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Administrative law and constitutional matrix – an English perspective

Relacje między prawem administracyjnym a konstytucyjnym – perspektywa angielska

Summary

The article amounts to compare the approach of English legal system towards administrative values with other European legal orders. The main purpose is to depict uniqueness of common law system in case of unwritten constitutional legal order. One of the most intriguing aspects of this situation is that England belongs to Europe which is strongly related to civil law approach. Research conducted in this regard leads to a broad discussion what potential scope for judicial review remains in case of English administrative law. The main outcome is that, even though, British administrative law is based on precedence and unwritten constitution, it remains effective and perfectly fitting to the shape of English law.

Keywords

constitutionalism, administrative law, rule of law, judicial review

Streszczenie

W artykule podjęta została próba analizy porównawczej angielskiego podejścia do prawa administracyjnego z podejściami występującymi w krajach europejskich. Celem artykułu jest ukazanie unikatowości angielskiego systemu prawnego *common law*. Szczególną uwagę zwrócono na brak konstytucji w formie jednego aktu prawnego oraz na fakt, że angielski system prawny jest oparty na precedensie. Przeprowadzone w tym zakresie badania skłaniają do dyskusji na temat potencjalnego zakresu kontroli sądowej angielskiego prawa administracyjnego. Głównym rezultatem przeprowadzonych w artykule rozważań jest to, że prawo angielskie, mimo że opiera się na precedensie i niepisanej konstytucji, pozostaje skuteczne i doskonale wpisuje się w istotę systemu *common law*.

Słowa kluczowe

konstytucjonalizm, prawo administracyjne, zasada praworządności, kontrola sądowa

Introduction

Administrative law remains a branch of law being in a special relation with the constitution as a document and of a constitutional character. In a very abstract sense both of those fields serve to ensure the relationship of a democratic character between individuals and the state. Starting from the general perspective, administrative law is a branch belonging to a public law which shall govern public policies. Due to a constant growth of administrative bodies' influence the amount of challenges grows as well. This is a general statement which remains true regardless of a state discussed, nevertheless, there are two aspects which make the United Kingdom of an especially interesting character and those are: the lack of a written constitution and distinct, common law, character of a state located in Europe. Administrative law endlessly tries to interrelate between being capable enough to act and being accountable for the actions taken. From this perspective it seems to be quite intuitive that administrative law is a tool created to protect individuals and grant a possibility to perform some actions within a state. Going even further with this analysis one can easily say that public administration and administrative law are strongly connected with individual rights of citizens and, consequently, connected with the constitution.

1. English and Continental Systems of Administrative Law – An Attempt Towards Comparison

At the beginning, it is crucial to note that English administrative law is a different phenomenon than French *droit administratif* or German *Verwaltungsrecht* [Thomar, 2000, p. 2]. In case of both French and German legal systems there is a strongly drawn regime of administrative law created as a powerful legal tool. An assumption that in civil-law oriented Europe a common law England would be different is almost obvious. The UK has a difficult and *sui generis* constitution which may be found among different documents, partially legal and partially extra-legal [Dorsen, Sajó and Rosenfeld, 2003]. The whole idea of the English legal system being a common law with no supreme document within a state with the additional value of the heritage of feudal tradition still present in law legacy makes English law extraordinary once administrative law comes into play. It shall be also kept in mind that the United Kingdom is a state of strong parliamentary supremacy. Such statement is not only related to a historical establishment of the rule but a real legal tradition currently present in the system. The Parliament holds a role of the representation of a Monarch, therefore the Lords and the Commons act together as a supreme body within the state. Interestingly enough, once there is an attempt

to translate this approach into more general, widely known, rule it ends up being called sovereignty of the state [Dorsen, Sajó and Rosenfeld, 2003]. In this place, it is necessary to ask what is a constitution? Why there is a strong majority of states having it in a written form? Both of those questions are of an abstract character and without one certain answer. In a very simple understanding, what remains true for most of the European countries, a constitution is a set of liberties, rights ensured by a document made not as a regular legal act but as an act made for generations. We have different constitutional documents, such as Magna Carta or Bill of Rights, but does it indicate that there is a constitution? English Lords sometimes refer to certain aspects as of a "constitutional importance", as it happened in case of Lord Diplock and Scarman [Duport Steels v. Sirs, 1980]. It denotes that there is a reasonable ground to believe that a complex construction operating instead of one act fulfills the duty of a written constitution. Going further, once the source for both administrative and constitutional law is partially the same – (the constitution), but at the same time different (unwritten form), there is a potential for a vast amount of blurred lines between both systems. This approach finds its roots in some early English writers' quotes which state that the difference between administrative law and attempting to draw such boundary is an artificial and exotic idea.

2. The Role of the Judiciary in Developing English Administrative Law

The traditional English approach towards administrative law comes from Victorian Times and promotes two main key factors:

1. the Parliament is sovereign,
2. the rule of law requires both individuals and public bodies to be subjected to the law of the land with no difference in treatment and privileges [Thomar, 2000, p. 3].

Due to the course of history and the changes in law there was a need to create a nexus between Victorian order and any newer approach. In case of England, the connection between present and past took the form of established practices. The dominant political culture was strongly grounded on the practical experience of governing classes who, due to their education and experience, were capable of recognizing some *dignified* or *efficient* parts of the constitution [Bagehot, 1993, p. 44]. The approach of, a nonobvious (to some extent) process behind English administrative law and governance finds its roots in a strong contrast between continental and English approaches. In case of Britain, instead of settled procedures one can encounter more of an informal rules and assumptions. That is why in common law systems (as in England) administrative certainty is often exchanged with the art of law rather than science. It is important to note that one of the most determining factors for English law to be so different

from continental law is no influence of Roman law in Britain. As for the different legal influences and strong feudal tradition, a common law system in England ended up as being judge-made with vast catalogue of differences once compared with continental law. The nature of the English law was inspiringly summarized by Sir Edward Coke C.J. in one of his writings – *Prohibition del Roy* from 1607. Sir Coke stated that "Law was founded upon reason, and that he [The King] and others had reason, as well as the Judges […] they [laws] are not decided by reason but by the artificial reason and judgment of Law, which Law is an act which requires long study and experience, before that a man can attain to the cognizance of it" [Sheppard, 2003, p. 481].

The phrase quoted above can be summarized with the statement that under the English law the focus is on practice and the huge potential of the judges to decide upon law. Law, based on a precedence, seems to be even more difficult to understand for continental lawyers used to the codified perspective. In the area which, by its own definition, should be free from any discretionary power, we meet whole standards driven out of cases. It becomes exceptionally visible in the idea of a state. In European countries like France of England there is a strong idea of a state. Under French legal culture it is recalled as *l'etate de droit* and in case of German as *Rechtsstaat.* In case of the United Kingdom instead of any of the ideals mentioned above, one can encounter more of a tradition and the idea of the Crown and Parliamentary sovereignty than the pure idea of a promotion of state power. This approach has been very often a subject of criticism from continental lawyers. For example, in 1903 a group of comparative scholars noticed that continental public law is an absolute antithesis to the development of public law, as well as the constitution in England [Redlich, Hirst, 1903]. The difference cannot be neglected, and the administrative culture of the continent characterized by the model of bureaucracy with legal-rational approach may be hardly compared with more discretionary-based English system where the judges play a central part. There are two areas of law where pointing out particular differences between continental and common law approaches seem to be the most vivid. Firstly, one can point out a right to compensation. Under most European legal orders like German, Dutch or French there is a complex system for granting a compensation in case of administrative actions. In case of English legal system, the right to compensation may only exist in case of a lawful administrative action on the ground of disproportionate public burden based on a specific statute [Stroink, Linden, 2005]. Consequently, on the other hand we can observe a vast trust towards the lower courts in the capability of applying law and for the higher courts in law making as well as lack of possibility for non-statutory right to compensation. The areas mostly entitled for a compensation under English legal system are denoted by Land

Compensation Act from 1973. The main area mentioned in the act which may be covered by compensation are:

1. the sphere of expropriation,
2. serious nuisance as a result of public activities.

The latter criterion is especially limited to the compulsory sale, concerning citizens being touched by unbeneficial planning of the public authority actions [Stroink, Linden, 2005]. Apart from the rather exceptional statute-based liability scope, it is important to notice that the English legal system puts trust in the lower ordinance – consequently, strong discretionary power is granted to courts to apply common law standards. What joins the perspective of the citizens with the position of public bodies is that both of them are subjected to the rule of law perspective in the form of judicial review. It is important to keep in mind that common law states that either England or India can be characterized by different approaches to judicial review. At the beginning, the possibility to conduct this was rather limited. Nevertheless, in the course of time, there was a pressing social need to develop this area of law. Such approach was especially highlighted by the growing importance of human rights and ideas, like protection from arbitrary decision and proportionality. The aspect of a judicial review is especially important because, by now, strong majority of cases concerning administrative law arose of from the grounds of the courts of 1st instance which, as a consequence, were supervised by the Queen's Bench Division [Jones, Thompson, 1996]. The situation of an administrative responsibility in case of the English legal system is rather complex and the initial assumption is that public bodies shall not be granted with more extensive laws than individuals. On the other hand, their laws should not be placed lower that the ones belonging to the members of society. The balance introduced by the system amounts to convey the message that there shall be no fear for administrative bodies unless liability is implied by a legal act. As an example of liability under the British law one can recall *Dunne v. North Western Gas Board* from 1964. The case concerned the application of strict liability principle for the administrative body. As the final result, the Court accepted that there is a possibility to help a public body responsible for the strict liability, once there is a real occurrence of a dangerous situation on its own premises. Since this landmark case and innovative, at that time, application of strict liability the newer trend, namely advocacy towards French approach of liability for public bodies came into play [Forsyth, 2000]. Due to a different development of some areas of compensation (and, consequently, responsibility) in case of administrative bodies there was a need to employ some notions in exchange. In general, the English law deals with some aspects by introducing broad notions as equity. Nevertheless, in case of administrative law, which remains pretty statutory-related with a strong constitutional background, it seems to be difficult. Due

to this background, the English legal system employed a solution for extra-statutory areas in the form of principles as proportionality and equality. There is also a criticism towards English approach which highlights the perspective that such uncertainty in law may lead to uneven distribution of the public burden. Such approach was mentioned by Stroink F. and van der Linden E. in the book *Judicial lawmaking and administrative law.* Mentioned values may serve as a ground for judicial review. In case of English judges (similarly to, for example, German judges) in case of judicial review in case of administrative law, they operate in a different constitutional framework, even though, in the classic understanding of British legal culture, the main ground for constitutional check is not denoted as the constitution per se but as the intention of the Parliament and its discretionary power [Künnecke, 2007]. Furthermore, the standard is a growing concept which evolves through the years jointly with constitution. One of the important changes introduced in the administrative review functionality was triggered by the Human Rights Act which entered into force in 1998 in the United Kingdom. The said Act was a solution to the case of how to incorporate the European Convention on Human Rights standards to the English legal system as the one not used to apply external sources and long acts. Due to the content itself, a special place occupied by individual rights and standards ensuring protection to some fundamental values, The Human Rights Act became of a constitutional character. English courts tend to be very flexible in developing principles out of case law which may serve as a ground for review, and that is why there is a strong tendency in the UK to decide upon the facts of the case. Nevertheless, even the flexibility may not simply overturn the years of practice but there is a potential to look for a common denominator in both cases. Under the English law the proportionality test, which serves as a ground for a judicial review with the potential to disqualify administrative decision, started with unreasonableness idea, which can be found, for example, in *Wednesbury* principle [Associated Provincial Picture Houses Ltd v. Wednesbury Corporation, 1948]. According to said rule, "a discretionary decision of a public authority should be quashed by the courts only if it is 'so unreasonable that no reasonable authority could ever come to it', whereas the principle of proportionality as it has been developed by EC and ECHR case law, holds that the decision of public body should be quashed only if it adverts effects on a legally protected interest or right go further than can be justified in order to achieve the legitimate aim of the decision" [Burca, 1997, p. 562].

The distinction between what is used by the EU under strict proportionality principle and by the United Kingdom equalizes at the level of the aim pursued. It is important to be aware that, contrary to the continental Europe, under English jurisdiction, the choice between different forms of proportionality is caused by the Parliamentary sovereignty and not by the separation of powers worked in the advantage of, for example,

executive [Ellis, 1999, pp. 60–61]. The more concrete the regulation is employed by the scope of proportionality principle, the stricter the possible judicial review. In case of European continental legal system principle of proportionality is rather broadly used with the ECHR leading approach to balance individual's right against another. In case of England, proportionality is applied; nevertheless, in the field of administrative law dealing with aspects concerning public policy there are some limitations arising out of practice. There is a tradition under the English law which claims that some actions caused by policy or allocation of resources shall not be a ground for complaints in case of, for example, contract law. Controversially enough, such rule is also present in case of administrative law. In scope of policy and proportionality the issue was raised in front of the Court of Appeal during the revision of the judgment described in *R v. Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.* Case [R v. Chief Constable of Sussex, ex parte International Trader's Ferry Ltd, 1997]. The case concerned a limitation made by the decision of Chief Constable towards the police assistance. The assistance was necessary to facilitate the export of animals to another member state and it was limited to two days only. It is important to notice that the assistance of the police was necessary to facilitate the process and there was no possibility to solve this differently. The Court of Appeal revised the decision of Divisional Court and held that managing resources like police is tightly connected with allocation of resources and is also made through policy decisions. Taking into account the limited character of manpower and financial assets, the Court of Appeal claimed that the decision to place some limitation upon the export is in line with the principle of proportionality. Kennedy L.J. pointed out an important distinction between well-known human rights proportionality and proportionality applied outside of this field of law. According to Kennedy, outside of the field of human rights, proportionality should normally only be applied in means that are grossly out of balance in relation to the end sought. Furthermore, he elaborated on the potential of interference with Chief Constable's decision by stating that under both EU and national law there should be no space for the interference unless it can be proven that Chief Constable was planning wrong [Ellis, 1990].

3. The Relationship Between Administrative Law and Constitutional Law: An English Perspective

Due to common law structure and close relation between constitutional and administrative law in England the area of overlap and scope of application may seem to be blurry. As mentioned before, the idea of judicial review in the UK functions differently than in continental Europe, especially in case of proportionality idea. Previously, The

Human Rights Act was also mentioned as an introduction of the European Convention to the English legal system. Even though, there was no clear statement on it being a newly growing source of administrative law, due to its character The Human Rights Act has factually affected the way the English law operates. What was newly introduced to the English legal system is independence as a separate protection ground [Endicott, 2015, p. 177]. Article 6 regulates that the right to a fair hearing and, consequently, a fair investigation in case of governmental wrongdoing shall be conducted independently from the government. The reading's straight forward approach may seem like a revolutionary step for the English legal system and in light of the art. 6 it may seem that in case of *Cooper v. Board of Works* or *Ridge v. Baldwin* the decisions were made by administrative bodies belonging to the government so consequently, such decisions were not independent. Nevertheless, it is crucial to highlight that there was no revolution, for those who were aware of how the English law works. This answer seems to be obvious but for the opposite side it may be disturbing. In general, British law and lawyers are not a strong supporters of big-revolution changes. The awareness of how influential the creation of a new precedence may be and how strong is the role of a judge in any branch of law is, provides a big support for the reluctance to go into the direction of big boom solutions. Instead of an absolute change of the approach there was a substantial change conducted in a more balanced way and with a limited scope, such as in the case *R (Anderson) v. Home Secretary* from 2002 [R (Anderson) v. Home Secretary, 2002]. The factual background of the case was as follows: Anderson received a life imprisonment sentence after he had been convicted of committing two murders. The Secretary of the State decided to set a period for Anderson's release on licence longer than recommended. According to the Crime Sentence Act from 1997 it was within a discretionary power of the Secretary of the State to decide upon the minimum time for the prisoner to remain in custody before he may potentially be released on licence. Anderson in his complaint stated that the Secretary of the State belongs to the executive and, consequently, that it violates art. 6, as the decision as such determining his minimum sentence time is taken by the executive. For the current English system such approach was quite innovative and external because it does not only extend the possibility of a judge to revise administrative decisions but also brings a new role activated by the European Convention to the system. The Court allowed the appeal and found out that leaving such decision, of a factual not procedural character, gives a judicial ability to the Secretary's Office which is not in line with the requirements stated in The Human Right Act. Before the Act entered into force, the judges where only able to make a suggestion towards the Secretary. After the case it was recognized by law that judges are capable of declaring that the status is contradictory with the Convention and declare it as void. Such approach, based on constitution-

ally recognized act, clearly casts a new light to the discussion about judicial review and the potential for courts to conduct it. If this case was decided in such a clear way by the Court stating that the judges can review such decisions and that there is a need for independence why the change couldn't be classified as a revolution? According to the requirements of the art. 6 from the Act, such approach may be taken only in case of decisions concerning criminal or civil rights as it was in the case. Even though it may look differently, there is no general requirement of independence to administrative law in case of English legal system [Endicott, 2015].

The English legal system in a combination with tradition steaming from common law country and interaction with external European and pan-European systems. An example of such a contribution might be the, European Convention on Human Rights and individual rights protection standards. The system, at least at the beginning, may seem to be a complex chaos difficult to understand by civil law-oriented lawyers. An English scholar, Albert Venn Dicey, claimed that treating public administration and private individuals on the same basis allows to the English legal system to protect its basic liberties in a better way than civil law countries do. Even if due to the Parliamentary supremacy and most of constitutional related rules being interpreted as the ones performed because of the will of the Parliament, there is a clear separation of powers – even in case of judicial review. That is why there is a need to respect bodies of equal status. As an example, one can recall the rule that High Court cannot review another superior court decision [Racal Communications, 1981], nevertheless High Courts can review all decisions made by executive bodies as, for example, police, local governments, ministers, military bodies, non-department public bodies.

The time which passed since *Wednesbury* [Associated Provincial Picture Houses Ltd v. Wednesbury Corporation, 1948] judgment is the time of building a new approach towards judicial review and administrative law. As one of the most visible metamorphosis, one can point out a shift from examining powers and procedures to the review of substance. Right now, we are witnessing a strong growth of new tendencies under administrative law, which may be called the constitutionalization of administrative law. Such approach in case of the English legal system, is especially visible after the introduction of The Human Rights Act in 1998. This visible shift may be compared to the general development of the principle of legality in the area of administrative law [Dyzenhaus, Hunt and Taggart, 2001]. The main result of the change is the focus on the justifications instead of the explanations. At the first glance, the difference may seem to be only of a semantic value, nevertheless, in case of standards, any justification requires a reason and the reason should be of a certain quality. This requires the norms of law to be capable of determining what constitutes a good reason [Dyzenhaus, 1997]. A good reason is es-

pecially visible in case of human rights area due to important distinction made in the doctrine. The judges and the courts started to be not only responsible for national law but also for the upgrade in national law based on incoming external triggers in a form of international law. The changes and new growing areas of law brings not only a change in administrative law in the UK but also within public administration. Colin Scot explored the idea with an attempt to map this complex sphere. His conclusion was that currently there is a possibility to distinguish four regimes of governance, namely (1) Governance through public law; (2) Governance through markets and competitions; (3) Governance through networks and communities; (4) Governance through design [Scott, 2006, p. 177–178]. The author claims that each of those modalities of governance brings some templates of responsibility with the potential to exclude the last one from this catalogue. The fact that legal writers observe some distinguishable changes in the area of public administration, as well as administrative law only proves that changes brought by European legal order, in case of the United Kingdom are very strong .

Conclusion

As a summary statement, the English legal system remains a great research area in the sphere of administrative law. This common law country, arising out of feudal tradition with no written constitution may be seen as a fascinating once it comes to such precise area of law as administrative law. This complex mixture is upgraded by the influence from external perspective. The United Kingdom is the only country within Europe with such strong common law approach and tradition. Besides that, and very unique legal culture, the United Kingdom actively participates in international law and, before Brexit, was an important part of EU infrastructure. This openness was a two-directions sword because, on one hand it brought numerous positive changes in the system, on the other it was not without any cost. The United Kingdom faced numerous difficulties on its way to European integration on the side of EU, as well as human rights instruments. Even though, the clash of two legal cultures did not paralyze the English law – it enriched it in an imperfect way which we can experience and observe right now. Beside any criticism, the determination to preserve tradition and to build a nexus between the past and the present is a great success of the British law.

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