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THEMATIC FOCUS:
The Rule of Law and Judicial Dialogue in Europe: Continuity and Change

BRINGING THE ADMINISTRATION UNDER THE RULE OF LAW IN THE FORMATIVE PHASE OF MODERN STATES

A Comparative Analysis

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Abstract

Despite the existing differences, the models developed within the framework of the 'rule of law', the 'Rechtsstaat' or 'l'État de droit' had one thing in common: they all reflect the endeavour to make the administration accountable, predictable, rational and effective institution. The main principle of subjecting administration to the rule of law during the formation of modern states was to guarantee individuals freedom and equality before the law. From this perspective, it's about emphasizing that administrative law is not the law of administration, even that chosen in democratic elections, as is the case with local government bodies. It is the law of the people and for the people, who agree to the administration functioning on their behalf and for the common good, fairly balanced with the good of the individual.

Keywords: public administration, rule of law, Rechtsstaat, l'État de droit, ius politiae

1. Introduction

The phenomenon of the subordination of the administration to the rule of law should be viewed as a process that did not occur overnight and which, at the same time, suggests that, in historical sequence, public administration emerged first, since without it the exercise of power by a ruler – whether feudal or absolutist – would have been impossible. It was not until the emergence of modern states that the need arose to objectify, rationalize, and standardize the actions of the administration, with the law proving to be the only predestined instrument for this purpose. At the same time, the introduction of the rule of law into the administration means far more than merely

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conferring a legal character upon it – it is a matter of binding the administration to the law. There is no question that the juridification of administration took place on a massive and unprecedented scale in 19th-century continental Europe under the overwhelming influence of the ideas of the Enlightenment and the French Revolution[1], as well as the realization of the principles of the Rechtsstaat[2]. Today, the existence of fundamental connections between administration and law is beyond question. Hans Kelsen had already argued that without law, there simply could be no administration[3]. Law brings the administration into being and determines its structure, its processes and functions, as well as the framework for permissible legal actions. owadays, this is enshrined in the supreme law of every state, which imposes a duty on public authorities to act within the framework of and in accordance with the law (in the case of Poland, this is Article 7 of the Constitution). The fundamental aim of the administration is the implementation of the law. Consequently, the administration should be assessed from the perspective of the implementation of the law.

The subordination of the administration to the rule of law must be viewed in a historical and comparative context, for although the administrations of individual states today are evidently undergoing processes of convergence on an unprecedented scale, exemplary solutions are the result of mutual learning and the adoption of tried-and-tested legal models developed over a long tradition. It is therefore worthwhile to compare the establishment of administrative law in 19th-century continental Europe with a very different model of administration, which is a product of the general common law system. The differences identified appear to be significant, yet taking them into account in the development process allows for a better understanding of the framework conditions and contexts within which today's administration operates. Despite the existing differences, the models developed within the framework of the 'rule of law', the 'Rechtsstaat' or 'l'État de droit' had one thing in common: they all reflect the endeavour to make the administration accountable, predictable, rational and effective institution, particularly in its dealings with individuals.

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1 Diana Zacharias: Der Begriff des Verwaltungsrechts in Europa. In: Armin von Bogdandy – Sabino Cassese – Peter M. Huber (ed.): *Verwaltungsrecht in Europa: Wissenschaft*. Handbuch Ius Publicum Europaeum. Vol. 4. Heidelberg, C. F. Müller, 2011. 543.

2 It's worth noting that in contemporary Polish literature, Robert von Mohl is mainly mentioned as the leading creator of the idea of the Rechtsstaat. The popularity of Robert von Mohl in Poland is shown by the translation of his two-volume encyclopedia in 2003 (see Robert von Mohl: *Encyklopedia umiejętności politycznych*. [Encyclopaedia of Political Skills]. t. 1–2. Antoni Białecki (translation), Adam Bosiacki (ed.), Liber, Warszawa, 2003). It should not be forgotten that R. von Mohl was not alone in his views and belonged to a large group of supporters of the idea of the Rechtsstaat, among whom the publishers of the state lexicon were the first to stand out. (Das Rotteck-Welckersche Staatslexikon) Karl von Rotteck, Carl Theodor Welcker, and Johann Christoph von Aretin, see Michael Stolleis: Rechtsstaat. In: Wolfgang Stammler – Adalbert Erler – Ekkehard Kaufmann (ed.): *Handwörterbuch zur deutschen Rechtsgeschichte*. Vol. 4. Berlin, Schmidt Verlag, 1990. 367.

3 As early as 1925, the famous Austrian administrative scholar Hans Kelsen stated that without administrative law, there is no public administration, and that it is the law that distinguishes administration from all other entities., see Hans Kelsen: *Allgemeine Staatslehre*. Berlin, Springer, 1925. 276.

2. Administration under ius politiae

The essence of the 'link' between administration and law is 'administrative law'. The term itself already points to the existence of two unequal components: law and administration, since the grammatical construction (noun and adjective derived from the noun) implies that it is law, in particular, that constitutes the central element determining the structure of administrative jurisdiction. Incidentally, similar terminology is found in most European languages; to name but a few: the French 'droit administratif', with which it all began[4] the Italian 'diritto amministrativo', the Spanish 'derecho administrativo' or even the English 'administrative law', although, as is well known, there was long resistance in the British Isles to recognising administrative law as a distinct branch of law[5]. In German, on the other hand, we find the form of a compound noun: 'Verwaltungsrecht', which, taken literally, is to be understood as 'the law of the administration' – that is, created to meet the needs of the administration – which in turn might suggest an instrumental function of the law in the hands of the administrative authorities[6]. Administrative law is not a branch of law controlled by the administration, yet the notion of placing the administration above the law accurately reflects the power structure that prevailed in continental Europe until the end of the 18th century. Given the multitude of states and administrative cultures, it is difficult to identify common elements, but similarities can undoubtedly be found in the relationships between the ruler, the administration, and the subjects. Before the law as we understand it today – including administrative law – took shape, the administration in continental Europe was regarded as the exclusive domain of the rulers (kings and princes), serving as a means of exercising internal administration and, above all, as a means of exercising power[7]. At the same time, the administration was not structurally separated from the person of the ruler, who viewed it purely as an instrument – a service or executive function carried out for his (the ruler's) benefit – that is, as a category standing above the administration itself.[8]

A common form of communication between the ruler and the administration, on the one hand, and their subjects, on the other, was the promulgation of laws applicable

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4 It's worth noting that the term administrative law (droit administratif) has replaced and taken over from other terms in French doctrine, like common law or political law, which was initially criticized for overly ‚glorifying' the administration, since in reality administrative law was created for the individual and the citizen, not for the administration. See Jean-Louis Mestre: *Introduction historique au droit administratif français*. Paris, Presses universitaires de France, 1985. 166.

5 At this point, it's worth quoting the frequently cited statement of Victorian constitutionalist Albert Venn Dicey addressed to Louis Jean Baptiste Henry Berthélemy – a professor of administrative law at the university of Paris 'In England we know nothing of administrative law, and wish to know nothing about it' – quoted in: William A. Robson: Administrative Law. In: Morris Ginsberg (ed.): *Law and Opinion in England in the 20th Century*. Berkeley, University of California Press, 1959. 193. https://doi.org/10.1525/9780520345331-010

6 Zacharias op. cit. 543.

7 Maria Gromadzka-Grzegorzewska: *Narodziny polskich nauk administracyjnych.* [The origins of Polish administrative sciences]. Warszawa, Uniwersytet Warszawski edition, 1985. 18.

8 Zacharias op. cit. 543.

unilaterally, which were referred to as 'ius politiae' (Policeyrecht)[9]. These consisted of regulations, proclamations, instructions, orders, decrees, edicts, ordinances or mandates which were enacted at the ruler's own and subjective discretion[10]. The concentration of all power in a single hand meant, in effect, that the law was created and applied by the same ruler with whom the administration was equated. The law was regarded as a unilateral instrument in the hands of the policey legislator and not as a means of limiting power. This means that the legal acts, issued according to subjective criteria, imposed numerous duties, commands and prohibitions on individuals, whilst at the same time not being binding on the ruler or the administration[11]. In short, the ius politiae did not originate in parliament; it was usually enacted in ad hoc situations, which deprived it of the character of general applicability (universality) of legal norms[12]; it was not subject to publication in the modern sense; and the informal nature of the enactment of legal acts, as well as the high frequency with which they were issued, made it impossible to invoke ius politiae in court proceedings.

One consequence of equating the ruler with the state[13] was the absence of any structural separation between the ruler and the administration. This, in turn, meant that the administration's actions were attributed to the ruler in the eyes of the outside world. However, the criteria for assessing these actions were not derived from the ius politiae, which was, after all, subject to all too frequent changes and dealt exclusively with the duties of subordinate individuals. At the same time, there was a strong need to articulate the question of accountability for the exercise of power within an ideological context. The rulers of the time therefore sought to legitimise their decisions, relying not on the prevailing ius politiae or on the support of their subjects, but on supernatural categories

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9 Johann Christian Pauly: *Die Entstehung des Polizeirechts als wissenschaftliche Disziplin. Ein Beitrag zur Wissenschaftsgeschichte des öffentlichen Rechts.* Frankfurt am Main, Vittorio Klostermann, 2000. 92.; Thomas Simon: *»Gute Policey«. Ordnungsleitbilder und Zielvorstellungen politischen Handelns in der Frühen Neuzeit.* Frankfurt am Main, Vittorio Klostermann, 2004. 440. As Adam Błaś points out, ius politiae was ‚an expression of the ruler's will and served as an instrument in carrying out internal administration and exercising the ruler's power', see Adam Błaś. In: Adam Błaś – Jan Boć – Jan Jeżewski: *Nauka administracji.* [The study of administration]. Wrocław, Kolonia Limited, 2013. 35.

10 Michał Szczaniecki: *Powszechna historia państwa i prawa.* [A General History of the State and Law]. Warszawa, PWN, 2000. 395.

11 The ius politiae norms only included the duties of the individual, giving them no rights, because they didn't bind the ruler or the administration. The norms set by the ruler didn't meet the standard of universality (generality and overall applicability), weren't of parliamentary origin, and their application wasn't overseen by the courts. See Franciszek Longchamps: *Założenia nauki administracji.* [The principles of administrative science]. Wrocław, Kolonia Limited, 1991. (reprint from 1949). 238.

12 Ibid. 163.

13 As Federico Chabod points out, the basic foundation of the states back then was based on a sense of loyalty and faithfulness to the king. See Federico Chabod: Ya-t-il un État de la Renaissance? In: Federico Chabod (ed.): *Scritti sul Rinascimento.* Torino, G. Einaudi, 1967. 610.

– on natural law[14] and grace bestowed by God[15]. The emphasis on accountability to God stemmed from the fact that Europe in the 16th, 17th and, to some extent, the 18th centuries knew no national patriotism, and people defined their sense of community through the religious identity of their ancestors and their affiliation with the Church[16].

At this point, it is worth examining the concept of the state's aims and functions as it was understood at the time, as these largely reflected the ruler's pre-determined aspirations. In this regard, there was a general conviction that the fundamental function of the state was to ensure the happiness of its subjects. The state was therefore expected to provide comforts and make the lives of individuals more pleasant[17], to promote their inner strength (prosperity) and eternal happiness,[18] to increase population growth – a prerequisite for a happy social existence[19] – and to guarantee security, including moral security.[20] The legitimacy of the ruler and the administration, which justified the state's

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[14] Christian Freiherr von Wolff, theorist of absolutism, professor of mathematics and natural law at the universities of Halle and Marburg, saw in natural law a constant and objective foundation for the state system. Natural law stands above the sovereign and sets limits on their actions. Because of its intangibility, natural law represents an ethical, rather than legal, limitation on the ruler's power and is not associated with any individual claims against the ruler. Additionally, Ch. Wolff pointed to the close connections between the Church and natural law, arguing that giving honor to God is in human nature. See Józef Bohdan Oczapowski: *Policyści zeszłego wieku i nowożytna nauka administracyi: przyczynki do dziejów tej nauki: historya nauki administracyi w XVIII wieku.* [Policey thinkers of the last century and modern administrative science: contributions to the history of this discipline: a history of administrative science in the 18th century]. Warszawa, Drukiem S. Orgelbranda Synów, 1882. 72.

[15] Małgorzata Moras: Reformy Józefa II (1780–1790) a rządy prawa [The reforms of Joseph II (1780–1790) and the rule of law]. *Studia z dziejów Państwa i Prawa Polskiego* 16, (2013), 132–149.

[16] Canon law that was valid across borders was then seen on the continent as a sort of binding factor (koiné). As Gabriel Le Bras demonstrated in his groundbreaking research, there is a strong influence of canon law on administrative law, which today is reflected in the existence of timeless categories in administrative law such as the common good (utilitas publica), public necessity (necessitas publica), or public association (universitas). See Gabriel Le Bras: Les origins canoniques du droit administrative. In: *L'évolution du droit public, études offertes à Achille Mestre*. Paris, Sirey, 1956. 395.

[17] According to Christian Wolff, the state is an institution meant to support people in their pursuit of happiness by making social life easier and sweeter for its individuals, see Christian Wolff: *Jus naturae methodoscientifica pertractatum*. Vol. I–IX. Halle, Francofurti & Lipsiae, Prostat in Officina Libraria Rengeriana 1740 – cited in: Oczapowski op. cit. 95.

[18] Johann Heinrich Gottlob von Justi understood happiness as a concern of the state, outlining broad boundaries of this concept and including citizens' freedom, their security, internal strength, which he equated with prosperity, as well as 'eternal happiness,' which is a continuation of earthly happiness, see Johann Heinrich Gottlob von Justi: *Grundsätze der Policey-Wissenschaft*. Göttingen, Vandenhoeck, 1756. – quoted in: Oczapowski op. cit. 97.

[19] Joseph Freiherr von Sonnenfels saw the main goals of the state in increasing the population, claiming that a large population is a basic condition for a happy social existence, which forms the foundation for security and strength externally, see Joseph Freiherr von Sonnenfels: *Grundsätze der Polizey, Handlung und Finanz – Zu dem Leitfaden des politischen Studiums*. Wien, J. E. von Kurzbeck, 1787. – cited in: Oczapowski op. cit. 149.

[20] The French polcey theorists Nicolas de La Mare (another acceptable spelling of the surname is Delamare) focused on describing the reality he observed, distinguishing eleven areas of administration, mainly in terms of oversight and security guarantees, not excluding public morality, see Nicolas de La Mare: *La Traité de la Police.* Amsterdam, Aux dépens de la compagnie, 1729. – cited in: Oczapowski op. cit. 157.

comprehensive intervention in every sphere of the individual's life, was based on the conviction that human beings are powerless and weak, incapable of securing their all-round development through their own efforts and by their own means[21]. The state's objectives and functions, understood in this way, required intervention in all areas of its subjects' lives in order to avert harm threatening the state[22] It is telling that the achievement of the aforementioned objectives was to be facilitated not so much by a system of social benefits as by a sophisticated system of commands and prohibitions contained within the ius politiae. This, in turn, leads to the conclusion that a significant portion of the responsibility was shifted onto the subjects themselves, whilst the effectiveness of the administration depended entirely on the willingness of individuals to comply with the established rules, commands and prohibitions[23]

When analysing the distinctive features of administration on the European continent prior to the emergence of administrative law in the modern sense, it is useful to broaden the analysis to include a comparative perspective. Whilst on the continent the concept of absolute power united all possible functions and mechanisms for the realisation of the public interest in a single authority, in England at that time we were dealing with a system of the separation of powers. Sovereign power lay with the king and the government, yet administrative tasks were traditionally carried out by local authorities. It is of crucial importance here that no hierarchical or subordinate relationships developed between these two categories of actors, as administration was carried out not on behalf of the king or the state, but on behalf of the original institutions. Consequently, one cannot speak here of a typical subordinate administrative and executive function vis-à-vis the sovereign, as the aim was the realisation of self-government. The role of administrative officials was carried out by Justices of the Peace, who were of aristocratic origin and personally administered counties. Representatives of the same class also sat in the House of Commons and successfully ensured that the interests of local communities were taken into account in the legislative process.[24]

Administrative methods also differed from those customary on the mainland; they were characterised by a high degree of heterogeneity and formed a mosaic of methods applied by parishes, shires, counties, and boroughs. Furthermore, the administrative process took into account the requirements arising from general common law, Acts of Parliament and the Crown's directives. The separation of the judiciary, the legislature and the executive (with a structural distinction between governmental and administrative tasks), as extolled by Charles-Louis Secondat, Baron de Montesquieu[25], was in reality not based on a separation but on a deep symbiosis within these three

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21 Błaś op. cit. 36.

22 Ibid. 36.; Gromadzka-Grzegorzewska op. cit. 18.

23 The aforementioned policey theorists Johann Heinrich Gottlob von Justi openly said that the fulfillment of the state's functions and the policey's goals largely depends on the people themselves, and in this way, he made both the individual and society jointly responsible for the fate of the state, See Oczapowski op. cit. 127.

24 Tim Blanning: *The Pursuit of Glory: Europe 1648–1815*. London, Penguin Books, 2008. 125 ff.

25 Charles de Montesquieu: *De l'esprit des loix*. Genève, Barrillot & Fils, 1748.

powers. As Rudolf von Gneist rightly observed, representatives of a homogeneous class of landowners sat in Parliament, in local government and in the common law courts, which served as a guarantee of the absence of conflict and the harmonious development of England.[26]

Given the different forms of government on the islands, a distinctive model of administration has emerged. In the classical understanding of parliamentary democracy, the administration is accountable to the government, which in turn is accountable to Parliament – meaning there are no direct links between all levels simultaneously. By contrast, the English system at that time featured direct and close links between local government and Parliament. Formally speaking, Parliament in Westminster delegated new powers to local government, but the mechanism in place for drafting 'Acts of Parliament' suggests a high level of involvement by local authorities in parliamentary work[27]. The draft bills were not, in fact, drawn up by the government or on its behalf, but within the framework of a special legislative procedure, the 'Private Bill Procedure', which was conducted under the auspices of the local authorities concerned and was subject to quasi-judicial scrutiny by the High Court of Parliament.[28] The oversight of administrative measures affecting individuals, on the other hand, was ensured by a system of judicial redress exercised in accordance with the applicable common law. The courts' strong position in monitoring compliance with the rule of law in administrative action was so significant that academic literature had already begun to refer not so much to the 'rule of law' as to the 'rule of the judiciary'[29]

The vastly different modes of operation of the administration outlined above are based on opposed mechanisms of exercising power. The system of absolute power prescribes not only the structural and functional unity of the ruler and the administration, but also the functional unity of the state with its subjects (those governed). From this perspective, the legitimacy of power and administration was sought in the worldview and in relation to supernatural forces that lay beyond the scope of action of the ruler, the administration or, even more so, the subjects. As we have seen, traditions, customs and natural law also played a not insignificant role in the common-law system of government. Yet whilst the

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[26] Rudolph von Gneist: *Englische Verfassungsgeschichte*. Berlin, Julius Springer, 1882. 704. https://doi.org/10.1007/978-3-642-52604-6 It's worth quoting Martin Loughlin's accurate observation that the phenomenon and causes of the stabilization of the system in England at that time were first diagnosed by foreign scholars, because local lawyers were too busy dealing with practical problems. See Martin Loughlin: Staat, Verwaltung und Verwaltungsrecht: Großbritannien. In: Armin von Bogdandy – Sabino Cassese – Peter M. Huber (ed.): *Verwaltungsrecht in Europa: Grundlagen*. Handbuch Ius Publicum Europaeum. Vol. 3. Heidelberg, C. F. Müller, 2010. 124.

[27] Before 1835, local government bodies were generally formed by individual Acts of Parliament setting up bodies for specific purposes in specific areas. For example, one Act of Parliament in 1769 created the Birmingham Street Commissioners to manage markets, ensure public safety at night and provide street lighting in Birmingham' – see Victoria County History, A History of the County of Warwick: Volume 7, the City of Birmingham – *Political and Administrative History: Local Government and Public Services*, 1964. – quoted in: Alice Baxter: *History of local government in English towns and cities*. London, House of Commons Library, 2025. 25.

[28] Loughlin op. cit. 122–123.

[29] Ibid. 122.

interpretation and application of the ius politiae on the continent lay exclusively in the hands of kings and rulers, in the British Isles this task fell to the strong and independent courts that applied the common law. Another key feature of the English system is the structural and functional separation of local government, which has developed into a distinctive system of the separation of powers, within which deep harmony actually prevailed due to members' shared status as landowners.

3. The emergence of administrative law

The emergence of administrative law in continental Europe in the 19th century fundamentally altered perceptions of the nature and functions of the administration. However, this epoch-making transformation did not happen of its own accord, nor did it occur overnight; rather, it was triggered by a series of key factors that compelled a change in the ways and methods of government and administration. There is no doubt that the driving force behind the changes on the continent was the quest for a fundamental reorganisation of the balance of power between the state and society. Advancing industrialisation necessitated qualitative and quantitative changes in the scope of the state's responsibilities. The administration was no longer to be responsible for ensuring the happiness of its subjects, as had been the case in feudal or absolutist states. Consequently, the previous methods of government – which were based on the issuance of occasional ius politiae regulations prescribing or prohibiting certain behaviours on the part of subjects – proved to be no longer appropriate. Administrative law became the predestined instrument for the transformation of social relations within the state; it was aimed at the self-determination of the individual, who, regardless of class affiliation, strove to realise their own rights and freedoms. This fundamental upheaval was triggered by the achievements of the French Revolution, underpinned by the views of the philosophers of the time, in particular Kant and Humboldt[30].

At the same time, we are seeing a gradual shift in its profile and an increase in public responsibilities, which necessitated an increase in the administrative workforce; this, in turn, led to a rise in the institutional significance of the administration as a distinct category[31]. In this situation, the need arose to establish a civil service law that would, a priori, regulate the functioning of the administration and the conduct of individual

[30] As the well-known Polish administrative scholar Franciszek Longchamps points out, Kant criticized state concepts aimed at achieving individual well-being. According to the philosopher, norms enforced through coercion do not reflect natural law, which is free of coercion. The purpose of introducing compulsory laws should not be the happiness of individuals, but their freedom to pursue their own happiness as they wish, as long as it doesn't infringe on the same freedom of others. See Franciszek Longchamps: Poglądy nauki francuskiej i belgijskiej na prawa jednostki wobec władzy. [Views of French and Belgian scholarship on the rights of the individual vis-à-vis the authorities]. *Acta Universitatis Wratislaviensis* 4, ‚Prawo' (1962), 13.

[31] Gerhard Wielinger emphasizes that the observed patterns already appeared in the final period of the rule of absolute monarchs. For example, the reigns of Empress Maria Theresa or King Frederick II of Prussia were marked by the constant expansion of the administrative state and bureaucratic state, in which nothing could happen without the approval of the bureaucratic machine, see Gerhard Wielinger: Mutmaßungen über einen Zusammenhang zwischen der Denkweise der österreichischen Verwaltung

civil servants, whilst at the same time creating the basis for a certain degree of distance between the administration and the ruler[32]. In this context, it should be noted that the law fulfils important functions in relation to the administration. On the one hand, it establishes the administration as an institution and, at the same time, defines the administration's responsibilities as an independent structural category. Furthermore, the law fulfils a stabilising function, as it objectifies the relationship of dependence between the administration and the ruler by establishing a catalogue of the authority's tasks and duties. Consequently, the criteria for assessing the authority and the civil servant become measurable and neutral.[33]

The patterns outlined above are also partly borne out in the case of England. The changes to the quantitative and qualitative nature of administrative tasks brought about by the process of industrialisation posed a threat to the cultural diversity of the administrative structures on the islands. Over time, it became clear that the heterogeneity of administrative functions and methods did not meet the social and economic demands of industrialisation, which involved the promotion of trade, increased migration of the population to the cities, and the urbanisat 13. ion of formerly rural communities, which had to grapple with problems such as sewerage, waste disposal, crime prevention and the provision of housing. All this heralded the gradual introduction of classical administrative structures, which was initiated by reforms in the social sphere.[34] Consequently, over time, a form of competition or rivalry developed in England between centralised and traditional administrative structures[35]

Despite the gradual emergence of centralised administrative structures on the islands, there is still no administrative law in the sense understood in continental Europe. The decisive difference appears to lie in the undisputed status of common law. The guarantees of administrative accountability, realised through judicial review, remain a defining feature of the system there, despite the emergence of a new type of administration with a hierarchical structure. The philosophical rationale behind the centralisation reforms in the English administration also appears to be of extraordinary importance for understanding the notion of administration in England. Whilst in continental Europe the emphasis was on the administration's duty to act lawfully, and

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und der Wiener Schule der Rechtstheorie. In: Erhard Mock – Csaba Varga (ed.): *Rechtskultur – Denkkultur*. Stuttgart, Franz Steiner Verlag, 1989. 165.

32 Horst Dreier: *Hierarchische Verwaltung im demokratischen Staat: Genese, aktuelle Bedeutung und funktionelle Grenzen eines Bauprinzips der Exekutive*. Tübingen, Mohr Siebeck, 1991. 36.

33 Ibid. 36.

34 A pioneering model solution is considered to be the Poor Amendment Act of 1834, which created a new type of social administration that was centralized and efficient. Other administrative matters were left in the hands of traditional local government structures. However, it soon became clear that, due to the lack of uniform procedures, this system was not efficient. That's why in the following years, following the example of the Poor Amendment Act, the functioning of education and healthcare was reformed. See Kenneth Morgan: *The Birth of Industrial Britain: Social Change, 1750–1850*. Harlow, New York, Pearson Longman, 2004. 66.; David Englander: *Poverty and Poor Law Reform in Nineteenth-Century Britain, 1834–1914: From Chadwick to Booth, 1834–1914*. London, Routledge, 2013. https://doi.org/10.4324/9781315840550

35 Loughlin op. cit. 127.

administrative law was viewed as both an instrument of change and a civilisational achievement, in the British Isles Jeremy Bentham's idea of utilitarianism profoundly shaped thinking. This view saw the administration's duty in the context of the effective, efficient and beneficial management of public affairs in accordance with the rules of the free market economy.[36] It appears that, despite the current processes of convergence among administrative systems in Europe, the observed differences remain relevant even today.

4. Parliamentary law

However, the new balance of power between the state and society, the unprecedented qualitative and quantitative increase in administrative tasks, and the ever-growing power of the civil service did not constitute the actual foundation of this new form of administration. It was the triumph of parliamentarism in continental Europe during the 19th century that led to the regulation of state administration being gradually and systematically removed from the jurisdiction of kings and rulers and transferred to that of parliament. There, the parliamentary law was, and remains, the fundamental mechanism for regulating constitutional and social relations within the state.

The parliamentary law created the administration and, at the same time, conferred great importance upon it by removing it from the arbitrariness of the (absolute) ruler and subjecting it to the authority of a normative act valid a priori. Furthermore, the parliamentary law was not confined to mere creation, but became a permanent instrument for steering the administration, which was accompanied by the assumption that the administration could be shaped in accordance with the will of the legislature.

A law is the result of Parliament's legislative activity and thus reflects the special status of the legislative power. And here, significant similarities can be observed between the provisions of the English and French systems of that time. Laws were, and continue to be, regarded there as the embodiment of the will of the sovereign people[37], which is why it was, de facto, out of the question to challenge them or call them into

[36] The basic motto of Jeremy Bentham was to achieve happiness for the greatest number of people, and it was not the compliance of administrative actions with the law, but rather the benefit that should be the only criterion for evaluating public actions. According to the philosopher, everything that contradicted utilitarianism should disappear, especially the heterogeneous traditions of local communities or the strong influence of the landed aristocracy. This initiated many administrative reforms, the most important element of which was the introduction of a single organizational model. Bentham's thinking was thoroughly centralist. Efficient action should be served by a system of hierarchical subordination, supported by a mechanism of punishments and rewards, which is supposed to ensure responsible and effective management of public affairs. Administration should be subject to the rules of the economy; road construction or prison management should be handled by the cheapest bidder, who will then be monitored, Nancy L. Rosenblum: *Bentham's Theory of the Modern State*. Cambridge, Mass., Harvard University Press, 1978. 118. – cited in: Loughlin op. cit. 128.

[37] For clarity, let's point out that while the sovereignty of the nation was the main slogan of the French revolution, in England it stood in a kind of opposition to the widely recognized principle of parliamentary sovereignty. This problem was solved by Albert Venn Dicey, who described the parliament as the legal sovereign and the people as the political sovereign, see Tomasz Wieciech: Normatywny wymiar

question in any way, even by an independent ordinary court of law. On the contrary – it was precisely through the case law of the courts in England that the principle of parliamentary sovereignty was developed and consolidated, effectively ruling out the possibility of challenging laws[38]. In France, by contrast, there is no such far-reaching symbiosis between the legislative and judicial branches as exists in the British Isles, since the doctrine of the French Revolution brought about a strict separation of powers, with the clear stipulation that courts should not interfere in the sphere of law-making. The primacy of Parliament is evidenced by the popular designation of France as the 'État légal', proposed by Raymond Carré de Malberg, which suggested that the laws fully embody the will of the sovereign people (volonté générale), which is not subject to the rule of the judges (gouvernement des juges)[39]

In this context, we note the leading role played by Parliament in shaping the model of public administration, whilst the role of the courts as a supervisory body over the activities of the executive in England and France is significantly weakened[40]. The point is that the ordinary courts in England and the administrative courts in France have, from the outset, focused primarily on monitoring the administration's compliance with the limits of its powers (acting ultra vires)[41]. This, in turn, further strengthened the power of the legislature, as no one other than Parliament defined the limits of the administration's powers of action through legislation.

However, the strong position of Parliament did not mean that the courts in either of these states had no influence over the actions of the administration. On the contrary, in England an indirect influence can be observed through the primacy of common law, insofar as any legislative activity had to relate to existing precedents in the

brytyjskiej konstytucji. [The normative dimension of the British constitution]. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 74, 2. (2012), 25. https://doi.org/10.14746/rpeis.2012.74.2.2

38 As Tomasz Wieciech points out, 'the principle of parliamentary sovereignty, whose origins go back to the Glorious Revolution of 1688, has survived in Great Britain due to the lack of a constitution in the formal sense. It provided Parliament – it's worth remembering its three-part structure made up of the king, the lords, and the commons – not only with full legislative power but also with legislative omnipotence, meaning that Parliament could make any laws, and its acts could not be effectively challenged by any body or compared under the threat of invalidity with any higher-ranking norms. Even at the end of the 18th century, the prevailing view was that a parliamentary act could not be unconstitutional.'. See Wieciech op. cit. 26.

39 The fear of the realization of judicial rule had already been expressed in literature much earlier, dating back to the Ancien regime, but it was only the principle of parliamentary sovereignty put forward after the revolution that seemed to act as an effective barrier against excessive claims of the judiciary, see Raymond Carre De Malberg: *Contribution à la théorie générale de l'État I.* Paris, Libraire de la Société du recueil sirey, 1920–1922. 493. – cited in: Yoan Vilain: Verfassungsprinzipien. In: Nicolaus Marsch – Yoan Vilain – Mattias Wedel (ed.): *Französisches und Deutsches Verfassungsrecht. Ein Rechtsvergleich*. Berlin–Heidelberg, Springer, 2015. 98. https://doi.org/10.1007/978-3-642-45053-2_3

40 Thomas Würtenberger: Konvergenzen oder Dominanz nationaler Rechtstraditionen in Deutschland und Frankreich. In: Lothar Albertin et all: *Frankreich-Jahrbuch 2001*. Wiesbaden, VS Verlag für Sozialwissenschaften, 2001. 153. https://doi.org/10.1007/978-3-663-10091-1_10

41 Thomas Philip Blunden Rattenbury: The *Ultra Vires* Rule: Its Substance and Significance. In: Stephen H. Bailey et all (ed.): *Public Law within Government*: *From the Post-War Years to the 1980s*. London, Palgrave Macmillan, 2008. 17. https://doi.org/10.1057/9780230583627_2

area of life being regulated[42]. In France, by contrast, administrative law developed primarily through the case law of the Conseil d'État[43], which represented a particular manifestation of the administration's independence not only from the ordinary courts but also from Parliament. The latter aspect highlights the role of the Conseil d'État as a special administrative court with close links to the government[44], which has a significant influence on the nature of the administration in France.

Against the backdrop of the above considerations, the different situation in Germany merits attention. Owing to the lack of democratic legitimacy of the German parliament, the special value of the law could not be derived from the will of the sovereign. Consequently, legal doctrine provided the justification by formulating the concept of the rule of law, which derives the special value of the law not from the 'charisma of parliament' but from the characteristics inherent in the law itself. This concerns, in particular, the law's abstract character, its a priori nature, predictability and verifiability, which in turn constitute the formal prerequisite for effectively guaranteeing the rights of the individual, in particular equality before the law and freedom. Alongside the law, institutional safeguards in the form of review by specialised administrative courts took on particular significance.

The idea of the Rechtsstaat represents the German response to the achievements of the French Revolution**,** adapted to the liberal tenets of the constitutional monarchy[45]. The law thus did not reflect any special status of Parliament vis-à-vis other branches of government; rather, the Rechtsstaat also aimed to restrict the legislature within the

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[42] Describing this relationship, Jan Jeżewski cites the opinion of Henry W. R. Wade, who pointed out that: ‚in England, the principles of administrative law cannot be derived from the constitution, venerated with universal respect; they are found by examining the ways in which courts interpret various statutes and looking for logical connections between different types of judgments'. See Jan Jezewski: Zasada rule of law jako aksjologiczne kryterium działania administracji państw członkowskich Unii Europejskiej. [The rule of law as an axiological criterion for the actions of the administrations of European Union Member States]. In: Janusz Sługocki (ed.): *Dziesięć lat polskich doświadczeń w Unii Europejskiej. Problemy prawnoadministracyjne.* [Ten Years of Polish Experience in the European Union. Legal and Administrative Issues]. Vol. I. Wrocław, Presscom, 2014. 19. See also Hubert Izdebski: *Fundamenty współczesnych państw.* [The Foundations of Modern States]. Warszawa, LexisNexisPolska, 2007. 91.

[43] It's about the issuance by the Conseil d'État of so-called general principles of law, which are not expressed in positive law (principes généraux applicables même en l'absence de texte). In the absence of relevant legal regulations, the Conseil d'État takes on a norm-creating role, classifying a certain principle as part of the general principles, whose binding power comes from being recognized by the judge. See Hubert Izdebski: Francuska Rada Stanu. [The French Council of State]. *Zeszyty Naukowe Sądownictwa Administracyjnego* 1, (2005), 137–140.

[44] In this context, Polish administrative scholar Jerzy Stefan Langrod wrote about the 'praetorian' nature of the Conseil d'État's adjudicative activity, see Jerzy Stefan Langrod: *Zarys sądownictwa administracyjnego: ze szczególnym uwzględnieniem sądownictwa administracyjnego w Polsce.* [An Overview of Administrative Justice: With Particular Reference to Administrative Justice in Poland]. Warszawa, Instytut Wydawniczy 'Bibljoteka Polska", 1925. 119.

[45] The concept of the 'Rechtsstaat' was developed as a German response not only to the achievements of the revolution, but also to the ideas of Jean-Jacques Rousseau. Yoan Vilain rightly observes: ‚Ob nun als formelles oder als materielles Konzept, der Rechtsstaat bildete sich als deutsche Reaktion auf die Rousseauschen Ideen der französischen Revolution vom «Volksstaat» und von der Volkssouveränität', see Vilain op. cit. 95–96.

scope of its lawful activities. As a result, the justification for the law was seen in the mission of self-restraint of the state and all state power. With regard to administration, the law was considered an effective tool to bind the administration to the law and to protect individuals from unjustified interference in their rights and freedoms. According to Otto Mayer, the Rechtsstaat is nothing other than a ‚state of orderly administrative law'[46].

5. Final remarks

In summary, it should be noted that a common element in all the countries discussed is the emphasis on the need for the administration to act according to the law, specifically parliamentary law. This indicates a general recognition of the principle of legal order in a formal sense. While, due to cultural differences, the concept of Rechtsstaat at that time cannot be compared to the rule of law, not to mention that in France there was not yet any talk of État de droit, but rather État légal, there was a general belief in the need to create a system of safeguards to make the administration a predictable entity responsible for acting in accordance with the law.

Emphasizing the formal aspects of the rule of law more strongly means an instrumental approach to exercising power through laws (the law-based state) – which is the opposite of the rule of law – and therefore implies an instrumental approach to administration and governance. The central role is taken by the law, which, according to the will of parliament, can carry any content and any values[47]. So even a dictatorship – if it meets the formal requirements – will be called a rule-of-law state[48]. During the period when modern states were taking shape on the continent, the formalistic view of the idea of the rule of law dominated, thanks to the spread of the principles of legal positivism, which in its most radical form was reflected in the so-called pure theory of law (Reine Rechtslehre). In the views expressed by Hans Kelsen at the beginning of the 20th century, the state and law form a single unified whole, which in practice meant an automatic labeling of any state entity as a rule-of-law state.[49]

In this sense, we should be critical of judging administrative actions solely from the perspective of faithfully following parliamentary laws. It's only by emphasizing the

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[46] According to the words of Otto Mayer: ‚Der Rechtsstaat ist der Staat eines wohlgeordneten Verwaltungsrechts', see Otto Mayer: *Deutsches Verwaltungsrecht.* Vol. I. 3rd ed. München, Verlag von Duncker & Humblot, 1924. 58.

[47] Joseph L. De Lolme spoke vividly on this subject, stating – unable to imagine the development of medicine in our times, especially genetics – that 'it is a fundamental principle with the English Lawyers, that Parliament can do every thing, *except* making a Woman a Man, or a Man a Woman. See Joseph L. De Lolme: *The Constitution of England*. 4th ed. London, G. Robinson and J. Murray, 1784. 134.

[48] In this regard, Hubert Izdebski gives the example of the Prussian state, where, despite meeting the formal requirements of the rule of law, the rights of national minorities were discriminated against, see Hubert Izdebski: *Historia administracji* [History of the administration]. 5th ed. Warszawa, Liber, 2001. 95.

[49] Hans Kelsen: *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*. Leipzig-Wien, Franz Deuticke, 1934. 16.

material aspects of the rule of law that we can see the importance of the individual's perspective and the protection of their rights. While in a ius politiae regime, the individual was seen more as a 'subject,' the laws made in parliament should look at authority as serving the individual and take into account the concept of the public interest. From this perspective, the main slogan and guiding principle of subjecting administration to the rule of law during the formation of modern states was to guarantee individuals freedom and equality before the law. We should therefore note that administrative law is not the law of administration, even that chosen in democratic elections, as is the case with local government bodies. It is the law of the people and for the people, who agree to the administration functioning on their behalf and for the common good, fairly balanced with the good of the individual.

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