INTEGRITY OF ADMINISTRATIVE LAW

Polish Perspective

edited by Jan Zimmermann

Wolters Kluwer

INTEGRITY OF ADMINISTRATIVE LAW

Polish Perspective

edited by Jan Zimmermann

Wolters Kluwer

WARSZAWA 2019

SERIA **MONOGRAFIE**

Publikacja dofinansowana przez Uniwersytet Jagielloński

Stan prawny na 15 kwietnia 2019 r.

Reviewers/Recenzenci
Dr hab. Tomasz Bąkowski, prof. UG
Prof. dr hab. Jerzy Supernat

Publisher/Wydawca
Joanna Dzwonnik

Managing Editor/Redaktor prowadzący
Adam Choiński

Linguistic Editing/Opracowanie redakcyjne
Anna Sorówka-Łach

Cover Design/Projekt okładek serii
Wojtek Kwiecień-Janikowski, Przemek Dębowski

Desktop Publishing/Łamanie
Marek Lisiowski

ISBN 978-83-8160-463-5
ISSN 1897-4392

Dział Praw Autorskich
01-208 Warszawa, ul. Przyokopowa 33
tel. 22 535 82 19
e-mail: ksiazki@wolterskluwer.pl

www.wolterskluwer.pl
księgarnia internetowa www.profinfo.pl

CONTENTS

ABBREVIATIONS

CJEU	–	Court of Justice of the European Union
ECB	–	European Central Bank
ECHR	–	European Court of Human Rights
GDPR	–	General Data Protection Regulation
LEX	–	Legal Information System LEX
NSA	–	Supreme Administrative Court (Naczelny Sąd Administracyjny)
NTA	–	Supreme Administrative Tribunal (Najwyższy Trybunał Administracyjny) in the years 1922–1939
SA	–	Administrative Court (Sąd Administracyjny)
TEC	–	Treaty establishing the European Community
TEU	–	Treaty on European Union
TFEU	–	Treaty on the Functioning of the European Union

Journals

AUW	–	Acta Universitatis Wratislaviensis
Dz.U.	–	Dziennik Ustaw (Polish Journal of Laws)
KPP	–	Kwartalnik Prawa Publicznego
KSP	–	Krakowskie Studia Prawnicze
KZS	–	Krakowskie Zeszyty Sądowe
OJ EU	–	Official Journal of the European Union
ONSA	–	Orzecznictwo Naczelnego Sądu Administracyjnego
OSA	–	Orzecznictwo Sądów Apelacyjnych
OSN	–	Orzecznictwo Sądu Najwyższego

OSNC	–	Orzecznictwo Sądu Najwyższego Izba Cywilna
OSP	–	Orzecznictwo Sądów Polskich
OSPiKA	–	Orzecznictwo Sądów Polskich i Komisji Arbitrażowych
OTK ZU	–	Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy
PiP	–	Państwo i Prawo
PPiA	–	Przegląd Prawa i Administracji
PPK	–	Przegląd Prawa Karnego
Pr.iP.	–	Prawo i Podatki
Prok.i Pr.	–	Prokuratura i Prawo
PS	–	Przegląd Sądowy
PUG	–	Przegląd Ustawodawstwa Gospodarczego
RPEiS	–	Ruch Prawniczy, Ekonomiczny i Socjologiczny
SP	–	Studia Prawnicze
SPE	–	Studia Prawno-Ekonomiczne
ZNSA	–	Zeszyty Naukowe Sądownictwa Administracyjnego
ZNUJ	–	Zeszyty Naukowe Uniwersytetu Jagiellońskiego

INTRODUCTION

A state may not exist without law, which is a social agreement between that state and society. Every state has a single system of law; it constitutes a very complex and diverse, yet always single being. Therefore, any division of such a system results in categories of second or further degree, and its components will not be considered whole entities independent from the legal system. However, a system of law needs to be divided by various criteria and for a wide variety of purposes into: substantive, national, social, civic, axiological, jurisprudential, academic, organisational and many more. If the division is to serve a given purpose well, it should not be arbitrary and random, but always reasonable and – which seems to be most important – based on clear and easily explainable criteria. It is always necessary for the division of a system of law to be transparent, though transparency is never absolute; it is always relative, since each identified segment is linked to another segment 'top-down' through the unity of the entire system as well as common normative elements, including the Constitution, the general principles of law, and the EU law. The aforementioned requirements for the system division make one assume that any type of classification ought to be precise and clear to a maximum extent, determining the integrity of one component when compared to the other, and at the same time each component singled out through a given division should be internally integral and coherent so that there is no doubt as to the belonging of the component to a specific field, institution, norm, case or issue. This allows one to avoid misunderstanding about the manner and form of application of the law, its effects, the hierarchy of its sources and norms, methods of studying and teaching it, and many more. Simultaneously, this only

relative precision always has to lead to an intermediate zone, a borderland of a kind, within the limits of which institutions or norms will operate as special hybrids belonging together to components distinguished as a result of division.

All of the above fully apply to the basic division of law into branches, and the said integrity and inescapable borderland can be observed in each branch of law. A need arises for research and methodology allowing one to characterise a given field of law, to study it thoroughly and formulate theses precisely based on its integrity and on the analysis of its borderland. Such a research area has not yet been explored in detail in Polish literature on the subject holistically or in a monograph – nor when it comes to administrative law – and we concur with Franciszek Longchamps who argued that the observation of a subject (in this case administrative law) from as many different perspectives as possible was most valuable.[1] We have attempted at such a discussion at the Department of Administrative Law of the Jagiellonian University in Poland and hereby present the results of our analyses in this book.

The introduction requires a few qualifications to be made.

First of all, we approached the problem from the Polish perspective, following the assumption that studying this subject matter with the use of the comparative method would not produce satisfactory results, due to significant differences across administrative law systems (administrative law tends to have a different place in various legal systems), and would be unfeasible in a short period of time and in a concise monograph. Thus, this book is based exclusively on selected Polish norms, the research of Polish legal scholars, and the Polish case law. The book is published in Polish and English to make it easier for the foreign reader to learn about the subject approached specifically from the Polish perspective.

Second of all, we are aware of the size of the discussed problem. Therefore, we only propose certain points of departure for further research as well as preliminary and principal theses. It is also an

[1] F. Longchamps, *Z problemów poznania prawa*, Wrocław 1968, p. 17.

attempt to employ a method not yet applied of characterising administrative law and describing its nature.

Third of all, we know that the aforementioned needs with regard to dividing the legal system may be, and to a great extent are, satisfied by legal scholars. However, in practice, one needs to concur with Zofia Duniewska who says that delimitation is not in principle a consequence of a deliberate and reasonable, logical and organising activity. She claims that it is also rarely carried out in a formal manner, as a result of legislative efforts; it is usually performed spontaneously based on a long-standing tradition and habits.[2] Ergo, setting the boundaries between fields, branches, and disciplines of law serves various purposes and, consequently, the boundaries set for one purpose by no means have to overlap with the boundaries set for other goals.[3] Thus, our study of the integrity of administrative law is burdened with difficulty, integrity-related aspects being in a state of flux. We have to deal with this obstacle.

Fourth of all, when thinking how to structure the book, we considered whether to prepare it as a monograph about a single topic or about coherent topics pertaining to the monograph as a whole, or – as some of us wished – to compile it as a certain collection of essays with a common theme, though of authorial nature and interrelated to a slightly lesser extent. We agreed on something in between. On the one hand, we wanted to discuss the selected topic as consistently and comprehensively as possible in a dozen or so of publisher's sheets, leaving room for individual assessment of the situation in Polish administrative law, on the other hand. I believe this is not methodologically controversial and served its purpose.

Prof. Jan Zimmermann, PhD habil.
Head of the Department of Administrative Law,
Jagiellonian University in Kraków

[2] Z. Duniewska, *Prawo administracyjne w systemie prawa*, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (eds), *System Prawa Administracyjnego*, Vol. 1: *Instytucje prawa administracyjnego*, Warsaw 2010, p. 160.

[3] A. Chełmoński, *Co to jest prawo gospodarcze?*, RPEiS issue 1, 1993, p. 7, quoted by Z. Duniewska, *ibid.*, p. 161.

PART 1

INTEGRITY AND BORDERLAND OF ADMINISTRATIVE LAW

Chapter 1

SUBSTANCE AND TYPES OF THE INTEGRITY OF POLISH ADMINISTRATIVE LAW

1. Nowadays, there is probably no country in the world with a legal system lacking the branch of 'administrative law'. However, an analysis of positive law, views presented in case law, and opinions voiced in jurisprudence of individual states prompt a conclusion that the concept of administrative law is not understood everywhere in the same way and that the branches of law being *designata* of the said concept are often different enough in scope.[1] One may easily observe the occurrence in the legal systems of European countries that, as a rule, administrative law in the Anglo-Saxon, Roman, and Germanic cultures stems from completely different roots, has a distinct tradition and original paths of growth, its conceptual structure even tending to be incomparable in certain states, and has been formed differently over the years and now is not uniform.[2]

---

[1] Cf., for instance, an opinion of R. Thomas according to which '"administrative law" in England means something quite different from either *droit administratif* or *Verwaltungsrecht*'; R. Thomas, *Legitimate Expectations and Proportionality in Administrative Law*, Oxford–Portland 2000, p. 2.

[2] Scepticism over comparability of national systems of administrative law in Europe is very often voiced in the literature. It is argued that as the organisation of public administration in various states is a result of diverse cultural and historical factors or political contexts affecting the state, the conceptual framework of 'administrative law' reflects peculiar structural features and determinants of the functioning of a given country that hinder or even prevent the formation of generalisations (in terms of administrative law) applying also to other countries. *See*, e.g. U. Scheuner, *Der Einfluss des französischen Verwaltungsrechts auf die deutsche Rechtsentwicklung*, Die Öffentliche Verwaltung issue 16, 1963, p. 714 et seq.

In addition, the 'status' of administrative law varies across countries. In some, e.g. in Great Britain, it is still in the process of liberation and 'rebirth', and the autonomy of that field from the ordinary law of the land is out of question. It is noteworthy that even relatively recently, in 1963 to be precise, Lord Reid in *Ridge v. Baldwin* argued as follows: 'We do not have a developed system of administrative law – perhaps because until fairly recently we did not need it'.[3] Presently, the field called 'administrative law' in Great Britain does not constitute a distinct body of norms, but rather functions as part of the ordinary law of the land.[4] Valid remains the statement made half a century ago by Stanley A. de Smith who argued: 'if by administrative law one means an identifiably distinct body of concepts and rules regulating justiciable administrative activity – and this is the sense in which the term "administrative law" is often used – one cannot discern in English law an entity recognisable by a continental administrative lawyer'.[5] What we have instead of an integrated coherence, according to that author, is an asymmetrical jumble developed pragmatically by legislation and case law in particular contexts, poorly mixed with private law and magisterial law, alternately blurred and jagged in its outlines.[6] However, obviously, the lack of an administrative law system in Great Britain understood as a part of the state legal order distinct from the ordinary law of the land and consolidated using common terms or principles does not mean that administrative law is completely non-existent there. After all, there is law related to public administration, land use planning, construction, education, healthcare, environmental protection, expropriation, etc., although such regulations are considered to be not more than derogative forms of ordinary-law norms,[7] applied in principle to the state and private individuals. Thus, in this sense, there is the unity of law

[3] *Ridge v. Baldwin* [1964] AC 40.

[4] Cf., for instance, H.W.R. Wade, C.F. Forsyth, *Administrative Law*, 11th edn, Oxford 2014, p. 8.

[5] S.A. de Smith, *Judicial Review of Administrative Action*, 2nd edn, London 1968, p. 4.

[6] *Ibid*.

[7] That is what André de Laubadère, Jean-Claude Venezia, and Yves Gaudemet think about English law, comparing the Anglo-Saxon and French concepts of administrative law; A. de Laubadère, J.-C. Venezia, and Y. Gaudemet, *Traité de droit administratif*, Vol. 1, Paris 1996, p. 34.

and the unity of jurisdiction because the traditional rule of law requires both authorities and individuals to be subject to the same law (ordinary law), and jurisdiction over the activities of administration to be held by the same courts that resolve disputes between citizens, i.e. courts of ordinary law (and not special administrative courts).[8] In other countries, e.g. in France, administrative law is not a derogative form of ordinary-law norms, but it remains a parallel, consistent system with its own area of governance and application and – being explicitly separate – it is believed to be an autonomous order, and the French concept of *droit administratif* is often presented as an example for other countries in the world. It is highlighted in the literature on the subject that at the foundation of the autonomy of French administrative law there is the nature of administration and of its objectives, determining the creation of a body of special substantive and procedural norms – interrelated and benefiting from specific sources – different from those which exist in private law.[9] At the same time, in practice, the autonomy of administrative law is the basic justification for the functioning of distinct administrative judiciary,[10] and it is of considerable importance for determining powers of an administrative judge to unambiguously define the boundaries of an administrative system. Consequently, in French law, every administrative body is subject to law and judges different from private law and its judges.[11]

When compared to the aforementioned and other countries, the Polish system of administrative law is in the middle and can be described as 'an integral system', i.e. a distinct system of norms constituting a whole, a single entity, based on common principles, standards and values, theoretically (from a jurisprudential perspective) independent and essentially self-contained, although not 'autonomous', not contrasting the remaining branches of law and not separate from them, but interrelated via co-occurring interactions;

[8] H.W.R. Wade, C.F. Forsyth, *Administrative Law…*, pp. 8, 17, 25.

[9] A. de Laubadère, J.-C. Venezia, Y. Gaudemet, *Traité…*, p. 33.

[10] J. Rivero, *Existe-t-il un critère du droit administrastif?*, Revue du droit public et de la science politique en France et à l'étranger issue 2, 1953, p. 280.

[11] F.-P. Bénoit, *Le droit administratif français*, Paris 1968, p. 56.

Jan Zimmermann – Professor, PhD habil. of Juridical Sciences, Head of the Department of Administrative Law of the Jagiellonian University in Kraków; judge emeritus of the Supreme Administrative Court; the author of around 150 publications on administrative law.

This is the first book on the market which concerns integrity of administrative law. The issue is topical both in theory and in practice of this field, however, it has not been the subject of discussion in scientific literature so far. The book is the compilation of authorial views presented by the academics of the Department of Administrative Law at the Faculty of Law and Administration of the Jagiellonian University in Kraków.

The publication discusses, among others, the following problems:
- the substance and types of integrity of the Polish administrative law,
- elements fostering the internal integration of the said law and obstacles to such integration,
- issues in the borderland of administrative and civil law as well as administrative and criminal law,
- relationships between administrative law and the law of the European Union and constitutional law,
- the phenomenon of expansion and withdrawal of administrative law.

The book may be of interest to judges of administrative and civil courts, public administration officers, students of law and administration, advocates and attorneys-at-law.

"When thinking how to structure the book, we considered whether to prepare it as a monograph about a single topic or about coherent topics pertaining to the monograph as a whole, or – as some of us wished – to compile it as a certain collection of essays with a common theme, though of authorial nature and interrelated to a slightly lesser extent. We agreed on something in between. On the one hand, we wanted to discuss the selected topic as consistently and comprehensively as possible in a dozen or so of publisher's sheets, leaving room for individual assessment of the situation in Polish administrative law, on the other hand."

Prof. Jan Zimmermann, PhD habil.

9788381604635 W01P01

ISSN 1897-4392
ISBN 978-83-8160-463-5
9 788381 604635

CENA 129 ZŁ (W TYM 5% VAT)