Transcription is a declaratory act and not affecting the assessment of the substantive legal effects of the events stated therein[15], in the sense that these effects – legally created and recognised by the state that issued the document in question – do not extend to the Polish legal area[16]. Consequently, the act created as a result of transcription, on the one hand, does not differ in content from the transcribed act, and on the other hand, it does not differ from civil status certificates registering domestic events in terms of form, evidential validity or rules of correction[17]. In other words, it enters into legal circulation on general principles[18], "detaching itself" from the original act registering the event[19].

Transcription of a civil status certificate is carried out by the head of the civil registry office at the request of the person affected by the event subject to transcription or any other person who demonstrates a legal interest in the transcription or an actual interest in the transcription of the death certificate. It is also possible to transcribe the act *ex officio* (see Article 104(6) CSC Act). In addition, the legislator has provided for the institution of obligatory transcription[20]. It is performed pursuant to the provisions of Article 104(5) of the CSC Act in three cases. Firstly, if a Polish citizen who is the subject of a foreign civil status document holds a civil status certificate confirming previous events, drawn up on the territory of the Republic of Poland and demands that civil status registration be carried out. Secondly, it is compulsory to transcribe the certificate if the citizen applies for a Polish identity document and thirdly, if he applies for a PESEL number.

The transfer of a civil status certificate takes a different legal form from an administrative decision. The competent authority performs a material and technical act[21]. As a general rule, when carrying out a transcription, the authority does not carry out a substantive assessment of the acts subject to it[22], but

14 Attention to this feature has been drawn in the case law of the Polish Supreme Court. See decision of the PSC V CK 6/2002 [2003] Lex 82443; decision of the PSC III CZP 12/2011 [2011] Lex 847153; decision of the PSC III CSK 259/2010 [2011] Lex 1129120; resolution of the PSC III CZP 58/12 [2012] Lex 1227013.

15 P Wypych (2003) 192.

16 M Pillich, 'Mater semper certa est? Kilka uwag o skutkach zagranicznego macierzyństwa zastępczego z perspektywy stosowania klauzuli porządku publicznego' [Mater Semper Certa Est? A Few Comments on the Effects of Foreign Surrogacy from the Perspective of the Application of the Public Policy Clause] (2018) Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego vol. 16, 12; M. Zachariasiewicz (2019) 148.

17 See judgments: Regional Administrative Court in Gliwice II SA/Gl 1157/15 [2016] Lex 2035383; Regional Administrative Court in Warsaw IV SA/Wa 270/10 [2010] Lex 779862; decisions of the PSC III CSK 380/06 [2007]; decisions of the PSC III CSK 259/10 [2011].

18 Cf P Kasprzyk, P Mostowik, P Skubiszewski, 'Transkrypcja zagranicznych dokumentów stanu cywilnego' [Transcription of Foreign Civil Status Documents] in P Kasprzyk (ed), *Podręcznik urzędnika stanu cywilego* [Civil Registrar's Manual] (Fundacja Instytut Naukowy im. prof. Józefa Litwina 2018) 283–314.

19 Resolution of the PSC III CZP 58/12 [2012].

20 As is clear from the explanatory memorandum to the Draft Act on Civil Status Certificates, the intention of the legislator was "to ensure that a Polish citizen for whom a civil status certificate has been drawn up in the Republic of Poland, and who holds later civil status certificates drawn up abroad, transcribes these certificates in order to ensure continuity of knowledge about the person in the state registers if that person intends to maintain his relationship with the country. (...) A single act of transcription will relieve a Polish citizen from using foreign documents before domestic public administration authorities and from the obligation to translate them more than once for the purposes of the explanatory proceedings in progress". See the Explanatory Memorandum to the Draft Act on Civil Status Certificates, Parliamentary Print No. 2620, 49.

21 See D Tykwińska-Rutkowska, 'Czynność materialno-techniczna' [Material and Technical Activity] in E Bojanowski, K Żukowski (eds), *Leksykon prawa administracyjnego. 100 podstawowych pojęć* [Lexicon of Administrative Law. 100 Basic Concepts] (CH Beck 2009) 39–41.

22 M Wojewoda, 'Kolizyjnoprawne aspekty rejestracji stanu cywilnego' [Conflict of Law Aspects of Civil Status Registration] in M Pazdan (ed), *Prawo prywatne międzynarodowe* System Prawa Prywatnego [Private International Law, Private Law System] (CH Beck 2015) 597.

only a check as to the fulfilment of formal conditions. This is a consequence of being bound by the general principle of confidence in a foreign civil status document[23].

Pursuant to Article 107 of the CSC Act, the head of the civil registry office shall issue an administrative decision to refuse transcription in the specifically enumerated cases outlined in the statute. This provision establishes narrowly defined limits for this institution, which has become the standard under the currently applicable law[24]. Transcription is refused in three main cases. First, if the document is not recognised as a civil-status document in the State of issue, or does not have the force of an official document, or was not issued by a competent authority, or raises doubts as to its authenticity, or confirms an event other than birth, marriage or death. Secondly, if the foreign document is the result of a transcription in a country other than the country of the event. Thirdly, if the transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland (public policy clause[25]). At this point, it is worth noting that Article 107(3) of the CSC Act, "allows the refusal of a transcription if the transcription itself is contrary to the Polish legal order"[26]. It is disputed in the literature whether this provision also applies in the case of obligatory transcription[27].

3. Problems of transcription of birth certificates of children of same-sex parents as interpreted by administrative courts

Pursuant to Article 1 of the PBAC Act, the basic function of administrative courts and the proceedings pending before them is to exercise the administration of justice through control activities over the performance of public administration[28]. In accordance with Article 1 § 2 of the PBAC Act it is the control of compliance with the law, i.e. legality of public administration activities. The court, using the methodology of control over the interpretation of law, leads to elimination of illegal acts and actions of public administration bodies from the legal turnover, and also prevents violations of law in the future[29]. Both functions of judicial control – repressive as well as preventive – affect the unification of interpretation and application of administrative

23 M Wojewoda, 'Transkrypcja aktu urodzenia dziecka, które zostało uznane za granicą' [Transcription of the Birth Certificate of a Child Recognized Abroad] (2017) Kwartalnik Prawa Prywatnego 26(2), 338.

24 M Wojewoda (2021) 53.

25 See comments on the public policy clause under the CSR Law: J Gajda, 'Klauzula porządku publicznego w prawie o aktach stanu cywilnego z 29 września 1986 r. oraz z 28 listopada 2014 r.' [Public Order Clause in the Act on Civil Status Certificates of September 29, 1986 and November 28, 2014] (2015) Administracja: teoria – dydaktyka – praktyka 4(41), 14.

26 E Przywiślak-Urbanek, 'Aktualne orzecznictwo sądów administracyjnych dotyczące rejestracji pochodzenia dziecka od osób tej samej płci' [Current Case Law of Administrative Courts Regarding the Registration of a Child's Descent from People of the Same Sex] in J Gołaczyński, W Popiołek (eds), *Kolizyjne i procesowe aspekty prawa rodzinnego* [Conflict and Procedural Aspects of Family Law] (CH Beck 2018) 151–160.

27 See J Gajda (2015) 42; M Wojewoda (2017) 350; J Pawliczak, 'Odmowa transkrypcji zagranicznego aktu urodzenia dziecka, w którym jako rodziców wskazano dwie kobiety. Glosa do uchwały NSA z dnia 2 grudnia 2019 r., II OPS 1/19' [Refusal to Transcribe a Foreign Child's Birth Certificate Indicating Two Women as Parents. Glosa to the Resolution of the Supreme Administrative Court of 2 December 2019, II OPS 1/19] (2021) State and Law vol. 1, 146–156.

28 T Woś, in T Woś (ed), *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz* [Act on Proceedings Before Administrative Courts. Commentary] (Wolters Kluwer 2016) 25.

29 L Leszczyński, 'Orzekanie przez sądy administracyjne a wykładnia prawa' [Adjudication by Administrative Courts and the Interpretation of Law] (2010) Zeszyty Naukowe Sądownictwa Administracyjnego vol. 5–6, 267–268.

law by public administration bodies[30], as well as administrative courts. Indeed, the important role of administrative courts in the process of the correct shaping of the interpretation of administrative law[31] needs to be emphasised. They participate in determining the meaning of certain provisions of law or fragments thereof, making the so-called operative interpretation (decisional[32]) in the course of considering a particular administrative court case and, moreover, in the case of the Supreme Administrative Court, by adopting resolutions. Although resolutions constitute the area of non-judicial activity of this court, it directly influences judicial-administrative jurisprudence and, in a broader perspective, also administrative jurisprudence (preventive function of judicial control)[33]. For, as J.P. Tarno notes, they serve to shape: "a certain style of behaviour that is supposed to realise the values that are assumed in a democratic state of law"[34].

In the context of the issue of the transcription of foreign birth certificates of children of same-sex parents, it should be noted that until 2 December 2019, i.e. the adoption of the resolution of the panel of seven judges of the Supreme Administrative Court of 2 December 2019, II OPS 1/19, the rulings of administrative courts in recent years in cases on complaints against administrative decisions refusing it[35], or against the material and technical act of transcription[36], could be divided into two main groups. Firstly, these are the judgments which advocated the inadmissibility of transcription of such acts, such as the judgment of the Supreme Administrative Court of 17 December 2014, II OSK 1298/13 issued on the grounds of the CSC Act of 86, and in the current state of the law, among others, the judgments of the Supreme Administrative Courts: of 20 June 2018, II OSK 1808/16; of 11 February 2020, II OSK 1330/17; of 17 February 2021, II OSK 2284/18, as well as judgments of the Regional Administrative Courts: in Łódź of 14 February 2013, III SA/Łd 1100/12; in Gliwice of 6 April 2016, II SA/Gl 1157/15; in Warsaw of 14 April 2016, IV SA/Wa 182/16; in Cracow of 10 May 2016, III SA/Kr 1400/15; in Warsaw of 20 October 2016, IV SA/Wa 1784/16; in Łódź of 5 February 2020, III SA/Łd 617/19; in Wrocław of 15 December 2020, IV SA/Wr 312/20.

30 T Woś (2016) 29.

31 A Skoczylas, 'Problem zachowania jednolitości orzecznictwa sądów administracyjnych' [The Problem of Maintaining the Uniformity of the Jurisprudence of Administrative Courts] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Sądowa kontrola administracji publicznej* System Prawa Administracyjnego [Judicial Control of Public Administration, Administrative Law System] (CH Beck 2016) 690; JP Tarno, *Naczelny Sąd Administracyjny a wykładnia prawa administracyjnego* [Supreme Administrative Court and the Interpretation of Administrative Law] (DIFIN 1999) 173–174.

32 M Zieliński, 'Rodzaje wykładni prawa' [Types of Interpretation of Law] in M Zieliński (ed), *Wykładnia prawa. Zasady, reguły, wskazówki* [Interpretation of the Law. Rules and Tips] (LexisNexis 2012) 59–61.

33 J Zimmermann, *Prawo administracyjne* [Administrative Law] (Wolters Kluwer 2012) 405.

34 JP Tarno (1999) 136–137.

35 Rulings of administrative courts on the review of rulings of competent public administration bodies in matters of citizenship, identity cards or passports, which are detailed administrative cases in relation to the general case for the transcription of a civil status certificate, although they remain closely related, have been excluded from the analysis. Cf P Mostkowik, *Problem rejestracji w polskich aktach urodzenia pochodzenia dziecka od "rodziców jednopłciowych" na tle orzecznictwa sądów administracyjnych w 2018 r.* [The Problem of Registering a Child's Descent from "Same-sex Parents" in Polish Birth Certificates Against the Background of the Case Law of Administrative Courts in 2018] (Instytut Wymiaru Sprawiedliwości 2019) 10–11; E Przywiślak-Urbanek (2018) 151–160.

36 See the judgment of the Regional Administrative Court in Cracow III SA/Kr 233/19 [2019] Lex 2691369; the judgment of the Regional Administrative Court in Szczecin II SA/Sz 1075/19 [2020] Lex 2956995. The admissibility of challenging a substantive and technical act of transcription in proceedings before an administrative court has been questioned in the literature. See M Wojewoda, 'O przypadkach dokonanej transkrypcji aktów urodzenia dzieci par jednopłciowych' [About Cases of Transcription of Birth Certificates of Children of Same-sex Couples] (2021) Problemy Prawa Prywatnego Międzynarodowego vol. 28, 148–151.

In the opinion of the deciding courts, under the previously applicable CSC Act of 86, refusals to transcribe were made on the basis of the public policy clause in Article 7 of the PIL Act, indicating that the location would produce effects contrary to the fundamental principles of the legal order of the Republic of Poland[37] in conjunction with Articles 7(4) and 73(1) of the CSC Act of 86 in conjunction with the provisions of the CCA contained in Section Ia "Parents and Children", Chapter I "Origin of the Child", Chapter II "Relationship between Parents and Children" and Section II "Adoption". In the current state of the law, a clear legal basis in this respect has been introduced in Article 107(3) of the CSC Act, from which it follows that the head of the civil registry office refuses a transcription if this would be contrary to the fundamental principles of the legal order of the Republic of Poland.

In these judgements it was indicated, inter alia, following the view expressed in the Polish Supreme Court decision of 26 February 2003, II CK 13/03, that the basic principles of the legal order are the fundamental principles of the socio-political system, i.e. constitutional principles, but also the main principles governing individual areas of law, including civil, family and procedural law[38]. Hence, for the purpose of the public policy clause in the analysed judgments it was assumed that in accordance with Article 18 of the Constitution of the Republic of Poland, marriage is a union of a man and a woman – therefore the notions of parenthood and parents should be referred to people of different sexes[39]. Moreover, it was pointed out that these concepts have a legal nature, i.e. the basic principles set out in Polish family law concerning the determination of maternity and paternity, and indirectly other provisions, e.g. Article 115 § 1 of the FGC Act concerning adoption by spouses, i.e. people of different sex[40], are decisive for the determination of the child's origin. This position, according to the content of the analysed judgments, is also confirmed by provisions of other laws, e.g. Article 42 CSC Act of 86 – in the current legal state Article 60 CSC Act – concerning the content of civil status certificates and the provisions of executive acts specifying the templates of these certificates[41]. Both in the previous and in the current legal state, the template of the birth certificate provides for the mother and the father to be entered on the certificate. Even if, in the opinion of the Supreme Administrative Court expressed in its judgment of 17 December 2014, II OSK 1298/13, the rubrics in the templates had other terms, e.g. parent or parents, in Polish law these terms are understood as mother and father. Moreover, as the cited court expressly emphasised, Polish law does not know the institution of same-sex parents nor does it provide for the possibility of sanctioning such a family on legal grounds, and the term "same-sex parents" constitutes a *contradictio in se,* as no child can be conceived from a same-sex union.

37 See judgment of the Supreme Administrative Court II OSK 1298/13 [2014] Lex 1772336; judgment of the Regional Administrative Court in Łódź III SA/Łd 1100/12 [2014] Lex 1287159.

38 See *inter alia* judgments of the Supreme Administrative Court: II OSK 1298/13 [2014]; II OSK 1808/16 [2018] Lex 2513922; II OSK 1330/17 [2020] Lex 3062328.

39 See *inter alia* judgment of the Supreme Administrative Court II OSK 1298/13 [2014].

40 See *inter alia* judgments of the Supreme Administrative Court: II OSK 1808/16 [2018] and II OSK 1330/17 [2020].

41 See the rozporządzenie Ministra Spraw Wewnętrznych i Administracji z 26 października 1998 r. w sprawie szczegółowych zasad sporządzania aktów stanu cywilnego, sposobu prowadzenia ksiąg stanu cywilnego, ich kontroli, przechowywania i zabezpieczenia oraz wzorów aktów stanu cywilnego, ich odpisów, zaświadczeń i protokołów [Ordinance of the Minister of Internal Affairs and Administration of 26 October 1998 on the detailed rules for drawing up civil status certificates, the manner of keeping civil status books, their control, storage and security, and the templates of civil status certificates, their copies, certificates and protocols] [1998] JoL 884, and now rozporządzenie Ministra Spraw Wewnętrznych z 29 stycznia 2015 r. w sprawie wzorów dokumentów wydawanych z zakresu rejestracji stanu cywilnego [Ordinance of the Minister of Internal Affairs of 29 January 2015 on the templates of documents issued from the scope of the civil status register] [2015] JoL 194.

In view of the above, in this group of rulings the administrative courts assumed that the transcription of a child's birth certificate in which two people of the same sex are indicated as parents would be contrary to the legal order in force in the territory of the Republic of Poland, which was understood as the impossibility to reconcile it with the values considered fundamental by the Polish legal system[42]. At the same time, the courts emphasised that the refusal of transcription does not lead to a violation of international and EU law regulations, specifically Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as Article 7 and Article 21 of the Charter of Fundamental Rights of the European Union[43]. In the judgment of the Supreme Administrative Court of 17 December 2014, II OSK 1298/13, the panel of judges indicated that the refusal to enter the child's birth certificate in the civil status book, in which two women are indicated as parents, does not violate the applicants' right to respect for family and private life, since the subject of the proceedings was neither the applicants' family nor private life, but only the formal conditions required for the entry of a civil status certificate. On the other hand, with regard to the violation of Article 21 of the Charter, the Regional Administrative Court in Warsaw, in its judgment of 20 October 2016, IV SA/Wa 1784/16, noted that the refusal to enter the child's birth certificate does not affect the child's or her mother's right to freedom of movement within the Union or the right to freedom of residence in the Republic of Poland or in the competent State according to the child's place of birth.

Secondly, these are rulings which allow for the transcription of a foreign birth certificate of a child in which same-sex people are entered as parents, which include, among others, the judgments of the Supreme Administrative Courts: of 22 August 2018, II OSK 2129/16; of 10 October 2018, II OSK 2552/16; of 27 February 2023, II OSK 388/2020; and judgments of the Regional Administrative Courts: in Poznań of 5 April 2018, II SA/Po 1169/17; in Cracow of 4 June 2019, III SA/Kr 233/19. These judgments were made in a different factual situation, in which Article 104(5) of the CSC Act concerning the so-called obligatory transcription was applied.

In the aforementioned rulings, the courts pointed out that the actions of the authorities taken on the basis of Article 107(3) of the CSC Act in an unreflective manner, in the logical layer, are correct, because in the light of the provisions of Polish family law, the mother is the woman who gave birth to the child and the father is the man, regardless of how this paternity is established[44]. Nevertheless, the authorities should bear in mind the fact of the obligatory nature of transcription resulting from Article 104(5) of the CSC Act. In their opinion, it is not lawful not to implement the obligation of transcription resulting directly from the provisions of the law – this obligation was therefore referred to the public administration body – with reference to Article 107, point 3 of the CSC Act applicable in the case of optional transcription[45]. If the legislator did not want a special procedure for the situations specified in Article 104(5) of the CSC Act, it would not have introduced changes to the solutions existing on the grounds of the CSC Act of 86.

The obligation to make a transcription of a foreign civil status certificate is therefore, in the opinion of the administrative courts, part of a broader system of the protection of children's rights established not only by the Constitution of the Republic of Poland in force, but also by acts of international law[46]. Therefore, the interpretation of the provisions of the CSC Act concerning

42 See *inter alia* judgment of the Regional Administrative Court in Warsaw IV SA/Wa 182/16 [2016] Lex 2459345.
43 See judgment of the Regional Administrative Court in Gliwice II SA/Gl 1157/15 [2016].
44 See judgment of the Regional Administrative Court in Poznań II SA/Po 1169/17 [2018] Lex 2478177.
45 See judgment of the Supreme Administrative Court II OSK 2552/16 [2018] Lex 2586953.
46 See judgment of the Regional Administrative Court in Cracow III SA/Kr 233/19 [2019].

the transcription of birth certificates of children of Polish citizens in which people of the same sex are indicated as parents should be performed in a broader constitutional context – constitutional standards for the protection of children's rights, inter alia the right to health care and the right to education (Article 68(3) and (5) and Article 70(1), (2) and (4) of the Constitution of the Republic of Poland) – and in consideration of the provisions of the Convention on the Rights of the Child, from which it follows that it is the state that should take appropriate legislative and administrative steps to safeguard the interests of the child[47]. Thus, it is other goods and interests, e.g. the principle of parenthood, that should give way to the welfare of the child, in particular in the case of contradictions between laws[48]. This clause, in the opinion of the Regional Administrative Court in Poznań, which agrees with the views of the doctrine, is in fact "a means of adapting statutory law to specific life situations, by means of the competence given to the body applying the law to use, in certain cases, extra-legal assessments and rules"[49]. A child who does not have confirmed citizenship – *nota bene* acquired by operation of law – as emphasised by the Regional Administrative Court in Cracow in its judgement of 4 June 2019, III SA/Kr 233/19, is only a potential and presumed citizen, in fact cannot exercise the rights vested exclusively in a Polish citizen. The Supreme Administrative Court made a similar statement in its judgment of 10 October 2018, II OSK 2552/16. Without questioning the legitimacy of the application of the public policy clause in general, this court emphasised, referring to the jurisprudence of the CJEU[50], that the notion of public policy as a justification for a derogation from the fundamental action of transcription should be interpreted narrowly, taking into account the specific realities of the case at hand and the serious threats to one of the fundamental interests of society.

Therefore, as a consequence of the pro-constitutional interpretation of the provisions of the CSC Act in the opinion of the Supreme Administrative Court as expressed in the judgment of 10 October 2018, II OSK 2552/16, as well as the judgment of the Regional Administrative Court in Poznań of 5 April 2018, II SA/Po 1169/17, there are no obstacles to the transcription of the birth certificate of a child of Polish citizens in which same-sex people are indicated as parents, since, as emphasised by the Regional Administrative Court in Cracow in its judgment of 4 June 2019, III SA/Kr 233/19 it is the failure to transcribe the birth certificate that would violate the basic legal order and lead to a situation in which a citizen, having not received identity documents, would not be able to materialise subjective rights.

Transcription may also be made if the child was born as a result of a medically assisted procreation procedure as a consequence of a surrogacy agreement and two men are indicated on the birth certificate. In the opinion of the Supreme Administrative Court, expressed in the judgment of 29 August 2018, II OSK 2129/16, the refusal to transcribe the child's birth certificate leads to questioning the origin of the minor from the applicant father based on the regulations and presumptions set out in the Family and Guardianship Code, which stipulate that the establishment of paternity depends on the prior establishment of maternity. According to the Supreme

47 See judgment of the Regional Administrative Court in Poznań II SA/Po 1169/17 [2018]; the judgment of the Supreme Administrative Court II OSK 2129/16 [2018] Lex 2563851.

48 Judgment of the Regional Administrative Court in Poznań II SA/Po 1169/17 [2018]. Cf judgments of the Polish Constitutional Court: of 28 April 2003, K 18/02 (2003) Lex 78052; of 11 October 2011, K 16/10 (2011) Lex 992832; of 21 January 2014, SK 5/12 (2014) Lex 1415468.

49 See judgment of the Regional Administrative Court in Poznań II SA/Po 1169/17 [2018].

50 See judgments of the CJEU C-438/14 EU:C:2016:401 para. 67, and C-193/16 EU:C:2017:542 para. 18 and the case law cited therein.

Administrative Court, referring to the ECtHR case law, "allowing a legal presumption to prevail over biological and social reality – irrespective of the established facts and the will of those concerned in a situation where this is of no benefit to anyone – is incompatible with the State's obligation to effectively respect private and family life, even taking into account the extent of the State's freedom in this sphere."[51].

Since two currents of jurisprudence have formed in the jurisprudence, the Supreme Administrative Court, having examined on 17 April 2019 at a hearing in the General Administrative Chamber the cassation appeal of M.Z. against the judgment of the Regional Administrative Court in Warsaw of 20 October 2016, IV SA/Wa 1784/16 issued in a case on M.Z.'s complaint against the decision of the provincial governor on the refusal to enter a foreign birth certificate in the civil status certificates by an order pursuant to Article 187 § 1 of the PBAC Act presented the following legal issue raising serious doubts to a panel of seven judges: "Whether the provision of Articles 104(5) and 107(3) of the Act of 28 November 2014 on Civil Status Certificates (...) in conjunction with Article 7 of the Act of 4 February 2011 – Private International Law (...), permits the transcription of a foreign birth certificate of a child in which same-sex people are entered as parents?"

The resolution of 2 December 2019, II OPS 1/19, addressing this issue, just like the first group of rulings by administrative courts, rule out such a possibility. According to this resolution, the effects of transcribing a foreign birth certificate of a child, where people of the same sex are listed as parents, are irreconcilable with the fundamental principles of the legal order. Although the role of the authority in the case of transcription – according to the Supreme Administrative Court expressed in the aforementioned resolution – boils down to determining whether the document to be entered into the Polish register of civil status is a copy of a civil status certificate, whether it is an original document drawn up in the country of original registration, and whether it complies with the fundamental principles of the legal order of the Republic of Poland, it does not involve translating it into the Polish language[52]. As part of the transcription, the head of the civil registry office may not provide a different content of the certificate than that which arises from the document, unless there is a need to adapt the data contained in the foreign document to the rules of the Polish spelling; however, he may omit some data that are irrelevant from the point of view of Polish law, and consider others as requiring supplementation[53]. At the same time the modifications do not mean the possibility of such far-reaching changes which would lead to the content of the foreign act being in conflict with the Polish civil status certificate created as a result of the transcription, e.g. the relocation of the father's data with the data of a woman who is not the child's mother but is entered in the foreign certificate as the parent[54]. Indeed, in the light of the Supreme Administrative Courts position, the obligatory nature of the transcription does not exclude the application of the grounds for refusal listed in Article 107 of the CSC Act and, moreover, creates a higher standard of proof in the proceedings listed in Article 104(5) of the CSC Act. Moreover, these increased evidentiary requirements, in the Supreme Administrative Courts opinion, do not affect the principle confirmed by the Polish Supreme Court's resolution of

51 See judgment of the ECHR 77785/01 [1995] HUDOC § 35.
52 See resolution of the Supreme Administrative Court II OPS 1/19 [2019] Lex 2746435.
53 Ibid.
54 Ibid.

20 November 2012, III CZP 58/12[55], in the light of which foreign official documents have evidentiary force on an equal footing with Polish official documents. Thus, even a civil status certificate drawn up abroad and not entered in the Polish civil status books is excluded evidence of the events stated therein.

In the aforementioned resolution, the enlarged panel of seven judges of the Supreme Administrative Court also contained an important guideline for public administration bodies competent in matters of issuing identity cards, passports or assigning PESEL numbers as secondary to transcription cases. According to it, in those cases in which transcription is not possible because it threatens public order and the child's citizenship is not in doubt, the correct interpretation of Article 104(5) of the CSC Act, which assumes obligatory transcription, cannot lead to making the obtaining of an identity card or PESEL number by a Polish citizen conditional, although it should be remembered that these cases are completely separate and independent from the transcription case[56].

At this point, it should be noted that the resolution under review is of a specific nature, i.e. it contains the resolution of legal issues of fundamental importance in the case in which they arose. Thus, in this resolution, the Supreme Administrative Court clarified legal doubts of an exceptional nature – legal issues arose, the clarification of which caused difficulties due to the possibility of a different interpretation of legal provisions. This resolution, pursuant to Article 187 § 2 of the PBAC Act is absolutely binding in a given case[57], an individually designated panel of the Supreme Administrative Court and contains an interpretation of a specific provision of the law[58], although it also has a real impact on the adjudicatory activity of other administrative courts and public administration bodies, which take into account the position of the Supreme Administrative Court in similar cases (preventive function of judicial control)[59]. The assessment expressed in the cited resolution was binding on the court which referred the question to the panel of seven judges of the Supreme Administrative Court, as reflected in the judgment of the Supreme Administrative Court of 11 February 2020, II OSK 1330/17. This one does not have the possibility to deviate from the assessment constituting an answer to the question posed by it. At the same time, bindingness in this case applies to the entire further proceedings until their final conclusion. On the other hand, as examples of rulings of administrative courts in which there was a reference to a resolution of the Supreme Administrative Court, which, pursuant to Article 269 § 1 in connection with Article 187 § 1 and 2 of the PBAC

55 See resolution of the PSC III CZP 58/12 [2013] OSNC 5, 55.

56 The obligation of the competent national authority of a Member State to issue an identity card or passport to a minor child of same-sex parents without first transferring by transcription that child's birth certificate to the national civil status register has also been pronounced by the CJEU. See order of the CJEU C-2/21 EU:C:2022:502, para. 45. Cf judgment of the CJEU C 490/20 EU:C:2021:1008, paras 56, 57.

57 The withdrawal procedure normalized in Article 269 of the PBAC Act applies to specific resolutions, with the exception that its activation does not affect the bindingness of the earlier resolution in the case in which it was adopted. H Knysiak-Molczyk, 'Jednolitość orzecznictwa sądów administracyjnych' [Uniformity of the Jurisprudence of Administrative Courts] in DR Kijowski, J Radwanowicz-Wanczewska, JP Suwaj, M Wincenciak (eds), *Wykładnia i stosowanie prawa administracyjnego* [Interpretation and Application of Administrative Law] (Wolters Kluwer 2012) 21–40.

58 D Tykwińska-Rutkowska, 'Uwag kilka o sformalizowanych instrumentach wykładni prawa administracyjnego w działalności sądów administracyjnych' [A Few Remarks on Formalized Instruments of Judicial Interpretation of Administrative Law by Administrative Courts] (2017) Przegląd Prawa Konstytucyjnego 2(36), 107–131.

59 JP Tarno (1999) 174–175, 180.

Act, applied accordingly, indirectly binds all the adjudicating formations of administrative courts, as long as there is no change in this position[60] as a consequence of the court re-presenting the legal issue arising to the relevant panel of the Supreme Administrative Court to resolve it[61], it is worth indicating, among others, the judgments: Regional Administrative Court in Łódź of 5 February 2020, III SA/Łd 617/19 and Regional Administrative Court in Wrocław of 15 December 2020, II SA/Wr 312/20, which emphasise the importance of the resolution for the cohesion of the legal system of the interpretation of national laws.

4. Concluding remarks

The rulings of administrative courts and the resolution of the Supreme Administrative Court presented in the third part of the study undoubtedly show the influence of the interpretation made by the Regional Administrative Courts and the Supreme Administrative Court within the scope of the adjudicatory activity of the courts of first and second instance and the resolution of the Supreme Administrative Court on the activity of the administration, as Professor Kasznica pointed out, but also on the activity of administrative courts themselves. Both the judgments of the Regional Administrative Courts and Supreme Administrative Court, as well as resolutions of the Supreme Administrative Court can be seen as formalised instruments of interpretation of administrative law, in which administrative courts impose their interpretation of the law by virtue of the law, and thus have a wider or narrower impact, depending on whether the interpretation is made for the needs of the *case* or the environment[62]. Obviously, the interpretation made in judgments of higher instance court – the Supreme Administrative Court – versus lower instance courts – the Regional Administrative Courts – or public administration bodies has a broader impact[63]. It is in judgments, which constitute the most important procedural action of an administrative court[64], that both courts of first instance, as well as the Supreme Administrative Court in the second instance, as J.P. Tarno notes, interpret the provisions of administrative law in a broader sense[65] – *ad casum* they interpret them in particular in cassation judgments binding on the authority and any court – even the Supreme Administrative Court – ruling again on the case[66]. *De facto*, the overtones of this interpretation are broader, as it also affects the handling of other cases – the same or similar to those which were the subject of the court's ruling – so it

60 Cf in jurisprudence: the judgment of the Supreme Administrative Court II FSK 147/14 [2014] Lex 2036424; judgment of the Regional Administrative Court in Łódź III SA/Łd 617/19 [2020] Lex 2791329.

61 See the possibility of reconsidering the legal issue pursuant to Article 269 § 1 PBAC Act in another case concerning the transcription of a birth certificate was pointed out in the judgment of the Supreme Administrative Court II OSK 2284/18 [2021] Lex 3242716. The panel stressed that this would be possible when, in a transcription case, there had already been a final and legally valid refusal to issue a Polish identity document to a Polish citizen for the sole reason that he had been refused transcription of his foreign birth certificate solely because a birth certificate revealing same-sex parents was to be transferred to the civil status register.

62 It is also possible to point to an alternative way of imposing the effect of interpretative activity on other entities – acting by force of fact. Cf E Łętowska, 'Uwag kilka o praktyce wykładni' [A Few Remarks on the Practice of Interpretation] (2002) Kwartalnik Prawa Prywatnego vol. 1, 34.

63 Cf Ibid.

64 T Woś (2016) 764.

65 JP Tarno (1999) 32.

66 As far as the impact of the administrative court's decision on the completed administrative proceedings and the decisions made in them is concerned, it is usually connected with the very operative part of this decision. See T Woś (2016) 890–891.

will be an important guideline in the process of interpreting administrative law for public administration bodies[67]. On the other hand, when the Supreme Administrative Court adjudicates as an appellate court, the essence of being bound by the interpretation of the law expressed by this court comes down to ensuring greater uniformity of jurisprudence and, moreover, limiting re-appeal of the ruling issued by the court of first instance, as a consequence of acknowledging the possibility of the appellate court to interpret legal provisions more accurately than the court of first instance[68]. The functions of the Supreme Administrative Court thus determine that the reach of the interpretation of the law by this court will be wider[69].

On the other hand, resolutions of the Supreme Administrative Court are a qualitatively different instrument of interpretation of administrative law than judgments, as it follows from Article 15 of the PBAC Act that they are aimed at ensuring the uniformity of the jurisprudence of administrative courts[70]. It follows from the definition of their subject matter that they are acts of interpretation of law[71]. At the same time, a resolution adopted pursuant to Article 15 § (1)(3) of the PBAC Act is an individual act of interpreting the law – it is binding on an individually designated panel of the Supreme Administrative Court in the case and contains an interpretation of a specific provision of the law. As J.P. Tarno notes, "the legal assessment contained therein constitutes the official line of Supreme Administrative Court jurisprudence", thus it has a real impact both on the jurisprudence activity of administrative courts and on the activity of public administration bodies, for which it also constitutes a model and a pattern to be used when adjudicating similar cases in the future, and leads to the creation of an element of normative novelty[72]. The assessment of their legal character in the literature on the subject is presented in various ways – from being regarded as an additional source of law next to the laws[73], to a peculiar legal phenomenon of a hybrid character, since, while not being sources of law, from the functional side they act like sources of law – determining in a binding manner the meaning of the interpreted legal norm[74].

67 J Dziedzic, *Sądowa kontrola administracji a wykładnia twórcza* [Judicial Control of Administration Versus Creative Interpretation] in DR Kijowski, J Radwanowicz-Wanczewska, JP Suwaj, M Wincenciak (eds) *Wykładnia i stosowanie prawa administracyjnego* [Interpretation and Application of Administrative Law] (Wolters Kluwer 2012) 131–145; JP Tarno (1999) 174.

68 B Dauter in B Dauter, M Niezgódka-Medek, A Kabta (eds), *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz* [Act on Proceedings Before Administrative Courts. Commentary] (Wolters Kluwer 2018) 697–704.

69 Cf the comments of JP Tarno (1999) 48.

70 See JP Tarno in JP Tarno (ed), *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz* [Act on Proceedings Before Administrative Courts. Commentary] (LexisNexis 2011) commentary on Art. 15.

71 E Bojanowski, 'Uchwałodawcza działalność Naczelnego Sądu Administracyjnego i jej znaczenie w systemie prawa' [The Legislative Activity of the Supreme Administrative Court and its Significance in the Legal System] in T Bąkowski, K Grajewski, J Warylewski (eds), *Orzecznictwo w systemie prawa* [Jurisprudence in the Legal System] (Wolters Kluwer 2008) 143.

72 See JP Tarno (1999) 174, 180.

73 D Dąbek, 'Między precedensem a źródłem prawa (o uchwałach Naczelnego Sądu Administracyjnego)' [Between Precedent and Source of Law (on Resolutions of the Supreme Administrative Court)] in T Bąkowski, K Grajewski, J Warylewski (eds), *Orzecznictwo w systemie prawa* [Jurisprudence in the Legal System] (Wolters Kluwer 2008) 205–206.

74 E Bojanowski, 'Utrwalona linia orzecznictwa (kilka uwagi na marginesie orzecznictwa sądów administracyjnych)' [Established Line of Case Law (A Few Remarks on the Margin of the Case Law of Administrative Courts)] in J Supernat (ed), *Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi* [Between Tradition and the Future in the Science of Administrative Law. An Anniversary Book Dedicated to Professor Jan Boć] (Wydawnictwo Uniwersytetu Wrocławskiego 2009) 50.

The quoted excerpts from the justifications of the rulings of administrative courts, mainly in cases concerning complaints against the decisions of provincial governors upholding the decisions of the heads of the civil registry office refusing to transcribe foreign birth certificates of children of same-sex parents, firstly, illustrate the variability of the jurisprudence of administrative courts in these cases over the years. This variability reflects doubts, primarily regarding the legal admissibility of such transcriptions[75]. For the time being, these doubts have been clarified by a specific resolution of a panel of seven judges of the Supreme Administrative Court of 2 December 2019, II OPS 1/2019, in which, similarly to the earlier judgments of the Regional Administrative Courts and the Supreme Administrative Court, numerous issues of a twofold nature – theoretical and practical – from the borderline of different fields of law, i.e. private and public, were raised as a consequence of the changing social conditions regarding the recognition of same-sex partnerships and the possibility to adopt or jointly raise children coming from one of the partners of such a union, and, moreover, the internationalisation of personal and family relations[76]. Secondly, both the judgments and the significant resolution, show the role of administrative courts, which are the foundation of a democratic state of law, after all, without them there is no rule of law[77], in "authoritatively interpreting the legal norms contained in legislative acts"[78].

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75 See the decision of the Supreme Administrative Court II OSK 1330/17 [2020].

76 Ibid.

77 JS Langrod, 'Sprawa reaktywacji sądownictwa administracyjnego' [The Case of Reactivation of Administrative Courts] (1999) Samorząd Terytorialny vol. 5, 72.

78 S Kasznica (1946) 179–180.

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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)(3) of the Act on Real Estate Management of 21 August 1997 (Journal of Laws of 2020, item

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.

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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Transformation of the General Administrative Procedure Model Under the Influence of the Pragmatisation, Automation, and Europeanisation of Administrative Jurisdiction

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Abstract
The model of the general administrative procedure in Poland is governed by the Code of Administrative Procedure of 14 June 1960. This act has undergone numerous amendments aimed at adapting the administrative procedure to the requirements of a democratic state governed by law and providing appropriate procedural guarantees to individuals. Despite the phenomena of decodification and atomisation of the administrative procedure resulting from specific regulations, the code model of administrative procedure remains the fundamental formal and procedural framework for the jurisdictional activities of administrative bodies. Contemporary trends in modernisation are characterised by several development directions, including: pragmatisation, which involves the de-formalisation of activities towards third-generation procedures; automation, which relies on electronic data processing systems and Europeanisation, encompassing the development of procedures integrated with European Union law. These trends lead to new institutions and legal regulations being introduced into the model of the general administrative procedure, such as simplified procedures, the tacit settlement of cases, electronic deliveries, the handling of cases using automatically generated documents and European administrative cooperation. With this in mind, the study focuses on the analysis and assessment of the impact of pragmatisation, automation and Europeanisation on code regulations governing administrative jurisdiction. It aims to formulate conclusions regarding the appropriateness of current amendments and propose recommendations for future changes.

Keywords
pragmatisation; automation; europeanisation; administrative procedure

1. Introduction

Poland is one of those countries with a codified administrative procedure. The Code of Administrative Procedure of 14 June 1960 (the CAP)[1] currently governs jurisdictional proceedings before public administration bodies in individual cases falling within the competence of these bodies (referred to as bodies in the organisational sense), which are resolved through administrative decisions or settled tacitly. It also applies to proceedings before other state bodies or entities appointed by law or agreements (bodies in the functional sense) to settle such cases. Additionally, it covers simplified proceedings for issuing certificates, handling complaints and applications, resolving competence disputes to some extent and procedures for European administrative cooperation (Articles 1 and 2). The CAP also includes substantive regulations concerning the imposition of administrative fines or granting relief in their execution.

Despite the phenomena of decodification and atomisation resulting from specific provisions that exclude, limit or modify the application of the CAP in certain cases, the code model of administrative procedure remains the fundamental formal and procedural framework for the jurisdictional activities of the administration. Therefore, in examining the transformation of the administrative procedure model in Poland, it is pertinent to focus on the normative changes affecting this legal act, particularly concerning the general administrative procedure.

When characterising this model, it is justified to adopt a dynamic perspective that emphasises changes in legal regulations and developmental trends, along with their impact on the scope of procedural guarantees, rather than a static approach that only considers the current legal state. The CAP has undergone numerous amendments in the past, aimed at aligning it with the requirements of a democratic rule of law, as stipulated in Article 2 of the Constitution of the Republic of Poland of 2 April 1997. These amendments have been instrumental in evolving the CAP to meet contemporary standards of administrative justice and procedural fairness.[2] The political transformation did not, however, end the process of development of the Polish administrative procedure. A particularly extensive amendment of the CAP was made in 2017[3] as a result of the work by an expert team,[4] although not all the changes postulated at that time were implemented. Therefore, this study pays particular attention to the current development trends manifested in the normative changes made in recent years. The examples cited, due to the limited framework of the publication, will be an exemplification of the dynamics of the development of the general administrative procedure, rather than an analytical characterisation of all the amendments to the CAP.

The development of legal institutions and procedures is always influenced by specific phenomena affecting the legal environment, legislative activity and the application of the law in practice. This impact is difficult to study due to its coupled and multidirectional nature. However, if specific phenomena are singled out as research patterns (criteria), it is possible to analyse and assess their

1 Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [Act of 14 June 1960 Code of Administrative Procedure] [2024] JoL 572.

2 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483 as amended.

3 Ustawa z dnia 7 kwietnia 2017 r. o zmianie ustawy – Kodeks postępowania administracyjnego oraz niektórych innych ustaw [Act of 7 April 2017 Amending the Act – Code of Administrative Procedure and Certain Other Acts] [2017] JoL 935.

4 See Z Kmieciak (ed), *Raport zespołu eksperckiego z prac w latach 2012–2016: Reforma prawa o postępowaniu administracyjnym* [Report of the Expert Team on the Work in the Years 2012–2016: Reform of the Law on Administrative Procedure] (Naczelny Sąd Administracyjny 2017).

impact on legal regulations. I consider the following to be particularly important contemporary trends in the development of administrative procedure: pragmatisation, associated with the deformalisation of activities towards third generation procedures;[5] automation, based on electronic data processing systems; and Europeanisation, involving the formation of proceedings integrated with European Union law.[6] These trends have resulted in the introduction of new institutions and legal regulations, such as: simplified proceedings, the tacit handling of cases, electronic delivery, the handling cases with automatically generated letters and European administrative cooperation. Therefore, the subject of this study is the analysis and evaluation, based on the dogmatic-legal method, of the impact of these phenomena on the regulation of the model of general administrative proceedings in Poland, together with the formulation of conclusions concerning the appropriateness of the current amendments and postulates for future changes.

2. Pragmatisation of the General Administrative Procedure

Pragmatisation is the process of shaping the legal framework of procedural institutions as well as the practical application of the law by administrative authorities in the spirit of pragmatism. However, this trend, developed especially in American doctrine, is sometimes understood in other ways.[7] Most often, *legal pragmatism* is combined with a theory of judicial adjudication that emphasises the practical aspects of applying the law, radically questioning the primacy of formalism.[8] In this view, the adjudication process should produce a decision with the most legitimate consequences, be mindful of its impact on the present and the future, adjudicate on the basis of all the facts relevant to the case, take into account that adjudication is situational or use practical reasoning, limiting the use of formalism as much as possible.[9] The pragmatic approach is also well illustrated by the trend of the reformation (and later counter-reformation) of administrative procedure, related to the participation of various interest groups in the proceedings and the limitation of discretionary actions of the administration.[10] "Pragmatism unstiffens all our theories, limbers them up, and sets each one to work."[11]

Procedural pragmatism is treated as a certain principle of administrative proceedings, according to which they are to be conducted efficiently, quickly and economically, with activities limited to the necessary minimum, with a clear focus on achieving a certain effect.[12] It is an attitude consist-

5 See J Barnes, *Transforming Administrative Procedure. Towards a Third Generation of Administrative Procedures* (Conference on Comparative Administrative Law 2016) 4, <https://law.yale.edu/sites/default/files/area/conference/compadmin/compadmin16_barnes_towards.pdf> accessed 5 Aug 2024.

6 See M Wilbrandt-Gotowicz, *Zintegrowane z prawem Unii Europejskiej postępowania administracyjne* [Administrative Proceedings Integrated with European Union Law] (Wolters Kluwer 2017).

7 See Ch Barzun, 'Three Forms of Legal Pragmatism' (2018) Washington University Law Review 95(5), 1003–1034.

8 See R Posner, 'Legal Pragmatism Defended' (2004) University of Chicago Law Review vol. 71, 683–690.

9 See K Łuczak, 'Zasady stosowania prawa przez sądy administracyjne a pragmatyzm prawny' [Principles of Application of Law by Administrative Courts and Legal Pragmatism] in Z Duniewska, M Stahl, A Krakała (eds), *Zasady w prawie administracyjnym. Teoria, praktyka, orzecznictwo* [Principles in Administrative Law. Theory, Practice, Case Law] (Wolters Kluwer 2018) 742.

10 S Shapiro, 'Pragmatic Administrative Law' (2005) Wake Forest University Legal Studies Research Paper Series 05-02, 22.

11 W James, *Pragmatism: A New Name for some Old Ways of Thinking* (The Floating Press 2010) 22.

12 J Wegner-Kowalska, 'Idea pragmatyzmu w postępowaniu administracyjnym' [The Idea of Pragmatism in Administrative Proceedings] in J Zimmermann (ed), *Aksjologia prawa administracyjnego* [Axiology of Administrative Law] (Wolters Kluwer 2017) 969.

ing in "striving for the selection of such tools for the implementation of the goals and objectives of the proceedings that take into account, to the greatest extent possible, the requirements of efficiency of action, considered through the prism of its basic components: effectiveness, efficiency and cost-effectiveness."[13]

The pragmatisation of administrative proceedings may manifest itself not only in a specific approach to the application of the law, but also in normative changes, leading to the development not only of administrative proceedings based on issuing individual acts (first-generation procedures) or general acts (second-generation procedures), but also of third-generation procedures related to the establishment of a permanent system of communication between agencies and between agencies and citizens, as well as the use of tools for the implementation of what is termed *good governance* – efficient management within the framework of public policies.[14]

The effect of pragmatisation is the contemporary shape of the general principles of administrative procedure. In particular, it is worth signalling the 2017 inclusion in the CAP of:

(1) the principle of resolving doubts about a rule of law in favour of a party in proceedings concerning the imposition of an obligation on a party or the restriction or withdrawal of a right from a party (Article 7a);
(2) the principles of cooperation between public administration bodies in the course of proceedings to the extent necessary to clarify thoroughly the factual and legal state of the case, taking into account the public interest and the legitimate interest of citizens and the efficiency of the proceedings, using measures that are appropriate to the nature, circumstances and complexity of the case (Article 7b);
(3) the principle of not deviating, without good cause, from the established practice of the administrative authority when resolving cases in the same factual and legal situation (Article 8 § 2);
(4) the principle of seeking an amicable settlement of disputes using not only administrative settlements but also mediation (Article 13).

Also important for the efficiency of the proceedings is the principle of speed and thoroughness, imposing an obligation on the authorities to use the simplest possible means to resolve the case (Article 12). In 2017, the relative nature of the principle of two-instance administrative proceedings was introduced, exempting this standard if a specific provision so provides (Article 15). Pragmatic considerations also support a possible derogation from ensuring that the parties are actively involved in every stage of the proceedings and that, before a decision is issued, they are given the opportunity to express their views on the evidence and materials collected and the demands made, as long as the handling of the case is not urgent due to a danger to human life or health, or due to irreparable material damage (Article 10 § 2).

In the justification of the draft of the extensive 2017 amendment of the Code, explicit reference was made to pragmatic ideas, pointing to the need to provide "a legal framework for a partnership approach of public administration to citizens through a less restrictive and formalistic use of power and the possibility to resolve cases contrary to the legitimate interests of the parties."[15]

13 Z Kmieciak, 'Pragmatyzm postępowania administracyjnego' [Pragmatism of Administrative Procedure] in W Jakimowicz, M Krawczyk, I Niżnik-Dobosz (eds), *Fenomen prawa administracyjnego. Księga jubileuszowa Profesora Jana Zimmermanna* [The Phenomenon of Administrative Law. Professor Jan Zimmermann's Anniversary Book] (Wolters Kluwer 2019) 499.

14 See J Barnes (2016) 4.

15 Explanatory Memorandum to the Government Bill of 7 April 2017 on amendments to the Code of Administrative Procedure and certain other acts, Parliamentary Print No. 1183, <https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1183> accessed 1 Aug 2024.

These demands were to be realised through the introduction of a simplified procedure of jurisdictional proceedings (Articles 163b-163g) and a form of settlement alternative to a decision through the tacit settlement of a case (Articles 122a-122h). Despite the experts' demands, neither the regulation of the administrative agreement nor the procedure for issuing general decisions was included in the CAP, which should be assessed critically.

The established model of the simplified procedure is mainly characterised by:

- being applicable only where this procedure is referred to by a specific provision;
- in principle the appearance of only one party to the proceedings;
- as a general rule, ending the proceedings tacitly;
- the possibility of initiating proceedings following an application by a party using the official form;
- restrictions on a party submitting new claims and evidence beyond the application initiating the proceedings;
- limited to evidence submitted by a party in conjunction with a request to initiate proceedings and evidence that is ascertainable on the basis of the data available to the authority conducting the proceedings, in the scope of the inquiry;
- a simplified statement of reasons for the decision, if it concludes the simplified procedure;
- exclusion of the contestability of most orders made during the proceedings;
- the possibility for the authority to proceed to a normal hearing if required in order to take into account new circumstances invoked by a party in the course of the proceedings.[16]

Alternatively, when the competent authority fully accepts the party's request, a case is tacitly settled by not issuing a decision, including a decision terminating the proceedings, within the statutory deadline (tacit termination of proceedings), or by not objecting via a decision (tacit consent). This implicit acceptance constitutes a positive decision for the party due to the administrative body's failure to act within the specified timeframe. In cases of tacit settlement, the party can request a certificate confirming the tacit settlement in the form of a decision, which is then subject to appeal. This alternative method of resolving an administrative case, compared to issuing a formal decision, is permissible only if specifically provided for by relevant provisions.[17]

The introduction of the above institutions into the model of general administrative procedure should be assessed positively, though the regulations on this subject are not without shortcomings and the lack of broader references in special provisions limits their application to a small category of cases. At the same time, the code model still does not explicitly take into account administrative proceedings of a hybrid nature, which are shaped in special provisions and constitute an expression of the regulatory diversification of administrative procedure. This is because selected areas of administrative proceedings have solutions based on the crossing of elements characteristic of different legal institutions and mechanisms. This diversification of procedural models and solutions may take, for example, the form of proceedings, in which the settlement in the form of a decision will take place only if it is not possible to settle the case in a non-jurisdictional mode through a material and technical activity (e.g. in cases of access to public information). This argues for a redefinition of the classical concept of administrative proceedings towards

16 See for example L Klat-Wertelecka, H Knysiak-Sudyka, 'Model administracyjnego postępowania uproszczonego' [Model of Simplified Administrative Proceedings] (2016) Państwo i Prawo vol. 7, 93–108; M Jaskowska, 'Postępowanie uproszczone w kodeksie postępowania administracyjnego i w prawie o postępowaniu przed sądami administracyjnymi' (2018) Zeszyty Naukowe Sądownictwa Administracyjnego vol. 4, 9–24.

17 See for example Z Kmieciak, M Gajda-Durlik, *Milczące załatwienie sprawy przez organ administracji publicznej* [Silent Handling of the Matter by a Public Administration Body] (Wolters Kluwer 2019).

a dynamic approach, encompassing actions aimed at settling a specific administrative matter in the form of a binding, external act (most often an individual administrative decision), as well as (in a broader sense) procedural complexes of a hybrid nature (mixed modes of administrative proceedings), one element of which may be a jurisdictional procedure, with the decision being an alternative form to a material-technical act or an administrative agreement.[18] The pragmatisation of administrative jurisdiction should therefore serve to open up legal regulations to the application of elements characteristic of third-generation procedures, if this serves to modernise administrative activity while guaranteeing procedural rights, which is not sufficiently emphasised in the current version of the CAP.

3. Automation of General Administrative Proceedings

Another phenomenon affecting the administrative procedure model is technological progress. Due to the speed of development and the extent of its impact, this process has been called the *digital tornado*.[19] It brings many unexpected effects related to the *endless spiral of connectivity*[20] between the administering and administered entities.

The technological revolution is influencing the integration of modern information and communication technologies (ICTs) into administrative activities. These can be used for a wide range of procedural activities, such as filing applications, making decisions, accessing case files, giving explanations, paying fees, serving letters, informing about a case, issuing orders, making settlements, presenting summonses or serving copies of files.[21] The conduct of proceedings with the use of ICT, although it may cover all phases of the proceedings, does not, however, support the need to distinguish a separate type of electronic administrative proceedings, because the essence of the jurisdictional activity remains the same as in proceedings conducted exclusively "on paper". Secondly, the automation of the execution of public tasks may not be limited only to the use of modern means of communication, but may also lead to a significant reduction or replacement of human labour by pre-programmed actions performed by machine (algorithmically) on data sets.[22] This process may involve what is known as algorithmic decision-making (ADM).[23]

18 M Wilbrandt-Gotowicz (2017) 54–55. More extensively M Wilbrandt-Gotowicz, 'O fenomenie postępowania hybrydowego' [On the Phenomenon of Hybrid Procedure] in W Jakimowicz, M Krawczyk, I Niżnik-Dobosz (eds), *Fenomen prawa administracyjnego. Księga jubileuszowa Profesora Jana Zimmermanna* [The Phenomenon of Administrative Law. Professor Jan Zimmermann's Anniversary Book] (Wolters Kluwer 2019) 930–948.

19 See K Werbach, 'Digital Tornado: The Internet and Telecommunications Policy' (1997) OSP Working Paper vol. 29, <https://www.fcc.gov/reports-research/working-papers/digital-tornado-internet-and-telecommunications-policy> accessed 5 Aug 2024.

20 See K Werbach, 'Introduction: An Endless Spiral of Connecitivity?' in K Werbach (ed), *After the Digital Tornado. Networks, Algorithms, Humanity* (Cambridge University Press 2020) 1.

21 See J Gołaczyński, K Tomaszewska, 'Informatyzacja postępowania administracyjnego i sądowoadministracyjnego' [Computerization of Administrative and Court-administrative Proceedings] in K Flaga-Gieruszyńska, J Gołaczyński (eds), *Prawo nowych technologii* [New Technologies Law] (Wolters Kluwer 2021) 53–88.

22 P Geburczyk, 'Automatyzacja załatwiania spraw w administracji samorządowej a gwarancje procesowe jednostek. Uwagi de lege ferenda w kontekście ogólnego rozporządzenia o ochronie danych (RODO)' [Automation of Handling Matters in Local Government Administration and Procedural Guarantees of Units. De Lege Ferenda Remarks in the Context of the General Regulation on Data Protection] (2021) Samorząd Terytorialny vol. 5, 21–22. See M Zalnieriute, L Moses, G Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) Modern Law Review 82(3), 432–433.

23 See more extensively R Koulu, 'Human Control over Automation: EU Policy and AI Ethics' (2020) European Journal of Legal Studies 12(1), 9.

The issues of computerisation, including automation, are among those that are the subject of numerous CAP amendments. This demonstrates the difficulty for the legislator to define a legal framework for a matter characterised by constant development and technical changes. The first provision that dealt explicitly with the use of information technology was introduced into the CAP on 1 January 1999 and provided for the possibility to submit applications to the authority by email.[24] In the subsequent years, the code provisions on this subject were amended several times. Of particular importance were the amendments of 2005, 2010 and 2014, connected with the enactment and later amendment of the Act on the Computerisation of the Activity of Entities Performing Public Tasks of 17 February 2005.[25] In 2005, the CAP regulated the issues of filing an electronic application and the initiation of administrative proceedings as a result of such a filing (Article 63 § 1 and 3a), the service of letters by an authority in the form of an electronic document (Article 39[1] and Article 46 § 3) and the observance of a time limit when filing electronic documents (Article 57 § 5 point 1). Then, with the amendment of 2010,[26] comprehensive solutions were introduced, creating the basis for conducting the entire procedure in electronic form, from the electronic application to the electronic delivery of the decision. Further procedural actions were computerised, such as the online inspection of case files (Article 73) or the issue of electronic certificates (Article 217). The extension of the use of IT techniques and the streamlining of actions taken with the use of these techniques were made with the 2014 amendment.[27] The electronic address of the applicant became a mandatory element of an application submitted in the form of an electronic document, and in the absence of such an address, the authority assumed that the electronic address from which the application was sent was the correct one. It was up to the participant of the proceedings to decide whether letters were to be served by electronic means, or whether they could opt out of such service. Such consent could cover specific proceedings or take the form of a general consent for matters handled by a given authority (Article 391). Threads related to electronification also appeared in the extensive 2017 amendment of the CAP. At that time, a solution was introduced that, if the addressee of a letter is a public entity that is a party or other participant in the proceedings, the electronic document is delivered to its electronic delivery box (Article 392). Provision was also made for the possibility of issuing certificates of tacit settlement of a case in the form of an electronic document or initiating simplified proceedings on the basis of an application made using an electronic form. The 2018 amendment[28] introduced the possibility of settling a case as an exception to the written form, not only orally, but also by telephone, electronic or other means of communication (Article 14 § 2).

24 Cf Article 63 § 1 of the CAP in the wording adopted by ustawa z dnia 29 grudnia 1998 r. o zmianie niektórych ustaw w związku z wdrożeniem reformy ustrojowej państwa [Act of 29 December 1998 Amending Certain Acts in Connection with the Implementation of the State Political Reform] [1998] JoL 1126.

25 Ustawa z dnia 17 lutego 2005 r. o informatyzacji działalności podmiotów realizujących zadania publiczne [Act of 17 February 2005 on Computerization of Activities of Entities Performing Public Tasks] [2005] JoL 565 as amended, unified text [2024] JoL 37.

26 Ustawa z dnia 12 lutego 2010 r. o zmianie ustawy o informatyzacji działalności podmiotów realizujących zadania publiczne oraz niektórych innych ustaw [Act of 12 February 2010 on Amending the Act on the Informatisation of the Activity of Entities Performing Public Tasks and Certain Other Acts] [2010] JoL 230.

27 Ustawa z dnia 10 stycznia 2014 r. o zmianie ustawy o informatyzacji działalności podmiotów realizujących zadania publiczne oraz niektórych innych ustaw [Act of 10 January 2014 on Amending the Act on the Informatisation of the Activities of Entities Performing Public Tasks and Certain Other Acts] [2014] JoL 183 as amended.

28 Ustawa z dnia 6 marca 2018 r. – Przepisy wprowadzające ustawę – Prawo przedsiębiorców oraz inne ustawy dotyczące działalności gospodarczej [Act of 6 March 2018 – Provisions Introducing the Act – Entrepreneurs' Law and Other Acts Relating to Business Activity] [2018] JoL 650.

Several amendments from 2010 to 2021 related to laws on issues of electronic identification and authentication in ICT systems, including the application of the EU eIDAS Regulation[29] and personal identity cards. They have led to the introduction of several equivalent methods of authentication, including, in particular, the binding force of letters in the form of an electronic document – a qualified electronic signature, a trusted signature or a personal signature,[30] as well as the electronic seal of the authority.

Today, the issue of the broadly understood automation of administrative proceedings in Poland boils down to two main issues – the reform of the electronic delivery system and the handling of cases using automatically generated letters.

By the Act on Electronic Delivery of 18 November 2020 (EDA),[31] the foundations were laid for a new electronic delivery system that is intended to be universal, covering a range of legal procedures, including administrative, tax, criminal, civil and administrative court proceedings. The system is currently undergoing implementation during a transition period lasting until 30 September 2029, at the end of which the current method of delivery based on electronic delivery boxes on the electronic platform of public administration services (ePUAP) will be completely replaced by new services, including the public registered electronic delivery service and the public hybrid service. The former is a service provided by a designated operator that enables data to be sent electronically between third parties and provides evidence relating to the handling of the data sent, including proof of sending and receiving the data. It protects the data sent against the risk of loss, theft, damage or any unauthorised alteration (cf Article 2(8) of the EDA in conjunction with Article 3(36) of the eIDAS Regulation). Under it, the public entity serves correspondence requiring proof of sending or receipt to the electronic delivery address specially created for this type of service and entered in the electronic address database or, if there is no such address, to the electronic delivery address from which the non-public entity sent the correspondence (Article 4 EDA). Only if it is not possible to serve the correspondence via this service is a public hybrid service used for this purpose (cf Article 5 EDA), which consists in converting the letter from electronic to paper form and serving it in this form on anyone who does not use an electronic delivery address.

With the Electronic Service Act, a number of provisions of the CAP were amended with effect from 5 October 2021, including those relating to methods of service, applications, summonses, powers of attorney, administrative settlements or certificates recorded in electronic form. The existing wording of the principle of writtenness has also been modified, indicating, among other things, that "Cases must be conducted and settled in writing recorded in paper or electronic form. (...)" (Article 14 § 1a CAP).

Unexpectedly, a regulation was also introduced into the CAP whereby "Matters may be handled using letters automatically generated and bearing a qualified electronic seal of the public administration body" (Article 14 § 1b CAP). In the absence of a legal definition of an automatically generated letter, it can be treated as a special type of letter in electronic form – a document that is created without direct participation or with minimal human involvement in the creation of its content and is a consequence

29 Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 Jul 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L 257, 73.

30 See more extensively G Sibiga, *Stosowanie technik informatycznych w postępowaniu administracyjnym ogólnym* [Application of IT Techniques in General Administrative Proceedings] (CH Beck 2019) 47.

31 Ustawa z dnia 18 listopada 2020 r. o doręczeniach elektronicznych [Act of 18 November 2020 on Electronic Delivery] [2024] JoL 1045.

of the retrieval and appropriate compilation of data by an ICT system, in particular on the basis of data contained in public registers or provided by the applicant.[32] Significant doubts arise here as to whether the legislator's intention was to introduce into the general model of administrative proceedings the possibility of settling cases in the form of automatically generated decisions, i.e. algorithmic decisions. It seems that the widespread use of processes of automatically issuing decisions should be associated with the establishment of legal bases broader than those contained in Article 14 of the CAP, together with the definition of types of cases in which this manner of issuing an administrative act is allowed and adequate procedural guarantees related to matters such as the scope of participation of parties in the proceedings, the course of the investigation procedure, justification of decisions or appropriate instance control, taking into account the specific nature of resolving cases with the use of IT tools. The regulation on this subject should furthermore correspond to the exceptions indicated in Article 22(2) of the GDPR.[33] This is because, as a general rule, any person to whom personal data is processed has the right not to be subject to a decision that is based solely on the automated processing of personal data, including profiling, and which produces legal effects in relation to that person or significantly affects them in a similar manner. Exceptions may only apply where the decision taken by automated means: is necessary for the conclusion or performance of a contract between the data subject and the controller; is authorised by Union law or by the law of a Member State to which the controller is subject and which provides for suitable measures to protect the rights, freedoms and legitimate interests of the data subject; or is based on the data subject's explicit consent. Indeed, it is important to ensure human oversight so that "the AI system does not undermine human autonomy or cause other negative consequences."[34] This oversight can be exercised through governance mechanisms such as the human-in-the-loop (HITL) principle, the human-on-the-loop (HOTL) principle or the human-in-command (HIC) principle.[35] The existing code regulations in this respect are so questionable that they should be considered far from sufficient to handle cases in the form of an automatically generated decision in a way that meets the requirements for proper supervision and compliance with the GDPR.

4. The Europeanisation of General Administrative Procedure

"Europeanisation consists of processes of a) construction, b) diffusion and c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, "ways of doing things" and shared beliefs and norms that are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, political structures and public policies."[36] Against the background of administrative law, Europeanisation is presented

32 M Wilbrandt-Gotowicz in M Wilbrandt-Gotowicz (ed), *Doręczenia elektroniczne. Komentarz* [Electronic Deliveries. Comment] (Wolters Kluwer 2021) 440.

33 Regulation (EU) 2016/679 of the EP and of the Council of 27 Apr 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119, 1.

34 'Ethics Guidelines for Trustworthy AI' (2019), <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai> accessed 5 Aug 2024. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 8 Apr 2019 Building Trust in Human-Centric Artificial Intelligence COM (2019) 168 final.

35 Ibid.; see also L Bygrave, 'Machine Learning, Cognitive Sovereignty and Data Protection Rights with Respect to Automated Decisions' (2020) University of Oslo Faculty of Law Legal Studies. Research Paper Series vol. 35, 21 and 25.

36 C Radaelli, 'Europeanisation: Solution or problem?' (2004) European Integration online Papers 8(16), 3, <http://ssrn.com/abstract=601163> accessed 1 Aug 2024.

as a process of "gradual assimilation by individual countries of certain models of public administration and administrative law, created by the European Union or the Council of Europe"[37] or "an adaptation, adjustment process by which features characteristic of the European system are transposed to other systems."[38] When referring to the Europeanisation of general administrative proceedings, I have in mind both the processes of changing the content of the code regulation as a consequence of European integration, as well as the formation of new models of proceedings under the influence of European law.

In the first view, the impact of Europeanisation on the design of code norms manifests itself primarily:

- in the axiological homogeneity of the general principles of administrative procedure and the principles of law recognised in European jurisprudence or expressed in the Charter of Fundamental Rights (CFR);
- in taking into account the adjudicatory competence of the CJEU as a basis for the construction of a premise for the resumption of administrative proceedings;
- in a regulation to ensure the implementation of personal data protection obligations in administrative proceedings;
- in the regulation of European administrative cooperation.

Referring briefly to each of the these manifestations of Europeanisation, one should start with the axiological identity of many of the general principles of administrative procedure with those recognised in the European order. An example of such a correlation is the current wording of Article 8 of the CAP, according to which public administration bodies will conduct proceedings in a manner that inspires its participants to have confidence in the public authority, guided by the principles of proportionality, impartiality and equal treatment, and will not deviate from the established practice of resolving cases in the same factual and legal situation without a justified reason. This axiological identity is also inherent in other principles of Polish jurisdictional proceedings – the principle of active participation of the parties in the proceedings (Article 10), persuasion (Article 11) and speed (Article 12), juxtaposed with the standards expressed in Article 41 CFR. With the 2021 amendment,[39] Article 145aa was introduced into the CAP indicating the possibility of requesting the reopening of the proceedings when a CJEU ruling has been issued that affects the content of the issued decision, within one month of the publication of the operative part of the CJEU ruling in the Official Journal of the EU. By contrast, under the influence of EU legislation, Article 2a was included in the CAP in 2019, with some regulations being modified in order to implement the enforcement by the investigating authorities of the information obligation referred to in Article 13 of the GDPR.

As part of the extensive 2017 revision of the code, Section VIIIa on European administrative cooperation was added. These provisions are accessory to EU law. They concern the provision of assistance, either ex officio or upon request, which includes, in particular, the provision of information on factual and legal circumstances and the performance of procedural acts in the context of legal aid. These framework regulations may apply to the processing of requests for assistance from the authorities of other Member States or the EU administration to the Polish

37 See G Krawiec, *Europejskie prawo administracyjne* [European Administrative Law] (Wolters Kluwer 2009) 15.

38 T Biernat, 'Europeizacja prawa – zjawisko wielowymiarowe. Wprowadzenie' [Europeanization of Law – A Multidimensional Phenomenon. Introduction] in T Biernat (ed), *Europeizacja prawa* [Europeanization of Law] (Oficyna Wydawnicza AFM 2008) 8.

39 See ustawa z dnia 18 grudnia 2020 r. o zmianie ustawy o drogach publicznych oraz niektórych innych ustaw [Act of 18 December 2020 on Amending the Act on Public Roads and Certain Other Acts] [2021] JoL 54.

administrative authorities, as well as to requests for legal assistance from the Polish authorities to the authorities of other EU Member States and the EU administration, if the provisions of EU law so provide and in accordance with the principles set out in those provisions.

Secondly, under the influence of European law, new models of administrative procedures are taking shape, deviating from the classical view of the jurisdictional procedure related to the determination of the legal situation of an individual in a given case by a single national administrative authority. As noted in the literature, the multi-stage nature of the decision-making process means that the traditional approach to administrative procedures cannot continue, requiring flexibility by taking into account the impact of Europeanisation on procedural models.[40] Consequently, there is a widespread reflection in the doctrine on different models of administrative proceedings determined by EU law, e.g. multi-stage proceedings – *mehrstufiger*,[41] complex, composite[42] (horizontal and vertical), mixed,[43] multi-jurisdictional[44] or integrated with EU law.[45] I define the latter as administrative proceedings whose procedural rules are at least partly defined by the EU legislator. The formal criterion thus distinguished makes it possible to cover three levels of procedures by this term: those before EU institutions, transnational procedures (conducted by authorities from different Member States) and proceedings conducted exclusively by national authorities taking into account procedural norms of EU origin, or whose content is conditioned by these norms. In the latter case, national authorities tend to make more complex assessments as to the applicable legal standards in specific cases than in cases not determined by Union law. The application of national and EU procedural norms by the authorities issuing administrative decisions may take place within the framework of a simple model – the appropriate application of national procedural norms to the extent not regulated by EU law (straightforward application), or of a complex model – the simultaneous co-application of national and EU law (national determined by EU law) in order to reconstruct a multicentric (pluralistic) procedural norm, corresponding to the requirements of ensuring the effectiveness of substantive law as well as procedural guarantees for individuals.

Taking into account the type of entity issuing a decision in an individual case (national or EU) and the number of administrative bodies involved in the proceedings (one or more), it is possible to distinguish several basic models of procedures integrated with EU law (the simple decentralised model – decisions are made by a national authority following proceedings conducted without the participation of authorities from other countries or the EU administration; decentralised complex – decisions made by a national authority with the participation of authorities from other Member States or the EU administration); centralised simple – decisions are made by the EU administration without the participation of national authorities; or centralised complex – decisions

40 See H Nehl, *Europäisches Verwaltungsverfahren und Gemeinschaftsverfassung. Eine Studie gemeinschaftsrechtlicher Verfahrensgrundsätze unter besonderer Berücksichtigung 'mehrstufiger' Verwaltungsverfahren* (Duncker & Humblot 2002) 30.

41 Ibid., 29.

42 See for example H Hofmann, G Rowe, A Türk, *Administrative law and policy of the European Union* (Oxford University Press 2011) 361–362; C Franchini, 'European Principles Governing National Administrative Proceedings' (2004) Law and Contemporary Problems 68(1), 184; H Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing 1999) 90.

43 See G della Cananea, 'The European Union's Mixed Administrative Proceedings' (2004) Law and Contemporary Problems 68(1), 197.

44 See H Hofmann, 'Multi-Jurisdicional Composite Procedures. The Backbone to the EU's Single Regulatory Space' (2019) University of Luxembourg Law Working Paper vol. 3, 1.

45 See M Wilbrandt-Gotowicz (2017) 257.

made by the EU administration in proceedings with the participation of national authorities). The phenomenon of the emergence of complex proceedings based on multi-phase procedural sequences of different types of acts and actions aimed at settling a case testifies to the diversification of procedural norms and the gradual reduction, due to the activity of the EU legislator, of the procedural autonomy of Member States. It poses a challenge to the coherence of national procedural regulations and raises doubts as to the adequacy of the means of judicial review of decisions taken at the national and EU levels.[46] Against this background, the regulations on European administrative cooperation introduced so far in the CAP only regulate the provision of legal aid in a superficial way, and do not respond to a number of doubts about the subsidiary application of code norms in integrated proceedings with an intrinsically incomplete sectoral regulation of procedural norms. It seems, however, that in the field of complex proceedings, the deficit of procedural regulation will continue until these issues are at least partly regulated in a model way at an EU level.

5. Conclusions

The CAP is an act that has been subject to constant revision in recent years in order to adapt it to modern challenges. However, in view of the more than half a century of application practice and the entrenchment of the established model of general administrative procedure through the body of case law and doctrine, its imminent replacement by a new codification should not be expected.

The model of jurisdictional proceedings in Poland is being dynamically shaped under the influence of the phenomena of the pragmatisation, automatisation and Europeanisation of administrative jurisdiction. Each of these trends can be attributed to related legal solutions or institutions that have been incorporated into the legal regulation. These are not one-off modifications (such as, for example, in the case of electronic actions), they involve diverse mechanisms to improve the functioning of administration (as in the case of solutions to streamline and deformalise proceedings) but do not always reflect the complexity of contemporary procedural relations (e.g. in relation to hybrid procedures or composite proceedings). Therefore, although it is possible to speak of certain trends in the development of administrative jurisdiction, the codification of administrative procedure has a model character, in view of the requirement to take into account, in specific cases, special provisions of a procedural nature, including those of EU origin; a dynamic character, because it is subject to constant normative changes; and an open character, due to the nature of administrative-legal relations requiring the use of undefined concepts, sometimes based on administrative discretion, or values anchored in general principles of administrative procedure.

The trend of incorporating regulations in the CAP framework to deform and streamline administrative proceedings should be viewed positively. The challenge in this context, however, is to choose the appropriate scope of regulation of what is to be deformed. It is necessary to avoid the paradox of over-regulating simplified proceedings, but also a situation that limits the handling of cases with the use of measures appropriate for third-generation procedures. Against this background, the solutions adopted in the CAP in the area of simplified proceedings and the tacit settlement of cases do not seem to fully realise the essence of pragmatism. Their application does not depend on the will of

46 See M Eliantonio, 'Judicial Review in an Integrated Administration: the Case of 'Composite Procedures' (2014) Review of European Administrative Law 7(2), 98; S Röttger-Wirtz, M Eliantonio, 'From Integration to Exclusion: EU Composite Administration and Gaps in Judicial Accountability in the Authorisation of Pharmaceuticals' (2019) European Journal of Risk Regulation 10(2), 396.

the authority or the party, but is limited to cases in which a specific provision expressly refers to it. A considerable shortcoming is the failure to include hybrid proceedings in the CAP, where issuing an administrative decision is only an alternative to handling the case in a non-manipulative form, e.g. through material and technical actions. There is no standardisation of the general decision and administrative agreements. It should therefore be postulated that an appropriate regulation on this subject should be included in the CAP.

As regards the phenomenon of automation, it should be pointed out that frequent normative changes are not conducive to the computerisation of administration and the expansion of the group of administration entities that use electronic document management systems. Although there are legal mechanisms in place for those interested in electronic correspondence with administration bodies, only the implementation of a new electronic delivery system can lead to a significant qualitative and quantitative change in this regard. However, the CAP modifications introduced by the e-service law do not reflect a transition period of several years, which means that, especially for citizens, the way of submitting applications or receiving decisions electronically may be completely opaque during the period when some of the authorities will already be using the public registered electronic delivery service and the public hybrid service, while some will still be using electronic letter boxes. In addition, the issue of incorporating an algorithmic mode of decision-making into the Polish administrative procedure system requires in-depth analysis and debate. The standard contained in Article 14 of the CAP, which generally refers to the possibility of settling cases through the use of automatically generated letters, is far from sufficient in terms of securing procedural guarantees of the parties to the proceedings and does not meet the requirements of the GDPR.

The model of administrative proceedings in Poland is also evolving under the influence of the country's membership in the EU. Amendments in this regard primarily address issues such as the regulation of legal assistance involving administrations of other EU Member States or EU institutions, which is supplementary to EU law. They also encompass obligations related to fulfilling information requirements regarding the processing of data for parties and other participants in proceedings, as well as the need to reopen proceedings following a ruling from the Court of Justice of the European Union (CJEU). Of significant note is the axiological consistency with general principles of administrative procedure and principles of law recognised in European case law or expressed in the Charter of Fundamental Rights (CFR).

In addition to changes of a normative nature, the phenomenon of Europeanisation affects administrative jurisdiction through the formation, as a result of sectoral regulations, of new models of administrative proceedings in which administrative authorities are obliged to apply procedural norms determined by EU law. Doubts as to the proper decoding of legal norms in specific cases and proper guarantees of judicial control concern, in particular, proceedings involving the authorities of a Member State and the EU administration, or authorities of different Member States. In this view, modifications of the model of administrative proceedings are in fact an element of the transformation of the *European Administrative Space*, co-created by legal regulations of supra-state (EU) origin and national norms shaped under the influence (e.g. as a result of implementation) of the former,[47] and national administrative bodies are part of the "administration of the European space."[48]

47 See M Wilbrandt-Gotowicz, 'Concept and Scope of the Europeanization of Administrative Proceedings Law – A Theoretical Perspective' in P Bieś-Srokosz, J Srokosz (eds), *Current Developments in Public Law in European Countries: Selected Issues* (Wydawnictwo im. S. Podobińskiego Akademii im. Jana Długosza 2016) 100–103.

48 See E Schmidt-Aßmann, *Ogólne prawo administracyjne jako idea porządku. Założenia i zadania tworzenia systemu prawnoadministracyjnego* [General Administrative Law as an Idea of Order. Assumptions and Tasks of Creating a Legal and Administrative System] (CH Beck 2011) 481.

The common thread in the transformation of the general administrative procedure model under the influence of trends like pragmatisation, automation, and Europeanisation is the potential to enhance standards of good administration. However, these trends also impact the decodification and atomisation of administrative procedures. They can lead to the development of specific procedural solutions distinct from the general model of jurisdictional proceedings. Additionally, they sometimes necessitate more intricate evaluations concerning the application of legal norms in specific cases.

These developments touch upon several critical doctrinal issues, such as the legal nature of administrative decisions, forms of public administration activities, the admissibility of legal remedies and the implementation of general principles of administrative procedure. They may require redefining fundamental concepts of administrative law or reshaping approaches to resolving administrative cases (for instance, introducing the automated issue of administrative decisions) and bolstering adjudicatory mechanisms to ensure effective judicial protection.

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