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The Administrative State in Poland before and after the Accession to the European Union

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The text offers a concise study of *Gestalt* of Polish administrative state before and after the accession of the Republic of Poland to the European Union (EU) within the framework of Europeanization of administrative law and administration in the member states. The authors borrowed the term 'administrative state', being rather unusual and unused in Poland, from the book *The Administrative State*, ed. by A. von Bogdandy, P.M. Huber, S. Cassese¹. *Nota bene* as in this book Sabino Cassese² ascribes the invention of the term 'administrative state' to the American political scientist Dwight Waldo³, the authors would like to add that in Germany as early as in the beginning of XX century the contemporary state was described as becoming an administrative state—*Verwaltungsstaat*, whilst its predecessor was called 'police state' ('police' being an equivalent of administration)—*Polizeistaat*⁴.

¹The Max Planck Handbooks in European Public Law. Vol. I *The Administrative State*, ed. by A. von Bogdandy, P.M. Huber, S. Cassese, Oxford 2017.

²S. Cassese, *The Administrative State in Europe*, [in:] *The Max Planck Handbooks in European Public Law. Vol. I The Administrative State*, ed. by A. von Bogdandy, P.M. Huber, S. Cassese, Oxford 2017, p. 58.

³D. Waldo, *The Administrative State: A Study of the Political Theory of American Public Administration*, New York 1948.

⁴ See J.S. Langrod, *Instytucje prawa administracyjnego* [Institutions of Administrative Law], Kraków 2003 and F. Longchamps, *Założenia nauki administracji* [Assumptions of Administrative Science], Wrocław 1949.

1. State and statehood

A state can appear and disappear, it is – as Thomas Hobbes famously said – a Mortal God⁵. Only few states have had the privilege of preserving state continuity and having a more or less continuous development. The popular examples are the United Kingdom, Sweden and Switzerland. The list is of course not exhaustive one as another possible example is Croatia whose Constitution⁶ in the opening part titled *Historical Foundation* refers to ‘historical facts and the universally accepted principles governing the contemporary world’ that allow to conclude on ‘the millennial national identity of the Croatian nation and the continuity of its statehood’. The history of Poland being the country deprived of a state (stateless country) for 123 consecutive years (1795-1918) and other countries without or with low level of statehood throughout their history is the opposite example and a lesson here. With this in mind the critical question arises: does the accession to and membership in the EU, which is a supra-state organization aiming to ‘create an ever closer union among the peoples of Europe’⁷, present a danger to preserving the status of a state?

An answer to the above question may be based on four standard elements of the conventional concept of the state, namely: population, territory, government and capacity to enter into relations with other states. As long as they are preserved one can maintain that membership in the EU and transferring significant part of state sovereignty to the EU doesn’t conflict with state status. In case of territorial element of the Polish state the opposite opinion is even justified. One can namely observe that before the accession Poland was located between Germany and Russia, whilst today, after the accession, Poland is located on the east border of the EU. From the geopolitical and geostrategic viewpoints it is the great change of fundamental importance for the safety of Poland. The conclusion of not losing the state status is strengthened by the fact that having a status of a European state is a necessary condition of membership in the EU⁸, that transfer of a part of state sovereignty follows the state decision of conferral⁹, and that being a member state of the EU doesn’t eliminate the possibility to be a member of other international organizations.

⁵The Hobbes’ metaphor was recalled by G. Biaggini, *Legal Conceptions of Statehood*, [in:] *The Max Planck Handbooks in European Public Law*. Vol. I *The Administrative State*, ed. by A. von Bogdandy, P.M. Huber, S. Cassese, Oxford 2017, p. 557.

⁶The Constitution of the Republic of Croatia of 22 December 1990.

⁷See the preamble and Article 1(2) of the Treaty on the European Union, and the preamble to the Treaty on the Functioning of the European Union. As the process of European integration is confronted with specific local (national) conditions the impacts of the Europeanization process are far from European unity.

⁸See Article 49 of the Treaty on the European Union.

⁹The principle of conferral determines whether the UE enjoys or lacks the competence to act. According to this principle the Union may only act where this is provided in the EU Treaties. The Treaties being concluded by the states. The fact that the EU has got legal personality (Article 47 of the Treaty on the European Union) allows it conclude international agreements with third countries, i.e. non-member states. Making use of this state-like function, the EU must stay in line with the principle of conferral (the general procedure for the conclusion of international agreements is laid down in Article 218 of the Treaty on the Functioning of the European Union).

2. Europeanization

Concepts and phenomena are embedded in context, including time and space. This is also true in case of the process of Europeanization – the natural consequence of membership in the EU. After the initial focus on the new extra-state (supra-state) institutions, bodies, offices and agencies, which was the dominant stream in the European studies until the 1980's, came the enhanced interest in the EU's actual impact on the member states since the 1990's, termed Europeanization. A new impetus to the use of the notion came with the 2004 EU eastern enlargement. But what exactly is to be understood by the notion of Europeanization still remains a bit unclear. On the level of maximum common denominator, it could be succinctly said that Europeanization is concerned with the influence of the EU on its member states. It is the analysis of changes in national polity, politics, and policy (3P) brought about by the EU. Some analyses focus on the very process, others more on its outputs and outcomes, still others try to identify the determinants (legal, political, social, etc.) of the implementation of EU law in the member states. The intertwined notions of Europeanization of administrative law and Europeanization of administration are similarly a bit misty although one thing may be said without any doubt, namely that their understandings and definitions are obviously linked with the concept of European public law. The great advocate of this concept Armin von Bogdandy concludes *inter alia* that 'European public law institutes, enables, guides, and constraints the exercise of domestic and transnational public authority in a way that forms and maintains a common legal space'¹⁰.

The process of Europeanization, including Europeanization of administrative law, is the quintessence of the EU: to establish common policies and legal rules in order to bring member states together (integration through law). As such, Europeanization is close to the notions of unification and harmonization of national legal systems. The idea of public law as a constructive tool of legal unification and the belief that there can be a common law of some sort that is independent of the state and a common legal space are of critical importance here. Regarding Europeanization of administration, it may be said that in some matters (mostly safety; food safety being only one example) EU institutions, bodies, offices and agencies assume more and more important administrative functions, thus replacing national administrations.

Modern type administration with administrative law submitting administrative bodies to the rule of law was born and developed in a state framework in the course of nineteenth century¹¹. The relationship between administration (and administrative law) and the state used to be in the first half

¹⁰A. von Bogdandy, *The Idea of Public Law Today*, [in:] *The Max Planck Handbooks in European Public Law*, vol. 1, *The Administrative State*, eds A. von Bogdandy, P.H. Huber, S. Cassese, Oxford 2017, p. 15.

¹¹One cannot deny that ancient Rome had a really good administration but the existence of an administrative law in ancient Rome is not generally accepted.

of the twentieth century like – using metaphor from a poem for children – between Mary and her little lamb, which means inseparable. However, in the EU this is not a case any longer. National administrations function together with the EU administration¹² the former undergoing the process of Europeanization. And the administrative legal corpus in the EU is not the national one but European one embracing EU administrative law and national administrative laws within the framework of European public law. It ought to be stressed that in addition to the vertical exchange going on in both directions between the EU and its member states, the horizontal dimension of European public law is also embraced, which is represented by mimetic processes, convergence, isomorphism, and comparative analysis, inspiration and exchange among the member states¹³. Moreover, the concept of European public law includes also European comparative legal scholarship that exceeds national borders and breeds common European categories and concepts emancipated of positive law of any individual member state. Article 179(1) of Treaty on the Functioning of the European Union foresees achieving ‘a European research area in which researches, scientific knowledge and technology circulate freely’¹⁴. This solutions can produce in the future European scientific (academic) community. Creating such community requires European identity of its members, which is still missing today as the majority of researches sees themselves in the relation to their specific national law and national scientific community whilst European public law and European legal space require European identity. Its accomplishment is not easy because of many reasons that can be summarized under the heading of diversity of national legal cultures. The idea of European public law serves well building the European legal space and creating the European identity of researches.

3. Europeanization of administrative law

Europeanization of administrative law has many aspects and dimensions and below are succinctly discussed those of them that seem to gain momentum after Poland’s accession to the EU. They can be grouped under the following headings: sources, cooperation, paradigm (constitutionalization), administrative democracy, scope and depth, and outcomes.

¹²See concepts of mixed administration, composite administration, joint administration, network administration, European administrative space, European administrative system, etc.

¹³A number of (not only) Central and Eastern European (CEE) countries like Poland and Hungary could be said to be under a distinct German legal influence, getting inspired and copying German legislation and case law, see M. Fromont, *A Typology of Administrative Law in Europe*, [in:] *The Max Planck Handbooks in European Public Law*, vol. 1, *The Administrative State*, eds A. von Bogdandy, P.H. Huber, S. Cassese, Oxford 2017, p. 595 ff. A bit risky notion of ‘intellectual Germanization’ could be applied here.

¹⁴The significant position within European research area occupies European Research Council together with its executive agency: European Research Council Executive Agency.

3.1. Sources

The impact of Europeanization on administrative law in its formal dimension brings Europeanization of the sources of administrative law. One can observe a massive inflow of European norms in national administrative laws. These European norms create European administrative law that is a body of principles and rules that constitute the administrative-law part in European Union law. And what is important here, penetration of EU norms into domestic legal systems increases in a way that escapes the grasp of state: the secondary legislation¹⁵ with the doctrines of direct effect and primacy is the best possible example here. Another critical issue is the scope of the doctrine of direct effect. It is addressed not only to the judicial branch but also to the (national) executive branch, which means that where a provision of EU law has direct effect, it is binding on all the authorities of the member state, that is not only on the national courts but also on all administrative bodies (administrative direct effect).

3.2. Cooperation

Europeanization of administrative law means that national sources of administrative law have to cooperate with EU sources. Moreover, the latter include both particular texts – Treaties and EU secondary legislation (special written provisions), and general principles, that is the general principles of EU law applicable in all situations of national implementation of EU policies and rules¹⁶. Special provisions and general principles are sometimes strongly intertwined as is exemplified by the case of good administration being an element of the right to good administration and a principle of good administration¹⁷. *Nota bene* this example is of importance as good administration can be seen as the administrative law equivalent to the constitutional concept of the ‘community of law’ proclaimed by the European Court of Justice¹⁸.

¹⁵The secondary law takes various forms. Article 288 TFUE acknowledges three binding legal instruments – regulations, directives and decisions (and two non-binding instruments: recommendations and opinions), regulations and decisions having direct effects in the national legal orders and directives being indirect forms of the EU law.

¹⁶ The body of principles that constitutes the administrative part in EU law and that is consistent with the principles in national administrative laws allows to speak about a European model of administrative law. Some lawyers grouped in the Research Network on European Union Administrative Law (ReNEUAL) have argued for a codification of its procedural part. See *ReNEUAL Model Rules on EU Administrative Procedure*, ed. by P. Craig, H.C.H. Hofmann, J.-P. Schneider, and J. Ziller, Oxford 2017 and *Kodeks postępowania administracji Unii Europejskiej (Code of Proceedings of EU Administration)*, ed. by J. Supernat, B. Kowalczyk, Warszawa 2017.

¹⁷ On a double status of good administration that of a fundamental right and, in its wider sense, that of a general principle of EU law under Article 41 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the Treaty on the European Union see H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union*, Oxford 2011, p. 190 ff.

¹⁸ Case 294/83 *Les Verts v Parliament* [1986] ECR 1339.

In Poland ensuring the compliance of domestic provisions with EU regulations is the task of administrative courts. In case of the lack of compliance the courts disregard application of the national law being contrary to the EU law, instead applying directly Union regulations. In other words, Polish administrative courts are the guardian of the proper cooperation between Polish law and Union law and bodies. One example of such courts' custody is the position of the Polish Supreme Administrative Court (Naczelny Sąd Administracyjny – NSA) regarding the right to return of excise duty. The Court challenged the Polish statutory limitation of persons entitled to return of excise duty as not compatible (too restrictive) with Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty (OJ 2009, L 9/12), concluding that the right to return of excise duty is derived directly from the provisions of the Directive (see e.g. the verdict of NSA of 23 February 2017, I GSK 1837/15).

In addition, national administrative judges come to be challenged by European judges in the development of administrative law in the European context. One case is telling here. The Polish Supreme Administrative Court by the decision of 23 February 2016 referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of Directive 2006/112/EC, in so far as it affects the value added tax which is charged on the supply of a building, or parts thereof, and of the land on which it stands (case C-308/16). According to the firm judgment of the Court of Justice of 16 November 2017 concrete provisions of the Directive must be interpreted as precluding a national law. After this judgement Polish administrative courts followed the line of not applying national provisions being contrary to Union directives. Their reasoning was as follows: 'National provisions and legal practice, judicial or administrative, leading to the diminishing of the effectiveness of community law, depriving the adjudicating court of ability to do everything what is necessary to set aside applying national law being an obstacle (even temporary) to the full effectiveness of community norms, wouldn't be acceptable in the light of requirements flowing from the very nature of community law' (the verdict of NSA of 23 November 2017, I FSK 312/16).

3.3. Paradigm (constitutionalization)

Europeanization of administrative law is supportive for a critical transformation in administrative law. Historically, administrative law treated the individual as a subordinate subject and was mainly an objective law, something particularly reflected in administrative litigations, which tended to be a control pitting a norm against norm. Today, the concern for human and fundamental rights in the EU law¹⁹ leads to a growing subjectivism. The result is a subjectivization of administrative

¹⁹K. Lenaerts and J.A. Gutiérrez-Fonssay that 'the very *raison d'être* of EU law is inherently linked to the creation of individual rights that are directly enforceable before national courts. For every EU right, there must be a judicial remedy. It is on this founding postulate that the entire EU system of judicial protection is based', K.

litigation, which evolves into a tool of protecting human and fundamental rights (the individual as a holder of rights) and to satisfy the interests affected by the administration, and not only a way of controlling and disciplining it. In the United Kingdom Paul Craig proposed to abandon the perspective whereby the essential function of administrative law was to ensure that the administrative authorities remain within the limits of the powers Parliament has given them – the model of the *ultra vires*; instead, he advocated a rights-based approach that focusses more on protecting the rights of individuals²⁰. Such approach was identified in ReNEUAL model code for EU administration by the European Ombudsman Emily O'Reilly and positively assessed by her: 'The law should not become a shield for the administration to hide behind by saying that a particular action is not expressly allowed or forbidden. It is therefore of fundamental importance that ReNEUAL succeeded in avoiding rules that are excessively detailed. The Model Rules do not invite a box ticking approach, nor do they create an obstacle course that inhibits sound judgment or defies common sense'²¹.

The fundamental change regarding understanding the role of public administration and their attitude towards an individual caused by EU regulations and case law was brought *inter alia* by the Court of Justice of the European Union in its judgment of 21 June 2012 in which adjudicated that concrete provisions of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006, L 347/1) must be interpreted in such a way as to preclude a national practice of tax authorities making the taxable person responsible for specific tax irregularities being outside his control and – as a result – depriving him the right to deduction from the value added tax. The judgment of the Court of Justice of the European Union has diametrically changed the line of case of law of Polish administrative courts transferring the concrete burden of proof from taxpayer to tax authority.

The new paradigm of administrative law is strongly supported by the new value-oriented principles and provisions in constitutional documents. One example is German Constitution of 1949. It brought the new role and understanding of the state according to which the state exists for the sake of the individual, not the individual for the sake of the state. Such an understanding of the relationship between an individual and the state marks a Copernicus revolution in public law²². *Nota*

Lenaerts, J.A. Gutiérrez -Fons, *A Constitutional Perspective* [in:] *Oxford Principles of European Union Law*, vol. I: *The European Union Legal Order*, ed. by R. Schütze, T. Tridimas, Oxford 2018, p. 107.

²⁰ P. Craig's idea is recalled by J.-B. Auby, *The Transformation of the Administrative State and Administrative Law*, [in:] *The Max Planck Handbooks in European Public Law*, vol. 1, *The Administrative State*, eds A. von Bogdandy, P.H. Huber, S. Cassese, Oxford 2017, p. 626.

²¹ E. O'Reilly, *Foreword by the European Ombudsman*, [w:] *ReNEUAL Model Rules on EU Administrative Procedure*, ed. by P. Craig, H.C.H. Hofmann, J.-P. Schneider, and J. Ziller, Oxford 2017, p. V.

²² A. von Bogdandy, P.H. Huber, *Evolution and Gestalt of the German State*, [in:] *The Max Planck Handbooks in European Public Law*, vol. 1, *The Administrative State*, eds A. von Bogdandy, P.H. Huber, S. Cassese, Oxford 2017, p. 218.

*bene*administrative principles and provisions in constitutions brought to the fore concept of constitutionalization of administrative law and constitutional foundations of administrative law.

The new paradigm of administrative law or its constitutionalization is clearly identifiable in Poland. Article 7 of the Polish Constitution²³ contains the principle of legality according to which 'the organs of public authority shall function on the basis of, and within the limits of, the law'. In practical terms this principle often means that administrative activity is based directly on constitutional principles and values, especially on Article 2 of the Constitution declaring that '[t]he Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice'. For example, it is settled case law that in the light of the principle of civic trust in the state and its law, being the implication of the clause of the democratic state ruled by law, and the principle that obligations of incurring responsibilities and public duties, including the payment of taxes, shall be imposed only by means of statute (Articles 84 and 217 of the constitution), it is not possible to demand from a taxpayer to incur responsibilities and public duties that are not established by a legislator in a statute but shaped by law-applying authorities in the process of extra-linguistic interpretation.

3.4. Administrative democracy

Among many examples of Europeanization of administrative law of special importance and high visibility in Poland (and the former communist or socialist countries) is the progress of administrative democracy, that is mechanisms for citizen participation in administrative processes²⁴. Mechanisms of administrative democracy are many although the most common are administrative transparency and procedures for participation, consultation, public debate, and so forth (procedural democracy). The progress is accompanied by the development of various legal arrangements that confer new rights (and enhance old ones) on citizens in their dealings with public authorities. The new rights mostly originated in the European sphere where the EU law (including the Charter of Fundamental Rights of the European Union) provided systems of administrative law with new guarantees of citizens' rights²⁵. In systems where administrative law is strongly influenced by the

²³The Constitution of the Republic of Poland of 2 April 1997.

²⁴ On the administrative democracy in the old Union (as exemplified by France) in the context of participatory and deliberative democracy see M. Wojtuń, *W stronę demokracji administracyjnej – partycypacja w postępowaniu administracyjnym we Francji* [Towards Administrative Democracy – Participation in Administrative Proceedings in France], [in:] *Partycypacja w postępowaniu administracyjnym. W kierunku społecznienia interesu prawnego* [Participation in Administrative Proceedings. Toward Socialization of Legal Interest], ed. by Z. Kmieciak, Warszawa 2017, p. 93 ff.

²⁵ Another European contributor is the European Convention of Human Rights.

constitution and its interpretation by constitutional judges²⁶, the movement towards administrative democracy has naturally been pushed forward together with that of constitutionalization.

3.5. Scope and depth

Not only legal texts are in fact open to the process of Europeanization of administrative law. Such elusive elements as concepts, principles, approaches, notions, methods, reasoning styles, legal thinking, as well as legal scholarship are being Europeanized as well (deeper level Europeanization). The principle of proportionality is an example often invoked here as an Europeanized way of thinking and reasoning in law. But as the reality in some countries teaches us, adopting laws and regulations is something rather different, sometimes even worlds apart, from embracing their spirit and true meaning. Sometimes different understandings are ascribed even to such basic notions as law, code, statute and justice.

3.6. Outcomes

The contemporary changes in administrative law are crucial ones. They tend to profoundly disrupt the concept of the relationship between administration and the law (administration and an individual, administration and society), the legal structure of the administration, the requirements that may be imposed on the administration, etc. In doing so, they create the need for theoretical adaptations. Here and there, a theoretical endeavors have been undertaken in scientific discussions, which are now becoming less national in their search for new paradigms²⁷ capable of accounting for the current reality of administrative law in Europe:

1. The study of national administrative law itself is not enough, especially when focused on case law²⁸. Therefore, some doctrines engage in a movement of more or less comprehensive review of their theory around this concern. A treaty on judge-made law in Polish administrative law²⁹ is a telling example. The new textbooks on administrative law with significant parts on European integration and EU law (being mostly administrative law)³⁰ or with strong European backdrop³¹ are also worthy of recalling here.

²⁶ Typical examples of strong constitutional basis to administrative law in terms of the number of constitutional provisions on administrative matters and the level of development of constitutional review (constitutional litigations) include German and Spanish systems.

²⁷ The main paradigm of contemporary legal thinking is that legal systems are primarily national systems of law. This proposition is at least prevailing in the field of administrative law.

²⁸ The birth of administrative law is due to the activities of judicial and legislative bodies. In case of EU administrative law it is mainly due to the activities of the Court of Justice of the European Union.

²⁹ D. Dąbek, *Prawo sędziowskie w polskim prawie administracyjnym* [Judge-made Law in Polish Administrative Law], Warszawa 2010.

³⁰ See *Prawo administracyjne* [Administrative Law], eds Jacek Jagielski, Marek Wierzbowski, Warszawa 2019.

2. The most ambitious scientific endeavors move squarely into European level as the center of thinking about administrative law. In Poland the XXIII Congress of Administrative Law held in Szczecin in 2014 was devoted to the tenth anniversary of Polish membership in the EU. Another example is the first Polish textbook on administrative law of the European Union³²
3. The European theory of administrative law includes connections between the administrative law of the EU and national administrative laws and the influence that the first exercise on the latter. The vision of European administrative law that includes connections with national administrative laws and the influence exerted on them holds even the conviction that 'in the future, national administrative laws will be mainly considered an implementation tool for EU rules and policies'³³. This conviction seems to go too far from Polish perspective.

4. The concept (definition) of public administration

In relation to national definition of legal notions under the influence of EU law, J.-B. Auby and L. Azoulay distinguish three types of context-dependent reactions: clarification, transformation and addition to the previously existing notion³⁴. Here it is noteworthy that our accession to the European Union has undermined the classic academic definition of public administration produced by our eminent late academic Jan Boć. His definition of public administration is as follows³⁵:

Public administration means satisfying collective and individual needs of people, arising from their living together in communities, by a state and its dependent bodies (central administration and local administration), as well as – within the framework of conferral – by local government bodies (local authorities).

³¹ See *Institucje materialnego prawa administracyjnego. Przegląd regulacji* [Institutions of Substantive Administrative Law. Review of Regulations], ed. by I. Lipowicz, Warszawa 2017.

³² *Prawo administracyjne Unii Europejskiej* [Administrative Law of the European Union], eds Robert Grzeszczak, Aleksandra Szczerba-Zawada, Warszawa 2016.

³³ J.-B. Auby, *The Transformation of the Administrative State and Administrative Law*, [in:] *The Max Planck Handbooks in European Public Law*, vol. 1, *The Administrative State*, eds A. von Bogdandy, P.H. Huber, S. Cassese, Oxford 2017, p. 622.

³⁴ Their observation recalls M. Bobek, *Europeanization of Public Law*, [in:] *The Max Planck Handbooks in European Public Law*, vol. 1, *The Administrative State*, eds A. von Bogdandy, P.H. Huber, S. Cassese, Oxford 2017, p. 649.

³⁵ In Polish: 'Administracja publiczna jest to przejęte przez państwo i realizowane przez jego zawisłe organy, a także przez organy samorządu terytorialnego zaspokajanie zbiorowych i indywidualnych potrzeb obywateli, wynikających ze współżycia ludzi w społecznościach', J. Boć, *Pojęcie administracji* [Concept of Administration], [in:] J. Boć ed., *Prawo administracyjne* [Administrative Law], Wrocław 2010, p. 15.

After Poland's accession the definition is archaic and can lead to weakening the idea of European integration and European administrative system. Hence, the concept of public administration must be reconstructed (transformation and addition are necessary) on new administrative reality in Europe and Poland. Mostly the definition should say that public administration is not only the state phenomenon but also supra-state one. Such addition will allow to link administrative law not only with the administration of the state, but also with the administration of the extra-state (supra-state) organizations. Therefore, 'post-accession' enlarged definition of public administration, based on Jan Boć's "pre-accession" one, could be as follows:

Public administration means satisfying collective and individual needs of people, arising from their living together in communities, by a state and its dependent bodies (central administration and local administration), its independent bodies (decentralized administrative agencies), as well as – within the framework of conferral – by local government bodies (local authorities) and bodies of extra-state (supra-state) organizations.

Three remarks may and should be framed in connection with the above proposal. First, the proposed post-accession enlarged definition of public administration departs from the traditional view that administration belongs to states or national governments, that legal systems are national systems of law, that administrative law is a product of the state and is a part of national law, that there cannot be a space for administration and administrative law beyond the state. The extra-state (supra-state) European Union with its administration and administrative law conflicts with such traditional view and makes it obsolete.

Second, the definition is a definition, not a theory of a concept, and as such cannot embrace too many elements, but only few critical ones. With this in mind we have decided not to fill it with other principles than the principle of conferral, namely the principles of subsidiarity and proportionality, not mentioning principles of democracy, decentralization and the rule of law. Nevertheless, it must be said that principles of subsidiarity and proportionality determine the conditions under which and the way in which EU and state competences may be exercised. Therefore they are so strongly intertwined with the principle of conferral that their meticulous analysis in extra and intra state administrative relations is a necessary condition of full explanation of the concept of public administration. Here it suffices to say that in extra state relations the principle of conferral deals with the existence of EU competence to regulate a field, the principle of proportionality addresses the intensity of EU action and seeks to protect member states against the expanding competence of the EU³⁶, and the principle of subsidiarity rather regulates the exercise of EU

³⁶In recent years, the principle of proportionality has acquired particular prominence as part of a fundamental rights enquiry and become a key instrument of judicial methodology. Its formalization in the Charter of

competence by setting a functional criteria to decide whether the EU – or rather the states – should act in a given field³⁷.

Third, offering post-accession enlarged definition of public administration embracing extra-state (supra-state) administration authors were inspired by Franciszek Longchamps' scientific theory of public administration or his approach to defining and analyzing (describing) public administration, which was produced in his book *Założenia nauki administracji* [Assumptions of Administrative Science] published in 1949³⁸. The author proposed universal extra-state approach to defining public administration outside the confines of time, polity and even law (at least in the first phase of framing a definition) concluding that the prevailing way of defining public administration within the framework of state is too narrow. The approach suggested by him (in 1949!) produces the definition of public administration of general capacity, which allows to locate within its borders and within the research field of administrative science any administration from the past and the future, including the extra-state administration, in a concrete example the EU administration.

5. The language of public administration

Edoardo Ongaro and Sandra van Thiel observe that '[l]anguage shapes thought, and language diversity – a major trait of cultural diversity – is a key feature of public administration, public management and public policy in Europe'³⁹. Language diversity in the EU with twenty four official languages is an undeniable fact. One consequence of it is that Polish administrative courts when interpreting EU law have to take into account different language versions of Union legal texts⁴⁰. But the unquestionable fact is also that among UE languages the special place occupies English language: it is not only the main language in Ireland and (by Brexit) the United Kingdom, but – mostly – the contemporary *lingua franca* and the European (and global) vehicle of international discourse on administration⁴¹. The impact of English language in public administration and administrative law in

Fundamental Rights of the European Union is of importance here. Article 52(1) of the Charter reads: 'Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others'. More on the principle of proportionality see T. Tridimas, *The Principle of Proportionality*, [in:] *Oxford Principles of European Union Law. The European Union Legal Order*, eds R. Schütze, T. Tridimas, vol. I, Oxford 2018, p. 243 ff.

³⁷ See more F. Fabbrini, *The Principle of Subsidiarity*, [in:] *Oxford Principles of European Union Law. The European Union Legal Order*, eds R. Schütze, T. Tridimas, vol. I, Oxford 2018, p. 221 ff.

³⁸ F. Longchamps, *Założenia nauki administracji* [Assumptions of Administrative Law], Wrocław 1949.

³⁹ E. Ongaro, S. van Thiel, *Languages and Public Administration in Europe*, [in:] *The Palgrave Handbook of Public Administration and Management in Europe*, vol. 1, ed. by E. Ongaro, S. van Thiel, Palgrave Macmillan 2018, p. 62.

⁴⁰ See e.g. the judgment of NSA of 22 November 2006, II GSK 2443/16.

⁴¹ *Ibidem*.

Poland after the accession has increased to an unprecedented degree. It suffices to point that many crucial English terms are used in Polish public administration community (scholars and practitioners) in their original versions (e.g. stakeholders, leadership, governance, agenda, benchmarking, etc.), many have been translated or replaced by their Polish equivalents (one rather funny example is: change agent – agent zmiany) and many have been ‘tamed’ and undergone the process of Polonization with better or worse results: agencification – agencyfikacja, adjudication – adiu dykacja, departmentalization – deperatmentalizacja, digitalization – digitalizacja, discretionary – dyskrecjonalny, evaluation – ewaluacja, implementation – implementacja, cancellation – kancelacja, coercion – koercja, profusion – profuzja, etc.⁴². The significance of English language for Polish administrative law is visible not only in terms of separate words but also in their collocations, i.e. texts (documents) and books in administrative domain. What should be stressed here is that next to translations from English into Polish we have got more and more Polish legal texts and books in English, as well as published in two languages in one (bilingual) volume (Polish – English) or in two volumes (one with Polish version and the other with English verbatim). A good example of a book in English published in 2005 to meet the increased interest in Polish law after our accession to the EU is *Outline of Polish Constitutional Law* authorized by Bogdan Banaszak⁴³. Two recent examples are the bilingual publication of the Code of Administrative Proceedings⁴⁴ and the book available in Polish and English authorized by Jagiellonian University academics on integrity of administrative law from Polish perspective⁴⁵. The latter example is of special relevance as the issue of integrity of law is of critical importance in a state being a member of the European supra-state organization with independent legal order⁴⁶ being a source of Europeanization processes.

6. Administrative state

In the opening part of the text we framed an opinion that membership in the EU doesn't eliminate the state status of the member states. Nevertheless, accession to and membership in the EU supra-state organization brings out as a result processes of Europeanization that change *Gestalt*

⁴² More examples of English Polish newspeak see J. Supernat, *Zarządzanie* [Management], Wrocław 2005, p. 183 ff.

⁴³ B. Banaszak, *Outline of Polish Constitutional Law*, Wrocław 2005.

⁴⁴ *The Code of Administrative Procedure. Kodeks postępowania administracyjnego*, translated by: M. Bińkowska, A. Chełchowski, P. Gumola, B. Kopik, R. A. Walawender, Warszawa 2017.

⁴⁵ *Integralność prawa administracyjnego. Perspektywa polska*, red. J. Zimmermann, Warszawa 2019 and *Integrity of Administrative Law. Polish Perspective*, ed. by J. Zimmermann, Warszawa 2019.

⁴⁶ In the verdict of 23 April 1986, C-294/83, Les Vertsv. Parliament, EU:C:1986:166, p. 23, the European Court of Justice declared that the Rome Treaty was not an ordinary international treaty, but a constitutional treaty, which, like national constitutions, contains a formal base for independent legal order. This new legal order is an integral part of national legal orders, and national courts are required to apply it.

of member states, including their constitutional and administrative fabric – public administration and administrative law. The administrative outcomes and changes are obvious as the state and especially the contemporary state is objectively and subjectively an administrative edifice (from the citizen's perspective, the state manifest itself as a patchwork of administrative institutions, bodies, offices and agencies). As Sabino Cassese succinctly observed: 'Where there is a state, there is an administrative system, and *vice versa*'⁴⁷.

The administration (as a function and an organization) being a part and parcel of the state represents the core shaping and shaped element of each state. And the development of a modern administration is closely connected with the emergence and development of the modern state. The relations among the administration and other key actors within the state (the government, the parliament and the judiciary) represent significant features of each state⁴⁸. The same may be said about relations between administration (the central administration) and local government, as well as about relations between administration (the central administration) and decentralized independent administrative regulatory agencies. *Nota bene* the fact that administrative functions and tasks are carried out not only by hierarchical central administration but also by actors outside the central administration and independent agencies denotes that the administration in the sense of a comprehensive all-embracing uniform apparatus does not exist any longer. Instead of the administration we have rather got a complex system of administration. Poland as an administrative state is of course not an exception. According to art. 3 of the Constitution "Poland is a unitary state" but nowadays and especially after the accession the reality is a bit more complex: Poland is a unitary state without unitary administration⁴⁹. It should be recalled here that the previous principle of democratic centralism have been replaced by the principle of decentralization and local administration (with exception of governors in regions) replaced by local government (Post-war Poland didn't have local government for forty years: 1950-1990. This fundamental democratic change being anchored in our Constitution of 1997 based *inter alia* on the principle of

⁴⁷ S. Cassese, *The Administrative State in Europe*, [in:] *The Max Planck Handbooks in European Public Law*, vol. 1, *The Administrative State*, eds A. von Bogdandy, P.H. Huber, S. Cassese, Oxford 2017, p. 58. Characterizing Britain as a 'stateless society' was justified *inter alia* by lack of a hierarchical and undifferentiated concept of administration and a system of administrative law, see M. Loughlin, *Evolution and Gestalt of the State in the United Kingdom*, [in:] *The Max Planck Handbooks in European Public Law*, vol. 1, *The Administrative State*, eds A. von Bogdandy, P.H. Huber, S. Cassese, Oxford 2017, p. 452-453.

⁴⁸ The distance between administration and government differs from one state to another. In Poland government is regarded as the top administrative organ and a part of the public administration. See S. Pawłowski, *Administrative Law*, [in:] *Handbook of Polish Law*, ed. by W. Dajczak, A.J. Szwarc, P. Wileński, Warszawa 2011, p. 249.

⁴⁹ The lack of unitary administration is typical for decentralized unitary states, and especially strong in states with regions (e.g. Italy) and autonomous communities (e.g. Spain) as well as implementing the principle of devolution (political decentralization) – e.g. the United Kingdom.

decentralization of public power⁵⁰ and the principle of subsidiarity aiming to strengthen the powers of citizens and their communities⁵¹.

The contemporary complexity of administrative state leads to the conclusion that anyone interested in the impact of the EU and process of Europeanization (and similar phenomena as internalization and globalization) on the state, and concept of statehood⁵² should examine administration in its connections and intersections with other key actors within the state, or – in other words – should examine *Gestalt* of administrative state and its legal regime. The latter is of importance as majority of contemporary states are – at least nominally, according to their constitutional charters – states of law⁵³. And it is needless to say that the EU is also the legal organization⁵⁴ based on a set of fundamental principles and values (community of values) including the rule of law⁵⁵ (community of law). The rule of law together with other principles and values listed in Article 2 of the Treaty on the European Union is a common denominator for the EU and its member states. Consequently, the EU is not an ordinary international organization but organization of integration with supra-state legal order of the EU and legal orders of the member states⁵⁶. In these circumstances the influence of the EU and process of Europeanization is realized *via* law (mostly administrative law) bringing as a result the convergence and harmonization of state legal regimes (mostly administrative ones). In other words, administrative law is a major instrument of the rule of law and Europeanization. One should notice here that the process of Europeanization concerns both the content of each fundamental branch of administrative law, viz.: substantive (or sector specific)

⁵⁰Article 15 of the Constitution of the Republic of Poland.

⁵¹Inserted into the Preamble to the Constitution of the Republic of Poland.

⁵² Transformation of state and administration is in no way a new phenomenon. It is as old as the very state and its administration.

⁵³See *An Inquiry into the Existence of Global Values. Through the Lens of Comparative Constitutional Law*, eds D. Davis, A. Richter, C. Saunders, Oxford 2015. The image of administration provided by national constitutions is generally limited and the richness of its functions in the constitutional texts hardly reflected. *Nota bene* constitutions don't provide a comprehensive picture of the ideal of good administration as well. The same may be said about the right to good administration anchored in Article 41 of the Charter of Fundamental Rights of the European Union that today has got the same legal value as the Treaties (Article 6 of the Treaty on the European Union) being 'the constitution' of the EU. Article 41 of the Charter contains only provisions aiming to guarantee the procedural fairness, but doesn't offer the full definition and description of good administration.

⁵⁴ F.G. Jacobs sees the specific characteristics feature of the EU in the fact that 'the European Union is based exclusively on law, not on power' – F.G. Jacobs, *Foreword* [in:] *Oxford Principles of European Union Law. The European Union Legal Order*, eds R. Schütze, T. Tridimas, vol. I, Oxford 2018, p. VIII.

⁵⁵ See preamble and Article 2 of the Treaty on the European Union. The principle of the rule of law in EU law and in Polish law as well as in legal systems of several member states has two aspects: first, the submission of official actions to the legal rules and procedures, and, secondly, the requirement of a legal basis for action. Article 7 of the Constitution of the Republic of Poland reads: 'The organs of public authority shall function on the basis of, and within the limits of, the law'. Next to similarity there is also a difference here: in EU law, being a developing legal order, case law need to flesh out limits of public power to a much greater extent than within legal orders of member states with a highly positivist tradition of legislative guidance of public power.

⁵⁶ Both European and state legal orders are parts of a new emerging public law: European public law, see A. von Bogdandy, *The Idea of European Public Law Today* [in:] *The Max Planck Handbooks in European Public Law*, vol. 1, *The Administrative State*, eds A. von Bogdandy, P.H. Huber, S. Cassese, Oxford 2017, p. 1 ff.

administrative law⁵⁷, procedural administrative law⁵⁸, organizational (systemic) administrative law⁵⁹, and applying their rules and provisions⁶⁰. And one more remark: changes in organizational administrative law mean changes in administrative structures and breed the common administrative European space (system)⁶¹, which is of importance as the EU relies on the national administrations for the implementation of the EU law and policies (so called indirect administrative implementation).

7. Conclusions

The above observations and positions regarding Polish administrative state before and after the accession to the EU allow to offer three concluding remarks.

Firstly, the accession and Europeanization contributed to fundamental change of the view of administrative law: from a law for administration to a law for society and an individual. Not a source of power and coercion⁶², but rather an instrument of policy and protection of public interest and individual rights. The establishment and preservation of a just balance here is the difficult task that

⁵⁷Provisions on administrative transparency and citizen participation evidence the changes in the substantive administrative law.

⁵⁸ See e.g. M. Wilbrandt-Gotowicz, *Europeanisation of Administrative Proceedings Law. Opportunities and Risks*, [in:] 'Białostockie Studia Prawnicze. Białystok Legal Studies' 2018, vol. 23, no. 2, p. 25 ff and A. De Ambrosis Vigna, D.R. Kijowski, *The Principle of Legitimate Expectation and the Protection of Trust in Polish Administrative Law*, [in:] 'Białostockie Studia Prawnicze. Białystok Legal Studies' 2018, vol. 23, no. 2, p. 39 ff. The edition is devoted to Europeanisation of substantive, procedural and organizational administrative law.

⁵⁹An example is the movement towards decentralization considered as a means of getting around inefficient and corrupt government and administration, avoiding conflicts (the more centralized government the easier it will find itself in the conflict-of-interest situation) and party politicization, and a condition of good state, good governance and good administration. Another example is establishing the legal construction of independent administrative regulatory agencies extracted from hierarchical lines and endowed with normative (regulatory) competencies and sanctioning powers to contribute to the legal supervision of the new forms of private activities.

⁶⁰ See e.g. M. Kamiński, *Internal and External Limits of the Principle of Consistent Interpretation of Domestic Law with the Directives of the European Union and their Relevance for the Adjudication of Administrative Courts*, [in:] 'Białostockie Studia Prawnicze. Białystok Legal Studies' 2018, 2018, vol. 23, no. 2, p. 9 ff. The external limits of pro-directive interpretation are derived from the EU law and case law of the Court of Justice of the European Union. Author concludes that the internal domestic *contra legem* limit (*contra legem* prohibition) is shaped and modified by the EU rules of interpretation. Therefore, 'the EU rules of interpretation shaping and confining the domestic interpretative methods establish a new >>hybrid methodology<< for consistent interpretation', p. 23. According to Article 19(1) of the Treaty on the European Union, the Court of Justice of the European Union 'shall ensure that in the interpretation and application of the Treaties the law is observed'. This mighty provision allows to unequivocally state that the EU has been established as an organization of law and integration (integration through law).

⁶¹See M.W. Bauer, J. Trondal, *The Administrative System of the European Union*, [in:] *The Palgrave Handbook of the European Administrative System*, eds M.W. Bauer, J. Trondal, Basingstoke 2015, p. 1 ff and J. Trondal, B.G. Peters, *A Conceptual Account of the European Administrative Space*, [in:] *The Palgrave Handbook of the European Administrative System*, eds M.W. Bauer, J. Trondal, Basingstoke 2015, p. 79 ff.

⁶² The total removing of coercion from a state or administrative activity is difficult to imagine. At least in not too distant future. Right to coercion is so critical for a state and society that sometimes even anchored in constitutions. E.g. Article C(3) of the Fundamental Law of Hungary of the 25th of April 2011 reads: 'The State shall have the right to use coercion in order to enforce the Fundamental Law and legal regulations'.

requires involvement and cooperation of all branches of government: legislative, judicial and executive; in the multilevel EU on two fundamental levels: European and national. Anyway, administrative law is not limited to the law that protects individuals against the administration, it is also the law of state regulation and governance. This dualism takes to the conclusion that the rule of law in administrative law concerns steering administration toward the pursuit of public interest and protecting private individuals (their rights and legitimate interests) against the administration⁶³.

Secondly, administrative law is one component of public law, the other (leaving aside criminal law) is constitutional law. Based on socialist tradition, legal scholarship and legal education in Poland still draw a line between constitutional law and administrative law. However, an administrative law without constitutional grounding and penetration is no longer conceivable in terms of positive law. The process of constitutionalization of administrative law seems to be more and more important in and for the EU. One of the critical issues here is the question of constitution's direct effect. The problem of EU law is that in the absence of clear constitutional authority (and coercive mechanisms) it is compliance that fuels normativity. The assumed acceptance of EU law in member states became part of the normative narration of what EU law actually is. The critical question is of course what degree of national non-compliance the EU legal order and EU institutions are ready to accept.

Thirdly, the administration has mostly been conceived of as a hierarchically structured entity (unity, monolith, etc.), as the administration of the state. Today, the administration is viewed as a more or less well-coordinated framework. This continues to gather momentum with the process of Europeanization and the phenomenon of de-nationalization brought by it. Consequently, Polish administration takes place not only within the context of Polish state and Polish law, but increasingly in extra-state (supra-state) European framework, and Polish administrative law in the European legal space evolves from a branch of state public law to a branch of European public law.

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⁶³ M. Fromont has a strong preference regarding the essence of administrative law in free democratic states and – accordingly – the fundamental task of lawyers: ‘the task of every jurist is to work comprehensively towards the realization of the protection of the citizen. Besides that, administrative efficiency is an important issue; however, this cannot lead to a disregard of the central concern – the protection of freedom’, *idem*, *A Typology of Administrative Law in Europe*, [in:] *The Max Planck Handbooks in European Public Law*, vol. 1, *The Administrative State*, eds A. von Bogdandy, P.H. Huber, S. Cassese, Oxford 2017, p. 599.

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The Administrative State in Poland before and after the Accession to the European Union

Summary

The paper offers a concise study of *Gestalt* of Polish administrative state before and after the accession of the Republic of Poland to the European Union. Pre-accession and after-accession fundamentals in the field of public administration and administrative law have been identified and analyzed within the framework of Europeanization of administrative law and administration in the member states.