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IMPORTANCE OF THE PRINCIPLE OF DECENT LEGISLATION FOR POLISH ADMINISTRATIVE LAW

Abstract

The paper analyses the principle of decent legislation and its significance for Polish administrative law. The principle in question derives from the concept of a democratic state under the rule of law. The significant role of administrative law in shaping the status of individuals (citizens) in the state as well as the influence of this branch of law on particular areas of social life are indicated. Due to the special characteristics of this branch of law, the principle of correct legislation should be absolutely taken into account in the legislative process that involves drafting of administrative legal acts. The case law of the Polish Constitutional Tribunal has distinguished certain elements or aspects of the principle of good legislation, including the following: non-retroactivity, protection of acquired rights, *pacta sunt servanda*, respect for pending interests or appropriate *vacatio legis*. The vast majority of them should be taken into account when working on administrative regulations. The paper also refers to the current crisis of administrative law discussed in the domestic literature from a practical point of view, by presenting two errors made by the legislator when amending administrative procedural laws. The conclusion of the study includes i.a. a proposal for a fuller involvement of experts, legal scholars and commentators, professional attorneys or administrative court judges in the process of drafting of administrative laws.

KEYWORDS

democratic state under the rule of law, principle of decent (good) legislation, administrative law

SŁOWA KLUCZOWE

demokratyczne państwo prawne, zasada przyzwoitej legislacji, prawo administracyjne

I. INTRODUCTION

The development of good law and its subsequent proper application is a fundamental responsibility of public authority. This general assumption is widely shared and accepted. In practice, it is much more difficult to decode what this 'good law' actually is and what standards it must meet in each particular case. It is important to remember that positive (written) law is by its very nature the primary means of resolving conflicts and balancing controversial social interests. Consequently, a lot of tension frequently grows around the process of legislation, and it serves as a platform for the natural game of interests.

It is stated in the literature that the legislature is well placed to secure and promote human rights.¹ Although it may be somewhat controversial, in my opinion, the area of law that has the greatest impact on the realization of human rights is administrative law. It is within this branch of law that public administration authorities can enter into the sphere of individual rights and freedoms most often and most freely. Due to the specific characteristics of administrative law, I argue that it is within this field of law that the principle of decent legislation plays a particular role.

In a democratic state under the rule of law, the process of formulating law is the subject of constitutional regulation and the issue constantly undertaken in the research and dispute of the scientific community, especially among legal scholars and commentators. In Poland, based on historical experience, the case law of the courts, especially of the Constitutional Tribunal (also Tribunal), and scientific dissertations, legal theorists have reconstructed the principle of decent legislation. This directive has a particularly important role in a modern state ruled by law.

¹ Grégoire Webber and Paul Yowell, 'Introduction: Securing Human Rights through Legislation' in Grégoire Webber and others, *Legislated Rights. Securing Human Rights through Legislation* (Cambridge University Press 2018) 1.

As Sławomira Wronkowska points out, making of law that would effectively serve the implementation of the adopted social goals is a particularly complex task in contemporary states. The growth of the organisational functions of the state and its enormous activity, especially in the economic and social sphere, have led to the inclusion of more and more new areas of social life in legal regulations as well as to an extremely rapid increase in the number of law-making acts issued. At the same time, the rapid and dynamic changes taking place in all areas of social life mean that changes to previously binding legal provisions and the drafting of new legal regulations must be carried out more frequently than ever before. Therefore, law-making decisions are becoming more and more difficult because, despite the progress in various fields of knowledge, including knowledge of social life, the systems of social affairs in which norms are established prove to be increasingly complex.²

The above view, expressed at the beginning of the 1980s, remains perfectly valid nowadays, and the difficulties and risks it outlined are even more evident at present. As I have mentioned, it seems that this is particularly relevant to administrative law,³ which has a particular impact on the status of the individual in the state, by determining his or her rights and obligations towards public authority and safeguarding a catalogue of the society's fundamental values. Some time ago, it was claimed in the domestic literature that Polish administrative law was in crisis. The source of this crisis is the growing distortion of administrative law itself, manifested above all in the excessive codification of social life (by means of administrative law regulations), as well as in the instrumental approach and the lack of legitimacy and moral deficiency of the law.⁴

Taking into account the particular importance of administrative law for the protection of civil and human rights and, additionally, its current crisis, it seems obvious that safeguarding the appropriate quality of this branch of law is currently a fundamental challenge for the legislator. In this context, the issue of the relevance of the principle of decent legislation for Polish administrative law should be thoroughly analysed. This paper is intended to serve this purpose. It should be noted, however, that due to the constraint of its scope, the issue may only be treated as a contribution to further scientific discussion on the subject.

² Sławomira Wronkowska, *Problemy racjonalnego tworzenia prawa* (Wydawnictwo Naukowe UAM w Poznaniu 1982) 6.

³ For the purposes of this paper, I have adopted a broad understanding of administrative law, which includes substantive, systemic and procedural norms.

⁴ Jacek Jagielski and Piotr Gołaszewski, 'Kryzys prawa administracyjnego a zmiana jego paradygmatu' in Dariusz R Kijowski, Alina Miruć and Agnieszka Suławko-Karetko (eds), *Kryzys prawa administracyjnego? Jakość prawa administracyjnego*, vol 1 (Wolters Kluwer Polska 2012) 28–29.

II. THE ESSENCE OF THE PRINCIPLE OF DECENT LEGISLATION

Broadly speaking, the concept of legislation is related in individual constitutional systems to the legislative activity of parliaments. Elected representatives have the task to adopt the law, which is then interpreted by the courts and applied by the executive power.⁵ Over the years, the essence of legislation has become not so much the power of the parliament to make law but the quality of the ‘produced’ provisions, i.e. the principle of decent legislation has emerged.

Under Polish law, the starting point for considering the principle of decent legislation is the clause of a democratic state under the rule of law⁶, *de lege lata* provided for in Article 2 of the Constitution of the Republic of Poland.⁷ Under this provision, the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice. There is a well-established view in the case law of the Polish Constitutional Tribunal, according to which an indispensable element of the principle of a democratic state under the rule of law are the rules of law-making, known as the principle of decent legislation.⁸

Following Bogusław Banaszak, it may be summarised that the essence of the principle of good legislation is the establishment of constitutional standards of

⁵ Alexander H Türk, *The Concept of Legislation in European Community Law: A Comparative Perspective* (Kluwer Law International 2006) 7.

⁶ As Mirosław Wyrzykowski points out, it seems that the attempt to formulate a universally accepted definition of the rule of law is doomed to fail. He does, however, provide a catalogue of specific determinants of the principle of a democratic state ruled by law, among which he lists, for example, the following: (a) the purpose of the state ruled by law is the development and consolidation of justice as well as the will and ability to protect the citizen from arbitrary power; (b) the state ruled by law should be a constitutional state, and civil rights and freedoms should be fundamental (basic) rights, which means that, in the case of civil freedoms, they establish, in principle, unlimited freedom towards the state and an essentially limited possibility of the state’s authoritative influence on citizens; (c) the state ruled by law determines the limits of its relations towards citizens, thus transforming the relations between the state community and the individual into legal relations (Mirosław Wyrzykowski, ‘Zasada demokratycznego państwa prawnego – kilka uwag’ in Marek Zubik (ed), *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego* (Biuro Trybunału Konstytucyjnego 2006) 234–35). A complete interpretation of the principle of a democratic state under the rule of law goes beyond the subject matter of this paper, however, a simple juxtaposition of the aforementioned determinants leads to the assumption that they cannot be actualised without the adoption and strict observance of the principle of decent legislation.

⁷ The Constitution of the Republic of Poland of 2 April 1997 [1997] JoL [Journal of Laws] 78 483 as amended.

⁸ Leszek Garlicki, *Polskie prawo konstytucyjne: Zarys wykładu* (5th edn, Wolters Kluwer Polska 2018) 76–77. In this context, the jurisprudence and literature also refer to ‘good’ or ‘correct’ legislation. In the following discussion, I use these terms interchangeably in view of the initial principle of ‘decent’ legislation.

correctness of the lawmaker's actions.⁹ In the Constitutional Tribunal case law, the following elements of the principle have been identified: (a) the principle of non-retroactivity of law, (b) the principle of protection of acquired rights, (c) the principle of *pacta sunt servanda*, (d) the principle of respect for pending interests, (e) the principle requiring the application of transitional provisions, (f) the principle of appropriate *vacatio legis*, (g) the principle prohibiting changes to the tax law in the course of the fiscal year, (h) the principle of the definiteness of laws, (i) the principle of proportionality, and (j) the requirement of observance of the principles of legislative technique.¹⁰

The Constitutional Tribunal continuously developing its standpoint on the essence and meaning of the principle of correct legislation, based on the already extensive case law in this regard. In order to show the visible tendency of a peculiar 'continuity' in the position of the Constitutional Tribunal on the discussed issue, it is necessary at this point to quote *in extenso* a passage from the relatively recent judgment of the Constitutional Tribunal in Case K 15/16 of 13 May 2021.¹¹ The Tribunal indicated therein that: 'one of the essential elements of the rule of law is the directive of observance of the principle of correct legislation ...'. In its judgment of 14 July 2010 issued by the full adjudicating panel, Case Kp 9/09, OTK ZU 6/A/2010, 59, the Tribunal, when analysing its previous case law, drew attention to three assumptions which are important for the assessment of the compliance of a legal provision with the requirements of correct legislation:

First – any provision of law, especially one that restricts constitutional freedoms or rights, should be worded in a way that allows unambiguous determination of who is subject to the restriction and in what situation. Second, the provision of law should be sufficiently precise to ensure its uniform interpretation and application. Third, such a provision of law should be so worded that the scope of its application includes only those situations in which a rational legislator actually intends to introduce a regulation limiting the exercise of constitutional freedoms and rights (see the judgment in Case K 33/00, 30 October 2001 OTK ZU 7/2001, 217; similarly i.a., the judgment Case K 47/04, 27 November 2006 OTK ZU 10/A/2006, 153) ... Another important element of the principle of correct legislation is also the observance of the requirements of logical and axiological consistency of the legal system. Therefore, 'legislative correctness means also legislating in a logical and consistent manner, respecting the general principles of the system and due axiological standards. It would, therefore, be incompatible with this principle to adopt legislation (even if the rationale of such legislation might appear to be correct) the provisions of which are inconsistent and cannot be explained with reference to other legal provisions. The purposefulness and possible legitimacy of the implementation of particular legal regulations cannot be an excuse for the making law in a chaotic and haphazard manner. Therefore, the

⁹ Bogusław Banaszak, *Prawo konstytucyjne* (5th edn, CH Beck 2010) 233.

¹⁰ Tomasz Zalasinski, *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego* (Wydawnictwo Sejmowe 2008) 51.

¹¹ OTK-A 2021 29.

arbitrariness and haphazardness of the enactment of legal regulations violates the principle of correct legislation, which is an infringement of Article 2 of the Constitution' (judgment in Case K 1/05, 21 February 2006 OTK ZU 2/A/2006, 18; similarly, i.a. judgment, Case P 28/07, 23 October 2007 OTK ZU 9/A/2007, 106).

Regardless of the critical remarks occasionally voiced in the literature about certain aspects of the Constitutional Tribunal's activity,¹² it should be noted that its decisions and judgments have had a significant impact on the Polish legal order.¹³ It should be recognised that the quoted stand of the Tribunal concerning the principle of decent legislation deserves approval. The Tribunal derived the said directive from the clause on the democratic state ruled by law, granted it a significant importance and continues developing its content in its judgments. The Constitutional Tribunal emphasizes the significance of understanding the principles of good legislation so that the legislator, respecting them, first and foremost should have to take into account the rights and freedoms of citizens. Most of the elements of the principle of decent legislation have a strictly protective role for individual citizens. One should mention here the principles of non-retroactivity, the protection of acquired rights and respect for pending interests.

III. SPECIAL ROLE OF THE PRINCIPLE OF DECENT LEGISLATION IN THE DEVELOPMENT OF POLISH ADMINISTRATIVE LAW

As already pointed out in the introduction to this paper, administrative law in its broadest sense performs significant roles in a democratic state under the rule of law. The specific feature of this branch of law is the fact that it regulates a very sensitive sphere of relations between the public authority and individual citizens. In other words, by means of administrative laws, the status of an individual in the state is affected in the most direct way. It is administrative law that determines the way in which civil rights and freedoms are exercised. Administrative law is part of public law, and so it typically implies the attempt of a public administration authority to regulate the conduct of usually many persons under legislative standards designed to promote the public interest.¹⁴ Within the framework of sub-

¹² Magdalena Malinowska-Wójcicka, 'Trybunał Konstytucyjny jako negatywny ustawodawca – skutki wyroków Trybunału Konstytucyjnego' in Maciej Kłodawski, Alicja Witorska and Mariusz Lachowski (eds), *Legislacja czasu przemian, przemiany w legislacji: Księga jubileuszowa na XX-lecie Polskiego Towarzystwa Legislacji* (Wydawnictwo Sejmowe 2016) 42.

¹³ I leave aside the political and legal disputes concerning the current shape and activity of the Constitutional Tribunal.

¹⁴ Richard J Pierce Jr, Sidney A Shapiro and Paul R Verkuil, *Administrative Law and Process* (Foundation Press 1999) 1.

stantive and procedural administrative law, the private interest of an individual and the public interest are balanced. By its nature, the influence of public administration authorities on the legal situation of individuals is decisive.

In American legal literature, Daniel E Hall describes administrative law as a body of law that defines the powers, limitations and procedures of administrative agencies (public administration authorities).¹⁵ In the United States, scholars devote much attention to the issue of control over administration.¹⁶ This is an obvious consequence of the assumption about the overwhelming influence of administrative agencies on the rights and obligations of individuals.

Regarding the national level, it is consistently argued in the literature that it is extremely difficult to define administrative law in an unambiguous and universal way, assuming that it is possible at all.¹⁷ Therefore, a number of domestic administrative theorists attempt to isolate the determinants (features or elements) of Polish administrative law that would predetermine its essence.¹⁸ The analysis

¹⁵ Daniel E Hall, *Administrative Law* (Lawyers Cooperative Publishing 1994) 1. Characteristically, this author quotes the following words of President Gerald Ford as a starting point for his discussion: 'a government big enough to give you everything you want is a government big enough to take away from you everything you have'.

¹⁶ William F Fox Jr, *Understanding Administrative Law* (Matthew Bender & Co. 1997) 31ff.

¹⁷ Jacek Jagielski, 'Określenie prawa administracyjnego i jego ogólna charakterystyka' in Jacek Jagielski and Marek Wierzbowski (eds), *Prawo administracyjne* (Wolters Kluwer Polska 2022) 43.

¹⁸ For instance, Elżbieta Ura presents the following catalogue of basic features of administrative law: (a) it is a branch of law, like civil law, except that it is not codified (there is no code of administrative law) and it is not uniform, as it is distinguished by certain detailed sections, e.g. environmental law or construction law, which contain also legal norms falling into other sections (branches) of law; (b) administrative law belongs to public law, which means that while in private law (civil law) the activities governed by it depend only on the will of the subjects of the law, in public law the decision as to the application of its provisions results from the will of the competent public authorities, and the addressees must respect them, unless the provisions stipulate certain rights which the addressees not always have to exercise; (c) it is a statute law and consists of a number of normative directives, prohibitions, authorisations, limitations, etc., the observance of which is safeguarded by a system of state-recognised legal sanctions, i.e. measures falling within the competence of administrative authority; (d) the sources of administrative law are the provisions of EU law, including the general principles of the Court of Justice of the European Union, the provisions of national law generally applicable and the provisions of internal law; (e) it governs the way in which administrative processes are carried out in the state by means of established institutions (bodies, administrative entities); (f) it is a component part of the whole system of law in the state; (g) it is the law that changes most frequently (every change in the political system and in the ruling elites affects administrative law and usually there is a change in it) and it is to the greatest extent dependent on politics (which certainly is not its advantage); (h) there is a close relationship between administrative law and the tasks and functions of the public administration: the subordination of the administration to law is one of the basic principles of the organisation and functioning of the state; (i) administrative law is also drafted by the administration itself, which means that the public administration can formulate directives for itself and, through its competence to make law, can continuously respond to various social phenomena; (j) the provisions

of the presented sets of the most relevant distinctive features of administrative law intuitively leads to the conclusion about the overwhelming influence that administrative law has on society and individuals.

Let us now turn to the central issue, i.e. the presentation of the special role that the principle of decent legislation has for Polish administrative law and law-making. Due to the complicated and multifaceted nature of this problem, the scope of the following analysis is limited to the presentation of three fundamental assertions concerning the mutual relations between administrative law and the principle of decent legislation.

Firstly, administrative law is by all means the most extensive branch of law in the Polish legal system. Apart from the rather extensive general part, the discussed branch of law has also a very comprehensive detailed part, which consists of acts governing particular areas of social life, e.g. the already mentioned environmental protection law and construction law, but also planning and spatial development law, geological law, mining law, health protection law, law on the market of medical products, law on access to public information, law on education (including higher education), law on assemblies, etc. Within substantive administrative law, there is no equivalent to the Civil Code,¹⁹ which is the most important, systemic compilation for private (civil) law, or so to say its ‘constitution’. The primary effect is that legislative changes in the basic concepts or constructs of administrative law may in practice affect several statutes, which automatically leads to amendments. This specific ‘fragmentation’ of the administrative law requires the legislator to be very well versed in the normative substance.

Secondly, the classic theoretical categories of administrative law, which, however, affect its application in practice, include administrative law authority, administrative law interference, administrative law coercion or public burdens. As Rafał Stankiewicz points out, the essence of administrative law authority includes the possibility of authoritative, unilateral shaping of a legal situation of the subject of the external sphere (individual, citizen) by the administering subject. This authority has the power, established by legislation, to issue various types of orders or prohibitions, permits, authorisations and concessions that are based on the presumption of legality.²⁰ In administrative law – contrary to civil law, where one of the main principles is freedom of contract²¹ – the initiative to produce certain legal effects frequently comes from the public administration body, which,

of administrative law are addressed partly to the administration and partly to entities outside it (Elżbieta Ura, *Prawo administracyjne* (1st edn, LexisNexis 2010) 25–26).

¹⁹ Act of 23 April 1964 Civil Code (Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny) consolidated text [2023] JoL 1610 as amended (Civil Code).

²⁰ Rafał Stankiewicz, ‘Władztwo prawoadministracyjne’ in Jacek Jagielski and Marek Wierzbowski (eds), *Prawo administracyjne* (3rd edn, Wolters Kluwer 2022) 115.

²¹ Pursuant to Article 353¹ of the Civil Code, parties entering into a contract may determine the legal relation at their own discretion, provided that its content or purpose do not prejudice the nature of the relation, a statute or the principles of social coexistence.

acting *ex officio*, may by issuing an administrative act (administrative decision) unilaterally shape the legal situation of the individual (citizen). Examples of such administrative decisions can easily be provided, which are often (e.g. expropriation of real estate) or almost always (e.g. imposition of an administrative fine) issued against the will of a party.

In the above context, the already mentioned elements of the principle of correct legislation gain particular significance, such as, for instance, the following directives: protection of acquired rights, appropriate *vacatio legis*, and definiteness of legal provisions or proportionality. The Constitutional Tribunal in its judgment in Case P 13/14 of 9 March 2017,²² when examining the issue of valorisation of compensation for expropriated real estate, found, i.a. that:

[A]t this point, the Tribunal considered it appropriate to remind that when assessing a provision in terms of whether its imprecision can be allowed in light of constitutional standards of correct legislation, the Tribunal takes it into account whether the legislator has taken care to maintain procedural guarantees protecting the individual against arbitrariness of the bodies enforcing the law. This method of review has been applied in the present proceedings. The correctness of the application of Article 227 of the Act of 21 August 1997 on real estate management²³ is subject to appeal at the appellate body and then examination in two-instance administrative court proceedings, which is a procedural guarantee limiting the discretion in the application of this provision.

Thirdly, the observance of the principle of decent legislation in the administrative law-making seems to be the best answer to the crisis in this branch of law indicated in the introduction to this paper. It is significant to note that the title of the 22nd Congress of the Chairs of Administrative Law and Administrative Procedure (Białystok, 23–26 September 2012) was ‘Crisis of administrative law in public administration?’²⁴ Among the commonly perceived symptoms of the poor state of administrative law are its extraordinary inflation observed in recent years and the phenomenon of the replacement of administrative regulations by civil law provisions. It is not difficult to find examples of laws that are completely incomprehensible to the average consumer or contractor.²⁵

²² OTK-A 2017 14.

²³ (Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami) [1997] JoL 115 741 as amended.

²⁴ Dawid Ziółkowski, ‘Historia Zjazdów Katedr Prawa i Postępowania Administracyjnego 1950–2018’ in Jacek Jagielski and Marek Wierzbowski (eds), *Prawo administracyjne dziś i jutro* (1st edn, Wolters Kluwer Polska 2018) 20.

²⁵ See e.g. the Act of 20 February 2015 on renewable energy sources (Ustawa z dnia 20 lutego 2015 r. o odnawialnych źródłach energii) consolidated text [2023] JoL 1436 as amended, or the Act of 5 September 2016 on trust services and electronic identification (Ustawa z dnia 5 września 2016 r. o usługach zaufania oraz identyfikacji elektronicznej) consolidated text [2021] JoL 1797 as amended.

The above analyses lead to the obvious conclusion that the importance of the principle of decent legislation for the Polish administrative law cannot be underestimated. The significant role of this branch of law for the organisation of social life and its impact on shaping the rights and obligations of individual citizens in a democratic state ruled by law require the legislator to be particularly careful when drafting administrative legal acts. Meeting the requirements and standards arising from the principle of correct legislation should, in the long term, result in a considerable improvement in the quality of administrative law.

In conclusion of this part of the discussion, two examples can be cited that illustrate the errors that the legislator can make in the course of amending administrative laws. These irregularities are related to the adoption of the Act of 6 March 2018 introducing provisions of Law on Entrepreneurs and other acts on economic activity,²⁶ and refer to amendments to two acts of key importance for general administrative procedures: the Act of 14 June 1960: Code of Administrative Procedure²⁷ and the Act of 30 August 2002: Law on Proceedings before Administrative Courts²⁸.

In my view, the first error is the inclusion, by virtue of the aforementioned amendment, of Article 14a in Chapter I, Section 2 (General Principles) CAP, according to which the public administration bodies allow parties to assess the performance of offices managed by these bodies, including the employees of these offices. In this case, the doubt is not so much about the content of the regulation but its placement in the statute. The said chapter of the CAP governs the basic general principles of administrative proceedings, such as the rule of law (Articles 6 and 7), the principle of objective truth (Article 7), the principle of increasing trust in public authority (Article 8), the principle of active participation of a party (Article 10), the principle of promptness and simplicity of proceedings (Article 12), or the principle of two-instance proceedings (Article 15). These have an overwhelming influence on the shape and course of administrative proceedings, and their content essentially expresses protective rules for the parties to the proceedings. It is pointed out in the literature that the general principles define a required benchmark for action of the authority conducting the proceedings and must be co-applied with other, specific provisions of the CAP that make them more detailed. In particular, these principles serve as interpretative directives in relation to the other provisions of the CAP, which means that the latter should be interpreted in such a way that the values derived from the general principles are

²⁶ [2018] JoL 650. The law entered into force on 30 April 2018.

²⁷ (Ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego) consolidated text [2023] 775 as amended (CAP).

²⁸ (Ustawa z dnia 30 sierpnia 2002 r. – Prawo o postępowaniu przed sądami administracyjnymi) consolidated text [2023] 1634 as amended (PAC).

not affected.²⁹ The general principles are obviously procedural in nature since they define the basic rules of administrative procedure.

In principle, however, the already cited Article 14a CAP does not strictly concern the conduct of administrative proceedings. It essentially amounts to the imposition of an unspecified obligation on public administration bodies to enable the parties to assess the performance of offices and their employees. Even a cursory analysis of the provision leads to the conclusion that it does not introduce any basic overriding, fundamental principle of administrative procedure. *Prima facie*, the insignificance of the regulation in question is also noticeable. The obligation of the authority, which can be met e.g. by providing questionnaires about the quality of service in the office, can hardly be regarded as comparable to the basic rules governing administrative proceedings, such as the obligation of public administration bodies to observe the rule of law or enabling parties to submit an effective appeal (two-instance procedure).

The other error in the amendment is the fact that it introduced incomplete changes in the PAC related to the establishment of a new special entity that may act in administrative court proceedings having the rights of a party, i.e. the Ombudsman of Small and Medium-Sized Entrepreneurs (SME Ombudsman). Pursuant to the added Article 8(3) PAC, the SME Ombudsman may take part in any pending proceedings, and submit a complaint, a cassation appeal, a grievance as well as a petition for reopening proceedings if, in his/her assessment, it is required for the protection of the rights of a micro, small or medium-sized entrepreneur within the meaning of the Act of 6 March 2018: Law on Entrepreneurs.³⁰ In such a case he/she enjoys the rights of a party.³¹ The aforementioned provision has been worded by analogy with Article 8(1) PAC (concerning the public prosecutor and the Ombudsman) and Article 8(2) PAC (concerning the Ombudsman for Children). All four entities listed in these regulations may be parties to any pending proceedings, as well as submit a complaint, a cassation appeal, a grievance and a petition for reopening proceedings.³²

At the same time, pursuant to the unchanged by the amendment Article 50(1) PAC, the entity entitled to submit a complaint is anyone who has a legitimate interest in it, the public prosecutor, the Ombudsman, the Ombudsman for Children, and a community organisation within its statutory activity, in matters

²⁹ Wojciech Chróścielewski, Jan P Tarno and Paweł Dańczak, *Postępowanie administracyjne i postępowanie przed sądami administracyjnymi* (Wolters Kluwer Polska 2018) 53.

³⁰ (Ustawa z dnia 6 marca 2018 r. – Prawo przedsiębiorców) consolidated text [2023] 221 as amended.

³¹ By virtue of the amendment in question, Art 173(2) PAC (the right to submit a cassation appeal) and Art 264(2) PAC (the right to request the Supreme Administrative Court to adopt an ‘abstract resolution’) were also amended, in both cases taking into account the SME Ombudsman.

³² Obviously, the premises enabling participation in a case are defined differently. For instance, the powers of the Ombudsman for Children are actualised if, in his or her judgment, the protection of the rights of the child requires it.

concerning the legal interests of other persons, if they took part in the administrative proceedings. Thus, as it can be noticed, the SME Ombudsman is no longer included among the entities entitled to submit a complaint. On the other hand, pursuant to Article 239(1)2 PAC, the following are not obliged to cover court costs: the public prosecutor, the Ombudsman and the Ombudsman for Children. The SME Ombudsman has been omitted also in this list. As commentators on the discussed provision point out: ‘the obligatory subjective exemption from covering court costs, however, does not include the SME Ombudsman, who is not mentioned in Article 239(1)2 PAC. It is difficult to decide explicitly whether this is a deliberate omission or an oversight of the legislator’.³³ It seems that, taking into account the systemic nature of the equal procedural status of the SME Ombudsman and three other special subjects (the public prosecutor, the Ombudsman and the Ombudsman for Children), we face here an oversight of the legislator, who, as it were, ‘forgot’ about the SME Ombudsman in the listing of entities in Article 50(1) and Article 239(1)2 PAC. Thus, gaps in the law were created as a result of legislative errors.³⁴

The demonstrated irregularities in the drafting (or amendment) of provisions of the broadly understood administrative law are all the more disturbing as they relate to two very important statutes governing the course of administrative and administrative court proceedings. The legislator should amend such important legal acts with particular care, being aware of the universality of their application and the direct impact on the procedural rights of individual citizens. Unfortunately, reliable activity of the legislator in this respect is not always the rule.³⁵

IV. CONCLUSIONS

In conclusion, the significance of the principle of decent legislation for Polish administrative law should be emphasised. The branch of law in question shapes

³³ Maria Jagielska, Jacek Jagielski and Piotr Gołaszewski, ‘Komentarz do art. 239–240’ in Roman Hauser and Marek Wierzbowski (eds), *Prawo o postępowaniu przed sądami administracyjnymi: Komentarz* (CH Beck 2019) 1071.

³⁴ The issue of the incorrect drafting of Art 50(1) PAC is of secondary importance, since the right to submit a complaint against the SME Ombudsman is granted directly in Art 8(3) PAC, which has already been cited. On the other hand, the problem of exemption from the obligation to cover court costs (Art 239(1)2 PAC) remains unresolved.

³⁵ In this context, it is worth recalling the discussion included in the study of Jan P Tarno, ‘Psucie Kodeksu postępowania administracyjnego’ in Janusz Niczyporuk (ed), *Kodyfikacja postępowania administracyjnego: Na 50-lecie K.P.A.* (Wyspa 2010) 847ff. The author argues, for instance, that ‘the lower quality of legislation on administrative proceedings is primarily a consequence of ill-considered amendments to the Code of Administrative Procedure’, *ibid* 848.

the legal situation of individual citizens in a democratic state under the rule of law. Since administrative law governs the rights and obligations towards public authorities, the elements of the principle of decent legislation play a particularly important role in the law-making process. These include, for instance, such aspects as the protection of acquired rights, the requirement of an appropriate *vacatio legis* or the requirement of proportionality of legal regulations.

At the same time, the domestic administrative law-making has specific characteristics. It is a very extensive branch of law, covering a number of areas of social life. The multiplicity and comprehensiveness of legal acts of administrative law, as well as their practical significance for the protection of individual rights, require the involvement of experienced and very well-prepared legislators in the process of making and amending administrative regulations. The participation of experts, representatives of jurisprudence and legal scholars, professional attorneys or administrative court judges in the legislative process should be postulated. It is worth taking advantage of the knowledge of people who apply administrative law on a daily basis and carry out scientific research in its area.³⁶

Finally, in the foregoing study, I have referred to convincing views on the crisis in which Polish administrative law currently is. In this regard, I have pointed out and discussed two errors made in the amendment to the Code of Administrative Procedure and the Law on Proceedings before Administrative Courts. They are certainly very modest, but nevertheless measurable, evidence of a general deterioration in the quality of this branch of law. Even in such important acts as those discussed, there are oversights or errors by the legislator, and their overall reliability may raise serious doubts.

In the above context, it seems that a kind of remedy for the current state of national administrative law should be a consistent reform of this branch of law through deliberate and careful action by the legislator. The starting point should be the rigorous observance of the requirements and standards arising from the principle of decent legislation. There is also a task emerging here for legal scholars and commentators, who should constantly 'remind' the legislator of the importance that the quality of administrative law has for the development of social and economic relations in the state. One can only hope that this study, at least to some extent, will fulfil this obligation on the part of science.

³⁶ Another proposal is to work towards a decisive improvement in the quality of explanatory memoranda to bills. They should be extensive, insightful and thoroughly prepared. Currently, it is not uncommon for the written reasons to draft legislation to contain a brief introduction to the subject matter being addressed, and then essentially to repeat the proposed provisions.

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