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## Administrative Judiciary in the European Doctrine of Administrative Law at the Turn of the 19<sup>th</sup> and 20<sup>th</sup> Centuries

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Sądownictwo administracyjne w europejskiej doktrynie prawa administracyjnego  
na przełomie XIX i XX w.

One of the fundamental assumptions of a constitutional and lawful state was recognizing the existence of an inviolable sphere of rights and freedom of individuals that restricted the freedom of administrative action. The guarantee for the protection of the sphere was seen in the statutory defining of the boundaries of the workings of the state apparatus and in the possibility of the external audit of the legality of the public administration. The duty was supposed to be fulfilled mainly by administrative judiciary which was considered to be one of the most significant institutions of administrative law in the 19<sup>th</sup>-century theory and practice. The term “administrative judiciary” was understood as the settlement of complaints against unlawful administrative decisions implemented by way of contentious proceeding before the authorities of the Member State. Such understanding of administrative judiciary did not decide upon the necessity for separating individual authorities, independent of Common Courts, that were established for administrative disputes resolution. It also did not define the material scope of its characteristics. Those issues were of special interest to the European Administrative Sciences, especially in the second half of the 19<sup>th</sup> century.<sup>1</sup>

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<sup>1</sup> Analysing achievements of legal-administrative literature in the field of administrative judiciary in the 19<sup>th</sup> century, Jerzy Langrod wrote that “(...) almost all of his representatives agreed with the thesis that a country under the rule of law is inseparably united with the institution of administrative judiciary and as such this type of judiciary must be considered a peak guarantee of law and order”. J. Langrod, *Zarys sądownictwa administracyjnego ze szczególnym uwzględnieniem sądownictwa administracyjnego w Polsce*, Warszawa 1925, p. 6.

Institutional separation of the administrative judiciary had both numerous supporters and opponents. The first ones justified their position as being necessary to respect the principle of separation of public authorities and the resulting distinction between the function of the administrative and judicial apparatus of the state and the difference in the nature of the disputes within the area of public and private law. The others argued the dispensability of establishing special administrative courts indicating that the existing common courts, besides the jurisdiction in civil matters, could equally well resolve disputes relating to public law arising in connection with administrative practices of the state, as in both cases the role of the court was to reinstate infringed law.<sup>2</sup>

In the French doctrine, there prevailed a dominant view on combining administrative jurisdiction with the executive apparatus of the state and on its independence of the common courts. Such a position was justified by the Montesquieu's principle of the division of public authorities according to which all matters belonging to the administration, including disputes related to its functioning, should be resolved by the administration itself. Delegating the power of implementation of the administrative justice to the common courts would have been, according to the French scholars, infringement of that principle and might have led to the deprivation of the autonomy of administration and to the independence of action.<sup>3</sup> Justifying the need to separate the administrative jurisdiction they pointed out that the scope of administrative action includes three functions: (1) current administrative board, (2) making decisions concerning general matters, (3) resolving ad-

<sup>2</sup> Opponent of the separation of administrative judiciary pointed to the example of England and other countries of continental Europe which followed England's example, such as Belgium, the Netherlands, Italy or Scandinavian countries (so-called "states of justice") where resolving administrative disputes by common courts was considered a natural consequence of the so-called "the rule of law", the guardian of which was supposed to be common courts only, regardless of the subject-matter, H.A. Zachariä, *Deutsches Staats- und Bundesrecht*, Göttingen 1865, vol. II, p. 94; O. Bähr, *Der Rechtsstaat*, Kassel-Göttingen 1864, pp. 69-74; J. Schmitt, *Die Grundlagen der Verwaltungsrechtspflege in constitutionellmonarchischem Staate*, Stuttgart 1878, p. 121.

<sup>3</sup> According to Eduard Laferrière, "(...) the executive should ensure implementation of law. In order to fulfil this task it should be granted the right to hear any disputes resulting from it, and consequently to resolve any complaints concerning its operation received from private persons. Depriving administration the right to resolve disputes resulting from its operation would deprive it of authority and independence, as disputes resulting from its operation would be resolved by authorities independent of the administration which would decide if the administrative decision is right or not which would be against the principle of separation of public powers", E. Laferrière, *Cours de droit public et administratif*, vol. II, Paris 1858, pp. 512-513. The identical position was taken by: L.-A. Macarel, *Des tribunaux administratifs, ou introduction à l'étude de la jurisprudence administrative, contenant un examen critique de l'organisation de la justice administrative et quelques vues d'amélioration*, Paris 1828, pp. 3-4; A.-F. Vivien, *Etudes du droit administratif*, vol. I, Paris 1859, p. 16; A. Batbie, *Introduction générale au droit public et administratif*, vol. I, Paris 1876, p. 55; M.H. Pascaud, *La separation des pouvoirs et les conflits d'attribution*, Paris 1878, pp. 27-30.

ministrative disputes. In the French administrative system, working according to the principle “one person should govern but many should decide and judge”, the first rule was applied by the single-person authorities (a prefect, a sub-prefect and a mayor), the second one by the collective bodies (General, District and Municipal Councils) and the third one by the Prefectural Councils acting as administrative courts. In this context, resolving administrative disputes, resulting from administration’s action, constituted one of its functions. The consequence of such a position was adopting in the French doctrine a division of administration into active, regarding a direct implementation of administrative tasks of the state, and into a contested (*contentieuse*), regarding resolving administrative disputes.<sup>4</sup>

In the French legal-administrative literature the notion “administrative dispute” was understood as every dispute, whose party was an administrative authority, regardless of whether it related to private or public law. Such an assumption was considered a basic criterion for distinguishing jurisdiction of Administrative and Common Courts. According to the assumption, common courts were created to protect the rights and interests of individuals against other legal entities and administrative courts were to protect the same rights and interests of individuals but against the administration. Such formulation of the scope of the French Administrative Jurisdictions was not so much the result of indications of positive law but of how much was developed in theory and practice. From the very beginning of the existence of Administrative Jurisdictions in France, individual authors tried to classify administrative disputes. According to Rodolphe Dareste, Alexandre-François Vivien, Édouard Laferrière, Anselme Batbie, and Adolphe Chauveau, the competences of Administrative Jurisdictions included all complaints from the citizens about administration’s performance by which there was a violation of the individual’s right resulting from laws, regulations and agreements.<sup>5</sup> Similar division was suggested by Léon Aucoc who identified three categories of administrative disputes: (1) the substance of the administrative disputes concerning violating individual’s subjective rights, resulting from laws, regulations and agreements, by the administrative authority, (2) disputes resulting from the interpretation of administrative acts and (3) disputes concerning a citizen’s complaint about misuse of powers by the administrative authority.<sup>6</sup> It was characteristic for French authors to

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<sup>4</sup> P. Lemarquiere, *Droit, procedure et jurisprudence administratif*, Paris 1839, pp. 3–17; E. Laferrière, *Cours de droit...*, *op. cit.*, p. 733.

<sup>5</sup> F. Dareste, *La justice administrative en France*, Paris 1862, p. 676; A.-F. Vivien, *op. cit.*, p. 16; E. Laferrière, *Traité de la juridiction administrative et des recours contentieux*, vol. II, Paris 1888, pp. 28–43; A. Batbie, *Traité théorique et pratique de droit public et administratif*, vol. II, Paris 1868, p. 419; A. Chauveau, *Principes de compétence et de juridiction administratives*, vol. II, Paris 1859, pp. 22–34.

<sup>6</sup> L. Aucoc, *Conférences sur l’administration et le droit administratif*, vol. I, Paris 1869, pp. 301–306.

exclude decisions made by administration within the granted discretionary power – the so-called discretion (*voie gracieuse*), which were subject to control only in the proceedings between the first and second instances, by the supreme power relative to the authority which issued them, from the Administrative Jurisdictions.<sup>7</sup>

The judgement of the Council of State, on the basis of which there was a definitive establishment of the scope of competence of the judiciary, played an important part in the complementing of the theory of Administrative Jurisdiction in France. Hearing before the Council of State as an administrative court took the form of the so-called full jurisdiction dispute (*pleine jurisdiction*) which, by analogy with the civil proceedings, aimed at determining the existence or non-existence of the violation of the individual's subjective rights and at determining whether the violation occurred as a result of the performance of the administrative authority. As a result, administrative courts were given a possibility of ruling on the legality of administrative decisions and the possibility of repealing (cassation) those decisions which were adopted in breach of the law (so-called cassation dispute). At the beginning, the jurisdiction of administrative courts was limited only to property disputes resulting from the contracts between administration and private persons. Over time, the case law of the Council of State extended the jurisdiction to the matters regarding the liability of the State for damages caused to the citizens by its officials and then to all the matters concerning establishing the legality limits of action of administrative authorities and protecting rights and interests of citizens.<sup>8</sup>

The formation process of the German doctrine of Administrative Jurisdiction was different from the one in the French science which was based on the already existing system of administrative courts and on the case-law of the Council of State. Because of the lack of their own experience in that matter, in the 19<sup>th</sup> century most of the German scholars supported the French concept of Administrative Jurisdiction as the closest one to realise the idea of the liberal rule of law. French influences were visible in the artistic creation of such authors as Robert von Mohl, Carl von Pfizer, Otto Kuhn or Lorenz von Stein.<sup>9</sup> The original, German theory of Administrative Jurisdiction was created in the second half of that century. Unlike France, where the

<sup>7</sup> A. Chauveau, *op. cit.*, p. 24; F. Dareste, *op. cit.*, p. 676; A.-F. Vivien, *op. cit.*, p. 16; E. Laferrière, *Traite de la...*, *op. cit.*, pp. 28–43; A. Batbie, *Traité...*, *op. cit.*, p. 419.

<sup>8</sup> A.-F. Vivien, *op. cit.*, pp. 128–137; A. Batbie, *Introduction générale au droit public et administratif*, vol. II, pp. 437–442; F. Dareste, *op. cit.*, pp. 222–223; E. Laferrière, *Cours de droit public et administrative ...*, vol. II, pp. 761–766.

<sup>9</sup> R. von Mohl, *Encyclopedia of Political Skills*, vol. II, Warsaw 2003, pp. 523–530; C. von Pfizer, *Über die Grenzen zwischen Verwaltungs- und Ziviljustiz und über die Form bei Behandlung der Verwaltungsjustiz*, Stuttgart 1828, pp. 22–30; O. Kuhn, *Die Trennung der Justiz und Administration. Ein Beitrag zur Staatsphilosophie und zum positiven Deutschen Staatsrechte*, Leipzig 1840, *passim*; L. von Stein, *Verwaltungslehre*, vol. I, Stuttgart 1884, pp. 47–53.

issue of Administrative Jurisdiction was established only in relation to its subjective condition, the starting point for the German doctrine was a clear distinction between private and public law as a criterion for the separation of competence and organizational administrative jurisdiction.<sup>10</sup> In an unanimous opinion of the German scholars, disputes regarding private law were expected to fall within exclusive jurisdiction of Common Courts and regarding public law – within the jurisdiction of Administrative Courts. The scholars, however, had different opinions concerning identifying the primary aim of judicial review of administration. In this respect, there were two dominant views. The first view considered protection of the objective legal order the main aim of Administrative pushing into background or even negating the existence of subjective public rights of individuals (Friedrich J. Stahl, Edgar Loening, Otto Mayer, Johann C. Bluntschli). The second view, mostly represented by authors linked to the Habsburg Monarchy (Otto von Sarwey, Edmund Bernatzik, Josef Ulbrich, Jiří Pražák), treated Administrative Jurisdiction as a key instrument to protect the subjective rights of individuals in the field of legal relationships resulting from the rules of public law.<sup>11</sup>

Rudolf Gneist is considered the creator of the German theory of administrative courts which includes a comprehensive coverage of the issue together with specific proposals of system-based solutions. The starting point for his reflections was the assumption that the main aim of administrative law was to ensure the performance of the State's tasks in the regulatory area regarding the rules of public law. As such, according to Gneist, the nature of the judicial review meant protecting the existing legislations and thus an objective (subject) legal order in the state, not only protecting personal (subjective) rights of individuals because the review of legality of administrative operations of the state apparatus indirectly served the interest of the latter. Therefore, according to the author, a citizen, complaining that his interest was violated by the illegal administrative decision, was only a peculiar intervener since the dispute was in the interest of protecting the objective legal order and not in the interest of protecting subjective rights of individuals.<sup>12</sup>

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<sup>10</sup> W. Jaworski, *Nauka prawa administracyjnego. Zagadnienia ogólne*, Warszawa 1924, pp. 16–19.

<sup>11</sup> F.J. Stahl, *Die Philosophie des Rechts*, vol. II, Heidelberg 1871, p. 607; E. Loening, *Lehrbuch des Deutschen Verwaltungsrechts*, Leipzig 1884, pp. 268–283; O. Mayer, *Deutsches Verwaltungsrecht*, vol. I, Leipzig 1895, pp. 133–146; J.C. Bluntschli, *Allgemeines Staatsrecht*, Stuttgart 1885, pp. 351–373; O. von Sarwey, *Das öffentliche Recht und die Verwaltungsrechtspflege*, Freiburg 1884, pp. 136–147; E. Bernatzik, *Rechtsprechung und materielle Rechtskraft*, Wien 1896; J. Ulbrich, *Grundzüge des österreichischen Verwaltungsrechtes mit Berücksichtigung der Rechtsprechung des Verwaltungsgerichtshofes*, Prag–Leipzig 1884; J. Pražák, *Die Prinzipielle Abgrenzung der Kompetenz der Gerichte und Verwaltungsbehörden*, Freiburg 1889.

<sup>12</sup> R. Gneist, *Verwaltung, Justiz, Rechtsweg, Staatsverwaltung und Selbstverwaltung nach englischen und deutschen Verhältnissen mit besonderer Rücksicht auf Verwaltungsreformenn und Kreis-Ordnungen in Preußen*, Berlin 1869, pp. 23–46.

According to Gneist, administrative dispute was every dispute, the subject of which referred to the sphere of public law, whether its parties were administrative authorities or private persons. This broad scope of administrative courts included both administrative matters resulting directly from law and contracts concluded by the administration and all administrative acts based on the discretion rule which, for most of the 19<sup>th</sup>-century theorists of administrative law, were only subject to review by authorities which were hierarchically higher in the proceedings within the administration. In Gneist's opinion, they were supposed to constitute the core of jurisdiction of administrative courts.<sup>13</sup> As a result, the manner of determining material jurisdiction of administrative courts, based solely on the subject matter, enabled to distinguish between judicial review of normative acts of administration and judicial review of administrative acts and contractual operation of administration in the theory of administrative law.<sup>14</sup>

The characteristic feature of Gneist's theory was seeking to closely combine administrative courts with the so-called active administration, mainly municipal. The lowest instance of administrative courts included authorities made up of officials of the executive body of the local government and of a professional government official, the second instance – made up of the college of officials accompanied by a civil factor, while only the third instance – the highest administrative court – intended to be independent of administration and made up of professional judges exclusively. His theory was put into practical use in the Prussian model of administrative courts.<sup>15</sup>

The views of the 19<sup>th</sup>-century doctrine of administrative judiciary presented above were reflected in three models of judicial control of administration. The first model separated administrative judiciary from the jurisdiction of common courts and entrusted it to the special system of administrative courts, regarded more or less as a part of administration (France and most of the German countries). The second model subjected settlement of disputes to administrative authorities in instance proceedings, and after exhaustion of this procedure to The Higher Administrative Court (Austria). According to the third model, all disputes resulting from the administrative operation were subjected to the jurisdiction of common courts (England, Belgium, Italy, the Netherlands, Scandinavian countries).<sup>16</sup>

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<sup>13</sup> R. Gneist, *Der Rechtsstaat*, Leipzig 1872, pp. 6–9.

<sup>14</sup> J. Boć, *Kontrola prawna administracji*, [in:] J. Boć (red.), *Prawo administracyjne*, Wrocław 1997, p. 345.

<sup>15</sup> R. Gneist, *Verwaltungsjustitz*, Leipzig 1871, pp. 634–639; M. Wyrzykowski, *Republika Federalna Niemiec*, [in:] L. Garlicki (red.), *Sądownictwo Administracyjne w Europie Zachodniej*, Warszawa 1900, pp. 121–124; H. Izdebski, *Historia administracji*, Warszawa 1997, p. 108.

<sup>16</sup> H. Izdebski, *op. cit.*, pp. 106–110; D. Malec, J. Malec, *Historia administracji i myśli administracyjnej*, Kraków 2000, p. 225; W. Witkowski, *Historia administracji w Polsce 1764–1989*, Warszawa 2007, pp. 47–53.

The situation was different in the Russian Empire where the constitutional principles of the Russian State (absolutism and consequent lack of separation of public authorities) stood in the way of separating administrative judiciary. As mentioned before, formally the whole Russian administration was supposed to operate on the basis of Acts. Their violation by the administrative authority authorised interested private or legal parties to make a complaint against directives violating their rights. In such cases, though, review of the administrative operations was limited only to study the legalism of the decisions taken, not to evaluate their impacts. Furthermore, every official was held financially liable towards private persons for material damages caused by their unlawful actions.<sup>17</sup> Complaints about unlawful administrative decisions were examined by special collegiate authorities created separately for individual departments of Administrative Boards (so-called *prisutswija*). They consisted only of a bureaucratic element and were completely subsidiary of competent administrative authorities. The highest authority in the system of control over administration were I and II Senate Departments in Power in Petersburg, but they too consisted of civil servants, and to examine administrative proceedings they had to receive prior authorisation from the competent minister. In consequence, administrative judiciary in Russia was not separated from the general administration division but because integrated into its structure, it was treated – from the formal point of view – as a special procedure within administration.<sup>18</sup> Therefore, in the disputed cases, judiciary and administration overlapped making the control over administration quasi-judicial. After 1867, those rules were also implemented in the Kingdom of Poland.<sup>19</sup>

In the Polish and Russian legal-administrative literature, interest in the issue of administrative judiciary was rather low. It resulted, it may be presumed, from political reasons which excluded free discussions on the safeguards of individual rights in the field of public law in the realities of the absolute rule. Those restrictions particularly affected Polish authors creating in the absence of their own statehood, under constant suspicion of the partitioning authorities and strict censorship. Addressing the issue of judicial control of administration and the issue of the legalism of the action of administrative apparatus and individual legal-administrative status connected with it constituted some form of a courageous act. Every conscientious analysis of those institutions in the Russian Empire had to

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<sup>17</sup> W.W. Iwanowski, *Uczebnik administratiwnogo prawa*, Kazań 1908, pp. 164–167; I.T. Tarasow, *Kratkij oczerk nauki administratiwnogo prawa*, „Wriemiennik Demidowskiego Jurideczskiego Liceja”, Jarosław 1888, p. 47; A.I. Jelistratow, *Osnownyje naczala administratiwnogo prawa*, Moskwa 1914, pp. 258–269; N.M. Korkunow, *Russkoje gosudarstwiennoje prawo*, t. II, Sankt Petersburg 1908, pp. 499–508.

<sup>18</sup> S.A. Korf, *Administratiwnaja justicja*, t. I, Sankt Petersburg 1910, pp. 212–283; A.I. Jelistratow, *op. cit.*, pp. 269–285.

<sup>19</sup> N.M. Korkunow, *Ruskoje...*, *op. cit.*, pp. 552–560; A.I. Jelistratow, *op. cit.*, pp. 286–294.

lead to the criticism of the already existing situation which put an author at risk of being accused of political dissidence and repression involved in it. It seems that it was for those very reasons that the issue of administrative judiciary in the Polish and Russian legal-administrative literature appeared very rarely and somewhat on the margins of the main issues of administrative law till the end of the 19<sup>th</sup> century, whereas first monographs, comprehensively summarising this issue, appeared with the turn of the new century.

In Russia, the discussion on the place of administration of justice in the system of the state authorities was initiated by Alexander II's judicial reforms from 1864. This date is also officially assumed as the beginning of administrative judiciary in this country. However, first works of Russian authors dedicated to this issue, such as Nikołaj O. Kuplewskij, Iwan T. Tarasow, Nikołaj M. Korkunow or Dimitrij I. Azarewicz, were limited to the analysis of individual models of administrative judiciary in Western Europe, mainly in France and German states, and to a search of analogies with institutional forms of administrative control in the Russian Empire.<sup>20</sup> This led to adopting modern legal-administrative terminology, characteristic for Russian literature of that period, and to its indiscriminate application to Russian institutions which were far from Western European standards. This situation did not change substantially after 1906, even though separation of powers implemented in Russia at that time allowed critical assessment of the Russian model of administrative control and created conditions for searching new, rational solutions in this matter. Works of Russian authors, such as Siergiej A. Korf, Wiktor T. Diejrużinskij or Igor I. Jewtichiew, created after that date, apart from outreach meaning, did not add much to the theory of administrative judiciary.<sup>21</sup>

Russian administrative judiciary literature was characterised by quite faithful imitation of German theories. Particular attention was given to works created by Gneist whose views approved most of Russian authors. The notion of administrative judiciary was introduced by Russian scholars by contrasting, as in German science, public law with private law, including only matters which resulted

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<sup>20</sup> N.O. Kuplewskij, *Administratiwnaja justicija w zapadnoj Ewropie. Administratiwnaja justicija we Francji*, Charków 1879, *passim*; I.T. Tarasow, *Organizacija administratiwnoj justiciji*, „Juridiczeskij Wiestnik”, t. 26, nr 6, Moskwa 1887, pp. 50–64; N.M. Korkunow, *Oczerk teorij administratiwnoj justiciji*, „Żurnal grażdanskogo i ugołownogo prawa”, t. 9, Sankt Petersburg 1885, pp. 28–41; D.I. Azarewicz, *Sudoustrojstwo i sudoproizwidstwo po grażdanskim dielam*, Warszawa 1891, pp. 1–237.

<sup>21</sup> S.A. Korf, *op. cit.*, *passim*; W.T. Dierjużinskij, *Administratiwnyje sudy w gosudarstwach Zapadnoj Jewropy*, Moskwa 1906; I.I. Jewtichiew, *Doktrina Oriu ob administratiwnoj justiciji*, „Juridiczeskij Wiestnik”, t. 16, Moskwa 1916, pp. 73–83. Apart from the mentioned ones, there were also a few other authors discussing the issue of administrative judiciary. Mostly, those were minor studies of the fragmentary nature. The bibliography of the Russian literature of administrative judiciary was collected by W.N. Durdeniewskij, *Russkaja literatura po administratiwnoj justiciji*, „Woprosy administratiwnogo prawa”, t. I, Sankt Petersburg 1916, pp. 130–143.



from public-law relations.<sup>22</sup> The term “administrative dispute” was understood as any matter relating to public law, to which administrative authority was a party and the subject of which was infringement of the binding law. As a criterion for determining jurisdiction of administrative courts they all agreeably concluded that

(...) the nature of legal relation out of which complaint arises should be considered a key feature. Public claims would be considered the ones legal basis of which rests on the relationship of dependency of individuals on public authority or other authority recognised by public law. However, claims relating to private law are based on individual interest, protected by law, that can have each individual outside one’s private interest in relation to the society as a whole, whereas this or any other nature of the complaint is defined by the rules of the existing public law.<sup>23</sup>

Most of those people considered protection of the objective legal order the main aim of administrative judiciary pushing protection of individual rights into background. Kuplewskij and Tarasow were the only ones who indicated a need to take legitimate, that is resulting from the existing legislation, interests of private persons.<sup>24</sup> As a consequence, it was characteristic for the Russian doctrine of administrative judiciary to limit its competences only to reviewing the merits and correct interpretation of legal regulations applied by the authority which constituted a basis for administrative decisions, which was consistent with the practices adopted by the Russian administration.<sup>25</sup>

Despite the fact that administrative judiciary appeared on the Polish territory quite early, already in the times of the Duchy of Warsaw, interest in this issue was relatively small among Polish authors.

At the beginning, introduction of the French model of administrative judiciary was treated with mistrust, as a sign of excessive statism and in the early years of the Kingdom of Poland it was even considered a transitional institution. The attitude changed in the post-uprising period when with the elimination of administrative judiciary in the Kingdom, one of the most important instruments for the protection of society from the arbitrariness of the Russian bureaucracy stopped functioning.<sup>26</sup>

In the Polish legal-administrative literature the issue of judicial control of administration was raised by only few writers, such as: Karol Boromeusz Hoffman, August Heylman, Aleksander This, Antoni Okolski and Aleksander

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<sup>22</sup> “(...) the notion of administrative judiciary can only be explained in relation to the difference between private and public law, however, the nature of administrative complaints should be sought not in the rights of the infringement of law but in the rights and impacts of the infringement”. N.M. Korkunow, *Oczerk...*, *op. cit.*, p. 28.

<sup>23</sup> D.I. Azarewicz, *op. cit.*, p. 10.

<sup>24</sup> N.O. Kuplewskij, *op. cit.*, p. XVI; I.T. Tarasow, *Organizacja...*, *op. cit.*, vol. 26, no. 6, p. 54.

<sup>25</sup> I.T. Tarasow, *Kratkij...*, *op. cit.*, p. 47.

<sup>26</sup> W. Witkowski, *Sądownictwo Administracyjne w Księstwie Warszawskim i Królestwie Polskim, 1807–1867*, Warszawa 1984, pp. 18–25.

Mogilnicki, but their contribution to the development of the theory of administrative judiciary was rather small. A characteristic feature of most works, especially those created in the first half of the 19<sup>th</sup> century, was avoiding deeper theoretical and practical considerations by their authors. Their works were limited to the analysis of the existing rules and to the presentation of organisational structures, composition and competences of administrative courts. This was the nature of the first Polish article about Polish administrative judiciary by Hoffman *O stanie sądownictwa administracyjnego w naszym kraju*, published in 1830 on the pages of "Themis Polska", as well as two works by Heylman *O sądownictwie w Królestwie Polskim* from 1834, and *Historia organizacji sądownictwa w Królestwie Polskiem* from 1861, and even a work written by Mogilnicki in 1900, entitled *Sądy administracyjne*.<sup>27</sup> These were not original publications but they included contemporary political views on administrative judiciary expressed in the criticism of the tendency to expand competences of administrative courts which settled property disputes between the state and citizens at the expense of common courts.<sup>28</sup> Hoffman's article was actually only an ordered set of rules relating to administrative judiciary in the Kingdom of Poland, Heylman proposed a division of judiciary of administrative disputes into civil, i.e. competent judiciary of administrative disputes defined in the French doctrine, and criminal – dealing with criminal and fiscal matters.<sup>29</sup> On the other hand, Mogilnicki appeared as a supporter of submitting disputes to common administrative courts "(...) resolving in accordance with any regulations of court procedures and mixed with administrative element in the composition".<sup>30</sup>

This and Okolski presented a different approach to the issue of administrative judiciary. The first one, in his article *O sporach jurysdykcyjnych* from 1830, attempted to theoretically justify maintaining the distinctiveness of administrative judiciary in the Kingdom of Poland.<sup>31</sup> Drawing on the example of the French doctrine, This inferred the institution of administrative judiciary from Montesquieu's principle of the separation of public powers, he argued that the judiciary of administrative disputes may be exercised only by the authorities associated with active administration, thus, only by administrative courts. Submitting such disputes to

<sup>27</sup> K.B. Hoffman, *O stanie sądownictwa administracyjnego w naszym kraju*, „Themis Polska” 1830, t. 7, pp. 277–305; A Heylman, *O sądownictwie w Królestwie Polskim*, Warszawa 1834, pp. 42–60; *idem*, *Historia organizacji sądownictwa w Królestwie Polskiem*, t. I, Warszawa 1861, pp. 185–202; A. Mogilnicki, *Sądy administracyjne*, Warszawa 1900, pp. 1–192.

<sup>28</sup> M. Gromadzka-Grzegorzewska, *Narodziny polskich nauk administracyjnych*, Warszawa 1985, p. 97.

<sup>29</sup> A. Heylman, *O sądownictwie...*, *op. cit.*, pp. 42–60; *idem*, *Historia...*, *op. cit.*, pp. 51–59.

<sup>30</sup> A. Mogilnicki, *op. cit.*, p. 8.

<sup>31</sup> A. This, *O sporach jurysdykcyjnych*, „Themis Polska” 1830, t. 8, pp. 289–324.

the jurisdiction of common courts, which would gain power to repeal and interpret administrative acts, would be, in This's opinion, a violation of fundamental principles of Montesquieu's theory leading even to the paralysis of administrative operation. Stressing the need to keep administrative courts separate from common courts, he not only indicated differences in their organization, competences and procedural rules but also difference in the objectives of common courts, including protection of individual rights in the field of private law, and of administrative courts, such as resolving disputes between citizens and state authorities which interfered with citizens' individual rights and interests. This saw the guarantees of administrative judiciary independence from interference of common courts in the judiciary of competence which, following Benjamin Constant's doctrine, he proposed to entrust a monarch as the fourth power in the state.<sup>32</sup>

The second important study covering the issue of administrative judiciary was a work by Okolski entitled *O sporach administracyjnych* published in 1867.<sup>33</sup> The author analysed French, German and English views on the subject of administrative judiciary and proposed his own definition of administrative dispute. Okolski examined administrative judiciary like French authors in the category of disputes between executive authorities and citizens. He defined the term "administrative dispute" as "(...) all the cases in which administrative authorities was in a conflict with law or interests of private persons" or as "(...) any dispute where administration is one of the parties (...)".<sup>34</sup> In the subjective scope, he differentiated between two categories of administrative disputes, taking differences between law and regulations as a criterion. The first one included disputes arising in connection to the interpretation of acts of the statutory rank, the second one – disputes arising in connection to the application of administrative acts issued by central and regional executive authorities (administrative provisions and regulations). He proposed to submit the first ones to the case-law of common courts and the second ones – to the resolution by administrative authorities of higher level as the competent administrative courts.<sup>35</sup> This rather untypical classification of administrative disputes was, according to Maria Gromadzka-Grzegorzewska, politically motivated:

(...) after 1832, in the Russian Empire as well as in the Kingdom of Poland formally the only source of rights was a monarch. The concept of law as an act created by the representation of the

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<sup>32</sup> W. Witkowski, *Aleksander This i Jan Kanty Wołowski. Wybitni prawnicy Królestwa Polskiego*, Lublin 2001, pp. 103–106.

<sup>33</sup> A. Okolski, *O sporach administracyjnych*, „*Ekonomista*” 1867, pp. 1–72.

<sup>34</sup> A. Okolski, *op. cit.*, p. 56.

<sup>35</sup> “(...) Disputes resulting from the implementation of laws, whose subject on question is regulated by act and a person's claims are based on provisions of law, should be subject to common judiciary only since only common courts are called on to uphold acts”, A. Okolski, *op. cit.*, p. 63.

nation did not exist there; the law was a normative act adopted by the emperor in a special mode with the involvement of legislative advisory authorities. (...) At the same time, demanding laws to be controlled by courts meant demanding control of the monarch's normative activity by them.<sup>36</sup>

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<sup>36</sup> M. Gromadzka-Grzegorzewska, *op. cit.*, p. 98.

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## SUMMARY

One of the fundamental assumptions of a constitutional and lawful state was recognizing the existence of an inviolable sphere of rights and freedom of individuals that restricted the freedom of administrative action. The guarantee for the protection of the sphere was seen in the statutory defining of the boundaries of the workings of the state apparatus and in the possibility of the external audit of the legality of the public administration. The duty was supposed to be fulfilled mainly by administrative judiciary which was considered to be one of the most significant institutions of administrative law in the 19<sup>th</sup>-century theory and practice. The term “administrative judiciary” was understood as the settlement of complaints against unlawful administrative decisions implemented by way of contentious proceeding before the authorities of the Member State. Such understanding of administrative judiciary did not decide upon the necessity for separating individual authorities, independent of Common Courts, that were established for administrative disputes resolution. It also

did not define the material scope of its characteristics. Those issues were of special interest to the European Administrative Sciences, especially in the second half of the 19<sup>th</sup> century.

**Keywords:** public administration; administrative law; administrative judiciary

### STRESZCZENIE

Jednym z podstawowych założeń konstytucyjnego państwa prawnego było uznanie istnienia nienaruszalnej sfery praw i wolności jednostki, ograniczającej swobodę działania administracji. Gwarancji ochrony tej sfery upatrywano w ustawowym określeniu granic funkcjonowania aparatu państwowego oraz w możliwości zewnętrznej kontroli legalizmu działania administracji publicznej. Zadania te miało spełniać przede wszystkim sądownictwo administracyjne, które w dziewiętnastowiecznej teorii i praktyce uznawano za jedną z najistotniejszych instytucji prawa administracyjnego. Pod pojęciem sądownictwa administracyjnego powszechnie rozumiano rozstrzyganie skarg na niezgodne z prawem decyzje administracyjne realizowane w drodze postępowania spornego przed organami państwa niezależnymi od administracji. Takie pojmowanie sądownictwa administracyjnego nie przesądzało jeszcze o konieczności wyodrębnienia szczególnych organów powołanych do rozstrzygania sporów administracyjnych, niezależnych od sądów powszechnych oraz nie określała zakresu przedmiotowego jego właściwości. Zagadnienia te stały się przedmiotem szczególnego zainteresowania europejskich nauk administracyjnych, zwłaszcza w drugiej połowie XIX w.

**Słowa kluczowe:** administracja publiczna; prawo administracyjne; sądownictwo administracyjne