Studia Administracyjne 11/2019 | ISSN: 2080-5209 | www.wnus.edu.pl/sa | DOI: 10.18276/sa.2019.11-07 | 85–95

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Issues of administrative powers in the processes of executing administrative law

Abstract

The subject of the study involves selected topics of administrative powers in the field of executing administrative law. The aim of the research is to determine the range of administrative powers in the processes of administrative law execution and to compare it with the scope of discretionary powers of administration in the administrative law application processes, to juxtapose legal bases of both types of authority, of sources of administration's legitimacy in both spheres and of causes for differentiation of legal bases of both spheres of administration's activity. The provisions of administrative law regulating this issue are analysed and the research is conducted using the method of interpretation of norms of applicable law.

The set of discretionary powers of administration in the external sphere of law execution and the internal sphere of processes of administrative law application and execution boils down to the implementation of statutory blanket rules setting aims and tasks, including determining or specifying the volume of public tasks, selection of methods and legal forms of action, deciding on the legitimacy, time, place and scope of action or non-action, establishing internal procedures for planned action, determining legal means ensuring internal steerage in the processes of performing public functions, objectives and tasks.

It is wider than the scope of discretion in the processes of its application thus making administration the mouth of the legislator. It is qualified to create the legal basis for its activities and to freely execute the statutory norm, being restricted in this regard only by the aims and axiology of a statute and the principles of rationality.

Key words:

administrative powers, execution of administrative law, application of administrative law, discretion, internal sphere of administration

Introduction

The authority assigned to public administration, which is one of the types of state authority, is a sort of interpersonal relation regulated by provisions of the law, occurring within the state and the structure of society organised on its territory, on the basis of which administrative entities, executing laws and by virtue of them, exercise tasks and powers, have the ability to implement their own will in certain social relations, even against the will and objection of the addressees, and ultimately using physical coercive measures to ensure the execution of

laws (i.e. corresponds to valid legal norms set by the state) and implementation of the system of values recognised in a given society and expressed in laws, and thus serves the common good, and the exercise of authority has specific legal consequences related to, among others, establishing, abolishing and changing interpersonal relations or legal relations, disposing of and distributing resources, goods and values.[1]

The issue of administrative authority can be analysed from the point of view of various criteria. It is a matter of selection of the objective and the method used to achieve it.[2] By and large, a profound reflection can focus on the analysis of areas of public administration activity.[3] This approach makes it possible to indicate different types of tasks[4], and thereby the scopes of presence of public administration authority in the life of society and the individual. However, a simple analysis of administration's activity will not say much about the essence of the competences that administration has in these areas.

Specific, individual activities of administration may become subject of an analysis so as to determine the legal forms of administration through which they are activated in individual spheres of their activities. This view will, in turn, provide insight into the legal nature of the activity and will allow one to establish on a certain scale the range of government authority-related powers that the administration has at its disposal in a given situation. This approach, however, has weaknesses in that it does not allow the perception of the whole phenomenon of administrative authority. Administration is equipped with power in the sphere embraced by administrative and legal regulation, even when it uses non-government authority-related forms of action. The essence of its authority lies in the fact that it can cooperate on a voluntary basis with an individual, social group, community or society, at the same time having the possibility to settle a specific matter unilaterally, by using the government authority-related powers by which it unilaterally makes a specific decision. The simple prospect of using authority allows these relations to be considered government authority-related. The phenomenon of authority also is based on the fact that it also indirectly affects the sphere of life in which its legal interference is excluded.

As a consequence of that, when characterising individual relatively homogeneous sets of government authority-related powers, this cannot be done under on command of the typology of administrative tasks, or by limiting the arrangements as to the range of the government authority–related powers of administration using a specific form of activity identified in legal provisions. This is an argument for formulating the concept of administrative powers on

1 See P. Winczorek, *Władza polityczna*, in: J. Kowalski, W. Lamentowicz, P. Winczorek, *Teoria państwa i prawa*, Warsaw 1981, pp. 222–227.

2 W. Hoffmann-Riem, *Methoden einer anwendungsorientierten Verwaltungswissenschaft*, in: *Methoden der Verwaltungswissenschaft*, E. Schmidt-Assmann, W. Hoffmann-Riem (ed.), Baden-Baden 2004, p. 19. On the subject of the method and research methods in the theory of administration see J. Łukasiewicz, *Zarys nauki administracji*, Warsaw 2007, p. 73; Z. Hajduk, *Ogólna metodologia nauk*, Lublin 2005, pp. 84–85.

3 However, these issues were not the subject of wider interest of Polish scholarly circles (apart from a certain exception: M. Kulesza, H. Izdebski, *Administracja publiczna. Zagadnienia ogólne*, Warsaw 1999, pp. 85ff.) and sometimes this interest was fragmentary, e.g. L. Zacharko, *Prywatyzacja zadań publicznych. Studium administracyjnoprawne*, Katowice 2000, pp. 13ff.; M. Tabernacka, *Zakres wykonywania zadań publicznych przez organy samorządów zawodowych*, Wrocław 2007, pp. 80–129; J. Blicharz, *Udział polskich organizacji pozarządowych w wykonywaniu administracji publicznej*, Wrocław 2005, pp. 31–40.

4 I indicated one of the proposals on the typology of public tasks in the monograph *Pluralizm administracji publicznej*, Warsaw 2019, pp. 41ff.

the basis of the concept of steerage[5], which has been engrafted in the particular field of legal doctrines by law theorists[6], including the views of legal scholars and commentators of administrative law.[7] I assume that the essence of authority (administrative powers) of public administration is grounded in its activity or impact on an individual or social and economic system (specific parts in the form of communities, social and professional groups, interest groups, etc.), aimed at making, by means of its own actions or actions of other entities, planned and thus conscious changes in the external world or in the behaviour of the recipients of the impact or actions aimed at causing the intended changes within the administrative structure (apparatus). Impact is a broader concept than settlement and may also include non-government authority-related, bilateral actions, or factual (e.g. information) actions, if they result in achieving changes theretofore planned by the public administration.

The concept of authority understood through the lens of steerage allows one to capture its essence, which should be considered not only in unilateral decision-making, but also in influencing in a different manner the directions, shape and content of the individual's behaviour (specified social groups or the entire society) in spheres include in the interest of the administration. A similar view has been present for long in the Polish legal writings that all administrative activities bear an element of state authority. "(...) The element of authority characterises the entire activity of the state administration"[8], and the essence of authority is that it is an expression of the will of the state, unilateral (even if the individual has the right to be heard), and this will expressed primarily by an administrative act is presumed to be correct.[9] It faced criticism from Tadeusz Kuta, who disagreed with the thesis about the government authority-related nature of the entire activity of the administration and limited the sphere of administration's powers to cases of using the government authority-related form of activity by the administration.[10]

Approaches to administrative powers

The source of administrative powers includes the provisions of the Constitution and ordinary laws which grant administrative organs and entities competences and obligations in the field of: application and execution of administrative law.

5 E. Knosala, *Prawne układy sterowania w administracji publicznej,* Katowice 1998, p. 13.

6 H. Rot, *System prawa – model cybernetyczny,* Państwo i Prawo 1965, no. 1; J. Wróblewski, *Prawo a cybernetyka (zarys problemów),* Państwo i Prawo 1968, no. 12; F. Studnicki, *Cybernetyka a prawo,* Warsaw 1969.

7 K. Sobczak, *Koordynacja gospodarcza. Studium administracyjnoprawne*, Warsaw 1971, p. 7. According to E. Knosala steerage is a relation between at least two optional objects (elements, schemes, systems), which is grounded in the fact that the desired changes in one of these (steered) objects are caused by the action of the other (steering) one. The state's influence on individuals under its authority, which is to cause them to choose from among various possible behaviours deemed desirable by the state, is also a case of steerage (*Prawne układy sterowania...*, p. 14.).

8 J. Starościak, *Prawne formy działania administracji*, Warsaw 1957, pp. 29, 167–168.

9 Idem, *System prawa administracyjnego*, Vol. III, T. Rabska, J. Łętowski (eds.), Warsaw 1977, p. 61. The assumption of presumption of validity as an attribute of public authority was criticised by W. Dawidowicz, who emphasized at the same time the obligation to perform the functions of a state administration organ. See W. Dawidowicz, *Nauka prawa administracyjnego*, Warsaw 1965, p. 256.

10 T. Kuta, *Pojęcie działań nie władczych w administracji na przykładzie administracji rolnictwa*, Wrocław 1963, p. 6.

Administrative powers may be defined in a narrow and broad sense. The criterion for identifying both approaches comprises the concepts of application and execution of the law. In the theory of law, the concept of the application of law is referred to the activities of a state organ which boils down to using the competence granted to it by a specific competence norm.[11] On the basis of the study of administrative law, this concept is associated with the administration's performance of classic regulatory and order-related functions and shaping the administrative law in the authority – citizen relations based on the *subsumptio iuris* method, regarding constitutional and statutory rights, freedoms and obligations of the individual, and their legal guarantees.[12] By contrast, the exercise of law, or more precisely a statute, is composed of activities of diverse nature, which share the fact that they involve the state organ applying competence norms generally outlined by aspiring to create the stateof affairs postulated by the act being implemented.[13] Therefore, execution is a wider concept, as it involves the use of competence provisions aimed at achieving the objectives of the statute outside the organ-citizen relations system based on the *subsumptio iuris* method.[14]

Administrative powers in the narrow sense should be referred to the processes of applying substantive administrative law[15] and the discretion granted to the administration with regard to settling individual administrative cases. In this sense, there is a reference to the external sphere of the application of the law which concludes with solving an administrative case of an entity situated outside the administration by an administrative act.[16]

By contrast, administrative powers in a broad sense include:

- constitutional and functional authority,
- authority to legislate and
- administrative authority in other processes of executing administrative law in the external and internal sphere, including specification of the volume of public tasks, selection of methods and legal forms of action, deciding on the time, place and scope of activity or non-activity, application of law in the internal sphere.[17]

The constitutional and functional authority and the authority to legislate are left outside the scope of this paper, which due to their size and importance should be the subject of separate studies.

11 Z. Ziembiński, *Teoria prawa*, Warsaw–Poznań 1978, p. 130. Cf. K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa*, Warsaw 1969, p. 285.

12 T. Kuta, *Funkcje współczesnej administracji i sposoby ich realizacji*, Wrocław 1992, p. 43.

13 Z. Ziembiński, *Teoria prawa*, p. 133.

14 On the differences between the application and execution of law and the methods used in both processes: "the inductive method of substantiation of administrative resolutions" and "the deductive method of substantiation of administrative resolutions" see. A. Wasilewski, *O metodzie konkretyzacji rozstrzygnięć administracyjnych*, "Acta Universitatis Wratislaviensis", Prawo CXLIII, 1985, p. 339.

15 More on the concept of applying the law J. Wróblewski, *Sądowe stosowanie praw*, Warsaw 1972, pp. 7-9; L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Cracow 2004, p. 15.

16 M. Jaśkowska, *Uznanie administracyjne a inne formy władzy dyskrecjonalnej administracji publicznej*, in: *System prawa administracyjnego*, Vol. 1, *Instytucje prawa administracyjnego*, R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), Warsaw 2010, p. 264.

17 More on the application of law in the internal sphere under the so-called steering model see W. Dawidowicz, *O stosowaniu prawa przez organy administracji państwowej*, "Zeszyty Naukowe Wydziału Prawa i Administracji Uniwersytetu Gdańskiego – Prawo" 1981, Vol. 9, p. 74.

Administrative powers in the processes of executing administrative law

The implementation of a statute is ensured by:

- including various competence and task-related provisions in the statute being implemented and specifying the forms of activity, and reserving administration's possible discretion in exercising explicitly granted powers,
- blanket coverage of a specific sphere of issues by the provisions of the act with the simultaneous absence of further statutory regulation and reserving administration's capacity for independent activity in this regard.

In the first situation, the statute defines the spheres that should be subject to performance by the administration, organs responsible for implementation, competence provisions, provisions specifying the form of action and the scope of discretion left at the implementation of these provisions of the statute. The range of discretion may be clearly defined in the statute. Examples include actions undertaken within the constitutional and functional authority, the authority to legislate or to apply administrative law in the internal sphere.

In the second case, the provisions of a statute create a certain framework for the administration's lawful operation, restricting it only by basic constitutional principles, the content of the act being implemented and considerations of rationality. In these areas administration operates within the law, with theoretically wider discretion. The discretion of administration is ensured by legal norms, which are often limited to indicating the aim or aims that are to be achieved. These are norms which contain final programmes. Their execution is usually secured with a description of the basic (only) public tasks that must be performed for the final programme to be accomplished.[18] The act also contains provisions which determine the competence of particular organs. Procedural issues related to a given task or a composition of public tasks may but need not to be regulated in the statute. Statutes may also indicate the forms of administrative activities in these cases. The absence of decisions in this respect entitles the administration to take non-government authority-related action where the external sphere is involved. With regard to the internal sphere, administration, in turn, is entitled to take any action that is not forbidden by the explicit provision of a statute.

By these means, a framework of administration's activity is established within which it may take action leading to the implementation of the final programme. Every action will be considered lawful in these cases. T. Kuta calls it "administration's organisational discretion", because in its performance administrative organs are bound only by the purpose, and they are left with freedom as to the order, type of action undertaken, time of is implementation, etc.[19]

The set of administration's discretionary competences in the external sphere of law execution and the internal sphere regarding processes of administrative law application and execution includes the implementation of statutory blanket rules that set objectives[20] (possibly also tasks), which involves the administration making discretional decisions on:

18 See more on this subject: W. Hoffmann-Riem, *Tendenzen in der Verwaltungsrechtsentwicklung,* "Die oeffentliche Verwaltung", 1997, p. 434 and the literature cited there.

19 T. Kuta, *Pojęcie działań niewładczych w administracji na przykładzie administracji rolnictwa*, Wrocław 1963, pp. 52–56; idem, *Aspekty prawne działań administracji publicznej w organizowaniu usług,* Wrocław 1969, pp. 70ff.; idem, *Funkcje współczesnej administracji i sposoby ich realizacji,* Wrocław 1992, p. 23.

20 CF. Idem, *Funkcje współczesnej administracji…*, p. 45.

- determining (in the absence of statutory regulation) or specifying (in the case of marginal regulation) the volume of public tasks,
- selection of methods and legal forms of action,
- deciding on the legitimacy, time, place and scope of action or non-action, unless an obligation to act at a specific time, place or by applying specific axiological principles results explicitly or implicitly from the content of the statute,
- establishing internal procedures for scheduled activities,
- determining legal measures to ensure internal steerage in the processes of performing public functions, objectives and tasks (save for measures expressly prohibited by statutes).

Limiting the statutory regulation to indicate the objectives of the statute and the organs responsible for their implementation will require administrative organs to determine – in the complete absence of statutory regulation – or to specify – in the case of marginal regulation – the volume of public tasks. The case of the absence of specification of public tasks in the statute is an absolute extreme, which should be considered only in purely theoretical categories as legally admissible, although in principle absent in the legal system. In such cases, a statute would have to indicate the organs responsible for achieving public objectives, not public tasks. Establishing the volume of public tasks lies with the statutes. The legislator can delegate its function to the administrative system to a small extent, an example of which is Article 7(1) of the Act of 8 March 1990 on commune self-government.[21] Building constitutional systems based on the principle of legalism and the rule of law implicates grounding each action of public administration organs on the basis of or within the limits of the law (e.g. Article 7 of the Constitution of the Republic of Poland). This creates the need to make the law more flexible be means of a system of general clauses, vague notions, presumptions of jurisdiction, allowing the administration to take a lawful action in cases not specified in detail in the given law. The canon of Article 7 of the Constitution of the Republic of Poland legitimises the award of a certain scope of independence of public administration in specifying its tasks within the framework of constitutional objectives and values. An example includes the principle of presumption of the commune's competences, which grants the commune discretional administrative powers in the performance of tasks that have not been expressly laid down in the applicable law. There is no possibility of granting the administration competences in defining administrative tasks in the classic administrative organ-citizen relation (*subsumptio iuris* model). A larger field of activity in the sphere of creating new administrative tasks by the administration exists with regard to tasks which Tadeusz Kuta defines as government authority-related and organisational tasks. Their essence is that they are a necessary intermediate link in the implementation of the general objectives defined in the Constitution of the Republic of Poland and ordinary laws, and sometimes also in governmental programmes.[22] In his opinion organisational activities should be handled by a different measure of the rule of law than classic, government authority-related activities in external relations. There is no doubt that the administration's choice of detailed tasks, which in fact constitutes the choice of measures to achieve the general objective, should take into consideration the element of rationality, fundamental constitutional values and should be within the limits of the law.

21 Dz. U. (Journal of Laws) of 2019, item 912 as amended, consolidated text.

22 T. Kuta, *Funkcje współczesnej administracji*..., p. 22.

Exercising the executive function takes places by the organ responsible for implementing the act (and in the case of deconcentrating the implementation of the act among several organs – by the organ responsible for a specific part of the implementation of the act) taking an appropriate action by virtue of which it determines the directions, time, principles, methods and legal forms of implementation of a specific task by its administrative structures. The organ which passes such an act may act on under statutory authorisation or task-competence provisions. In the first case, the provision of the act clearly indicates at least the material scope of the authorisation and the legal form of administration`s activity. The basic legal form of implementation of the act is an implementing rule or provision of acts of domestic law, or, possibly, provision of rules of domestic law. The administration cannot replace this legal form with another form of action. Non-obligatory regulations are also rare. The case is similar with local laws, although the administration has wider discretional administrative powers with regard to them.

The sphere of executing administrative law in the scope of forms of activity comes within fragmentary statutory regulation. An example involves the power to issue implementing rules and other implementing provisions. In the unregulated scope the administration has the discretion to select legal forms of action serving the performance of objectives and tasks entrusted in it. The competence-task provisions are the legal basis for their issuance. The administration here uses forms of internal regulations and non-government authority-related actions, also addressed to external entities.

A statute may reserve the administration's discretion to decide on the legitimacy, time, place and scope of action or non-action. By making such decisions, the administration is bound with the purpose of the statutory regulation, its axiological system and the general axiological system which arise from the Constitution. In most cases, financial decisions will be pivotal with reference to decisions on the time of action or non-action. These types of problems are decided upon in financial plans that determine the sequence in which administrative tasks will be implemented. Leaving such a wide range of discretion can also be highly independent of the financial aspect. The necessity for action or non-action may be determined by the nature of the subject of administrative law regulation which results from the urgency and unpredictability of the appearance of the regulated phenomenon, its nature, intensity of danger, the type of goods that may be threatened by this phenomenon. An example here includes local administration organs passing order regulations.

The organs also have equally broad discretion in their internal sphere. The execution of law in this sphere is associated with taking acts in law and factual action. It is rare for both categories of action to be isolated. They usually form a series of actions sharing a common objective. Therefore, despite the focus of attention on legal means of implementing statutes, one cannot omit the factual acts that may constitute links connecting a series of factual and legal actions into one whole aimed at implementing the act.

Legal measures play a pivotal role in securing internal steerage during processes of implementing laws. The process of implementing a statute is coordinated to a significant degree by provisions specifying the tasks and competences of particular organs. This sphere is precisely formalised to a high degree. It is supplemented by coordination through hierarchy, i.e. the right to use steering and government authority-related measures. Their extensive deformalisation

is an attribute of internal steering measures. The competence provisions which determine the reporting in service (within the office) or hierarchical reporting (as part of multi-level hierarchical structures) are the basis for undertaking this type of action. However, there are no procedures for taking such legal measures in the statutes. The provisions specifying the procedure and grounds for refusing to carry out an instruction by an official or employee are an exception. The absence of regulation constitutes a scope for action in this regard without establishing specific procedural rules (i.e. based on customary procedures, established orally ad hoc) or shaping these procedures unconstrainedly on the ground of internal regulations.

Two types of factors affect the content of internal procedures created from the ground up by the administration: legal and non-legal. A legal factor will involve e.g. the organisational structure of the office or organisation within which the task will be performed. General procedural institutions regulated by the Code of Administrative Procedure also affect the shape of procedures. As an example of a non-legal factor the competences of specific clerks of a given office can be indicated. Low competences will affect the formalisation of procedures to ensure protection of competent officials against the mistakes of incompetent officials and create the possibility of easy holding individual persons responsible in the future.

Launching the process of implementing an statute requires undertaking a number of planning and programming tasks, i.e. preparatory actions preceding the processes of proper implementation of an statute, including: prior arrangement of the internal organisation and its adaptation to the government authority-related process, including the organisation of human and material resources dedicated to implementing processes including recruitment of new officials, shifting previously employed officials from certain tasks to new ones, training them if necessary, acquiring material assets necessary to implement a statute, adjusting existing resources for possibly new tasks, etc. The next stage involves assigning specific tasks, time of their implementation and issuing general internal management acts determining specific types of actions and individual resolutions in the process of performing, issuing service-related instructions specifying how to handle an individual matter. Next, the process of implementing a statute requires ongoing supervision of the implementation processes, interfering in it as part of supervisory activities in order to verify the performance of general acts and service-related instructions, which are an internal form of applying administrative law. The implementation of a statute also involves a systematic analysis of the performance of assumed plans, their evaluation according to the experience gained in the course of taking measures and changes in external conditions taken into account in the planning processes.

Conclusions

Administration's discretion is commonly identified with the external sphere of the application of administrative law which concludes with solving an administrative case of an entity situated outside the administration by an administrative act.[23] Administrative powers extends to the entire process of applying the law and is undoubtedly wide, as it embraces discretionary powers present at the stage of interpretation of legal regulations, authority at the stage of establishing the facts and the thought process of recognising certain facts as proven[24], discretionary powers at the stage of subsumption[25], and above all discretionary powers at the last stage of the process of applying administrative law, which comes down to establishing the legal consequences of a fact recognised as proven on the basis of the applicable provision of law. Administrative powers will appear at this stage if the legal norm does not determine legal consequences unequivocally, leaving the organ with the possibility to select them from among the options indicated in the provision of law. The scope of discretionary powers in this case is considered to be the widest and the discretion of administration is often identified with this type of authority.

At the same time the discretion of administration with reference to execution of administrative law is inadmissibly omitted. The scope of administrative discretion in the processes of implementing administrative law is obviously wider than administration's discretion in the processes of application of administrative law. The extent of discretion in of the application or execution of law is illustrated by a summary of its legal basis. In the first case, the source of discretion always lies in a precise legal regulation which determines the potential possibilities of administration's behaviour. This discretion is thus restricted. In the case of implementation of administrative law, administrative discretion may be a consequence of absence of a comprehensive statutory regulation. It does occur that it is limited only to covering a particular administrative case with the material scope of the statute. Other issues related to the implementation of this blanket rule are then outside the statutory regulation. Administration then becomes the mouth of the legislator and has the competence to create the legal basis for its operation, to select legal forms of action, and to set in motion factual activities aimed at implementing the statutory norm. In this regard, administration is fully capable of independent action restricted only by the objectives and axiology of the statute and the principles of rationality.

The impact of the sphere of administrative law execution on the process of its application, including the impact of the discretionary powers in the sphere of administrative law execution on the scope of discretion in its application is an undoubted problem that has not been taken up in the study.

23 M. Jaśkowska, *Uznanie administracyjne...*, p. 264.
24 K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa*, Warsaw 1969, p. 294.
25 Ibidem, p. 295.

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