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# Intertemporal Issues in Administrative Law and Concept of Retroactivity in Law

## Abstract

In essence, this study aims at presenting basic intertemporal problems of administrative law. These problems are extremely complex and, despite a commonly held view on the alleged poorer theoretical issues in the field of administrative law, intertemporal issues in administrative law demonstrate an even greater level of complexity compared with such a well-developed discipline as civil law. This state of affairs stems from the very nature of this branch of law. Presumably, this is why within the field of administrative law we may encounter application of not only all basic descriptive principles of administrative law, but also of those principles that are particular in a certain aspect (e.g. the principle of validity, the principle of *lex mitior retro agit*). It is equally important to mention that intertemporal decisions are made also in the field of administrative law; the content of these decisions is only partially (if at all) determined by positive law.

## 1. Introduction

Intertemporal problems are associated with complex problems of both interpretation and validation. They can be of formal legal nature as well as complex axiological nature. In essence, this study aims at presenting basic intertemporal problems of administrative law in accordance with the competence of one of the authors, with particular emphasis on administrative procedural law. At the same time, we accept, as theoretical basis, the findings made by the second of the authors.<sup>1</sup>

It is a common view to consider administrative law to be far from the classic design of civil law as far as its finesse is concerned. Administrative law is viewed, in a sense, as poorer law. This impression is intensified, paradoxically, by the alleged poorer legal

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<sup>1</sup> These findings are not self-reliant in the sense that they have been made based on Z. Ziemiński's concept on the relationship between legal norms and legal provisions, the concept of legal situations and – to a rudimentary extent – they fit into M. Zieliński's theory of interpretation (commonly known as derivative theory of interpretation). In general, the concept of the so-called intertemporal law was presented in: J. Mikołajewicz, *Prawo intertemporalne. Zagadnienia teoretycznoprawne* [Eng. *Intertemporal law. Theoretical legal issues*], Poznań 2000. This book will not be cited further in detail in this study based on the convention that, unless otherwise stated, a defined theoretical legal thesis was presented in that book.

theoretical problems of this branch of law. But it is well-founded to suppose, as this study will demonstrate, that is not so much administrative law that is poorer, but simply that many issues have not been developed by the doctrine (sometimes they have not even been noticed), and if they have been worked out at all, the work has been limited to a certain – mostly very practical – aspect.

Continuous changes in administrative law, including frequent and expeditious implementation of reforms of administration, imperfections affecting construction of legal provisions that form the basis for its functioning, and dynamics of states of affairs in administrative cases, all contribute to the fact that the regulations of administrative law repeatedly raise questions of both interpretation and validity. Lack of sufficient awareness of general issues, call it principles, not infrequently leads to erroneous interpretation of those regulations. Oftentimes considerable difficulty may be faced in the very determination of the legal provisions in force in a given field of administrative law.<sup>2</sup>

## 2. Basic concepts

This condition is further exacerbated by noticeable confusion of terms, often even equivocation errors, indiscrimination of issues essentially different, aliasing of distinct issues merely because of their designation – most often to a certain extent only – by equally sounding expressions. Therefore, it may be useful to introduce several fairly simple conceptual distinctions.

Too often there appears confusion of various, yet different, “principles”, usually combined with a specifying phrase, such as “of law”, “legal”, “general”. This study does not aim at a broader discussion on the use of the term of “principle.”<sup>3</sup> Nonetheless, let us note that basically we mean something else when we use such phrases as: “principle of direct operation of the new law” when we refer to this principle in its descriptive sense, namely the statement that – to the applicable extent – the new law is applicable also to cases with an ancient element (principle in its descriptive sense); and we mean something else while stating that to the applicable extent, as of its entry into force, the new law shall be applied to legal situations with an ancient element (principle in its directive sense); finally, we mean something else by expressing that – in a statistically captured regularity – most commonly adopted solution to an intertemporal problem is the application of the new law to all legal situations. Although in the latter case, if at all, it would be more appropriate to use the term “in principle” in lieu of “principle”.

<sup>2</sup> See W. Jakimowicz, *Wykładnia w prawie administracyjnym* [Eng. *Interpretation in administrative law*], Kraków 2006, p.297; W. Taras, *Spór o właściwość między samorządowymi kolegiami odwoławczymi w sprawie uzgodnienia rozkładu jazdy samochodowej komunikacji pasażerskiej* [Eng. *Dispute on jurisdiction between self-government appeal boards on agreement on timetable for passenger vehicle transport*], “Casus” 2004/33, p. 45; R. Hauser, A. Kabat, *Uchwały Naczelnego Sądu Administracyjnego, (Zagadnienia wybrane)* [Eng. *Resolutions of the Supreme Administrative Court (selected issues)*], “Państwo i Prawo” 1999/1, p. 3–4, and ruling of the Supreme Administrative Court (NSA) of 9 March 2004, OW 18/04, unpublished.

<sup>3</sup> The views of the Poznań school of law on the principles of law are contained in a still valid book written by S. Wronkowska, M. Zieliński and Z. Ziemiński, *Zasady prawa. Zagadnienia podstawowe* [Eng. *Principles of law. Basic issues*], Warszawa 1974. This does not mean that the authors of this school do not use the expression “principle” as associated with a closer qualifier in a manner different from the two meanings highlighted in the main text (e.g. J. Mikołajewicz, *Zasady orzecznictwa Trybunału Konstytucyjnego. Zagadnienia teoretycznoprawne* [Eng. *Judicial principles of Constitutional Court. Theoretical legal issues*], Poznań 2008), which – from the point of view of our current considerations – would be of negligible importance. However, it is important to note that they do not use the term “principle” (Pl. *zasada*) in the Anglo-Saxon meaning, particularly as delineated in the works of R. Dworkin, *Law's Empire*, Cambridge Mass. 1986.

The second very serious reason for confusion seems to be lack of sufficient distinction between intertemporal law, as a certain legal issue, and retroactivity as a certain property of defined legal norms.

We regret to say that in this regard a certain decline may be noted, perhaps related to case law of judicial authorities, but also blind indulgence in the results of that activity of the doctrine.<sup>4</sup> For example, in one of the rulings of the Constitutional Court it is explicitly stated that:

“Generally speaking, the legislator may apply one of the following three principles of intertemporal law:

- a) Principle of reverse operation of law (retroactivity),
- b) Principle of direct operation of the new law (retrospectivity),
- c) Principle of further operation of the old law.”<sup>5</sup>

Although the legislator may indeed apply one of the three, in a descriptive sense, principles of intertemporal law, however, these principles are: principle of direct operation of the new law, principle of further operation of the law, principle of the choice of law by the subject concerned. The principle of reverse operation of law does not occur at all in the sense that, even if one pictures a slow-witted subject<sup>6</sup> who would indeed order anyone to do something in the past, the outcome – out of sheer conceptual necessity – could not have been imposed by law, because law is not pragmatically absurd. This by no means implies that a theorem on the existence of retroactive law – often used by lawyers – may not be reasonably interpreted. We will discuss this in a moment.

At this point it is sufficient to say that retroactive law is, of sheer empirical necessity, simply and always a form of the new law. Already here we note that in the case of laying down retroactive legal norms, there is no need for them to refer to situations with an ancient element, although – providing that such situations continue in existence – the refusal to apply the principle of direct application of the new law in such situation would appear, to say the least, peculiar. Although it is quite possible that retroactive law will apply only to situations lacking any ancient element, e.g. establishment of a new tax liability based on an event which, under the previously applicable law, entailed no liability whatsoever, to the extent that those legal norms were to apply to events occurring prior to their entry into force.

### 3. Intertemporal law versus retroactive law

Based on the above remarks alone it may be concluded that intertemporal law substantially differs from retroactive law. This difference is a direct categorial difference; After all, in the first case we are dealing with a certain legal issue, while in the second case – with legal norms having specific properties.

While in the first case we refer to specific legal problems, in the second one the reference is made to specific norms of a legal system. Namely, legal norms whose scope

<sup>4</sup> See *Prawo intertemporalne w orzecznictwie Trybunału Konstytucyjnego i Sądu Najwyższego* [Eng. *Intertemporal law in the case-law of Constitutional Court and Supreme Court*], edited by E. Łętowska, K. Osajda, Warszawa 2008; M. Uliasz, *Reguły intertemporalne w polskim postępowaniu cywilnym* [Eng. *Intertemporal principles in Polish civil procedure*], “Przegląd Sądowy” 2008/3.

<sup>5</sup> Judgment of the Constitutional Court of 8 December 2009, SK 34/08, published OTK-A 2009/11/ 165.

<sup>6</sup> Assumption of a rational legislator, and specifically the assumption on its perfect empirical knowledge, excludes any such situation.

of application – by reference to the circumstances before their entry into force – is associated with a scope of regulation that is different compared to the scope of regulation of a legal norm, which in a similar field of application was in force at the time when a certain legal norm was applied. By referring to a similar scope of application I mean that at least some circumstances that are a part of the scope of application of these legal norms are identical. It may turn out that a retroactive legal norm is not at all similar to any other legal norm, as it imposes a legal obligation in relation to the situations that have not been previously subjected to any legal regulation whatsoever.

Therefore, of necessity, retroactive legal norms are legal norms that provide for a legal sanction and define in a relative manner a derivative legal situation of certain subjects. This necessity is a consequence of the sheer structure of the world. If we make a common sense assumption that it is not possible to act in the past, then any utterance ordering an action in the past appears thrice nonsensical:

- a) pragmatically nonsensical, since it does not fulfill a suggestive function assigned to it; it does not require any proof that it is impossible to suggest to anyone acting in the past in an efficient manner,
- b) semantically nonsensical because, in fact, it does not order anything (assumption *impossibiliū nulla obligatio est*), thus it has no directive force, and directive force is precisely the force that we attribute to legal norms,
- c) finally, syntactically nonsensical, as only ostensibly would it define the scope of application of legal norms.

Hence the property of retroactivity may only be attributed to legal norms, yet excluding any sanctioned norms. In case of intertemporal law, its components do not include legal norms, but a set of decisions that- in the process of interpretation – form the basis for reconstruction of one of the elements of the scope of application of a norm decoded in principle on the basis of either “old” or “new” legal provisions, i.e. of the element indicating that the norm determines legal situations also with an ancient element that has already been characterized in more detail.

The question of retroactivity, however, is not a focus of this study. The only relevant statement is that if it was not for the commonly accepted principle of *lex retro non agit* (as a principle of interpretation), all intertemporal decisions would be as simple as that: in each case the new law should be applied, hence – based on the *de omnium* principle – the new law should also apply in resolving any intertemporal problems. Apart from that – also in relation to the principle of non-retroactive effect (understood as a principle of interpretation) – it is impossible to find any subject-matter relations between intertemporal problems and the issue of retroactivity. Unless those relations were to be considered – on the basis of confusion of concepts and without noticing that in relation to the law in force before the entry into force of retroactive law, this retroactive law is simply new law – as a subclass (this newly enacted retroactive law) of a certain class (a set of the newly enacted norms) separable from that class; and after all, this may not be maintained.

#### 4. Intertemporal problems of administrative law

It is important to note that administrative law is primarily positive law, governing an extremely widespread and diverse area of social life. This property of administrative law is mainly due to a variety of its objectives and functions. It is composed of “sets of a large

number of legal regulations, enacted at different times and by different entities.”<sup>7</sup> Precisely due to the very breadth of matters governed by administrative law, its full codification has not been possible. It should also be noted that thus far any attempts to lay down legal regulations covering general principles of that law – or even of a law containing general provisions of administrative law – have all failed.<sup>8</sup> Similarly to other fields of science, also the doctrine of administrative law uses its own terms, sometimes assigning to them meanings that greatly differ from the meanings attributed by other legal disciplines. A great task of the doctrine of administrative law has been to adapt the manner in which traditional concepts of administrative law are understood to the ever-changing subject of research. It should be emphasized that only some of the concepts used in administrative law are autonomous, since the doctrine of administrative law shares them with other disciplines, including economics or political science.<sup>9</sup>

Turning to more specific observations, it should be noted that administrative law regulates not only the organization and the functioning of public administration, but also relationships between its subjects in the framework of hierarchy and chain of command based on rights and obligations of the subjects of legal norms of substantive law applied and enforced in a specific procedure.<sup>10</sup> These obligations are frequently determined by way of administrative acts undertaken by competent authorities in adjudicating proceedings (e.g. proceedings regulated by the Code of administrative proceedings or in the Tax code).<sup>11</sup> In addition, a significant portion of these proceedings may directly stem from legal provisions. In all such cases, regardless of the form of determination of obligations, public authorities are concerned with their execution, which is an obvious manifestation towards full implementation of public administration activities.<sup>12</sup> Accordingly, the doctrine has traditionally postulated a threefold division of matters governed by administrative law: institutional administrative law, law governing forms of public administration activities – inclusive of procedural law, and substantive administrative law.<sup>13</sup> Accordingly, the doctrine of administrative law distinguishes three types of norms of administrative law. First of all, norms of institutional administrative law concerning the organization of administrative apparatus<sup>14</sup> and regulating questions of “establishing and staffing of administrative authorities and their offices, internal construction and relationships between individual structures of the organization”.<sup>15</sup> Secondly, norms

<sup>7</sup> Z. Duniewska, in: *Institucje prawa administracyjnego, System Prawa Administracyjnego* [Eng. *Institutions of administrative law, System of administrative law*], Vol. 1, edited by R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2010, pp. 110–113.

<sup>8</sup> Z. Duniewska, in: *Institucje prawa...*, pp. 110–113.

<sup>9</sup> See more on this subject in: I. Lipowicz, *Dylematy zmiany siatki pojęciowej w nauce prawa administracyjnego* [Eng. *Dilemmas of changes in terminology in the science of administrative law*], in: *Koncepcja system prawa administracyjnego* [Eng. *Concept of system of administrative law*], edited by J. Zimmermann, Warszawa 2007, pp. 36ff. and P. Przybysz, *Tradycyjne pojęcia prawa administracyjnego – potrzeba i sposób ich dalszego używania* [Eng. *Traditional concepts of administrative law – the need for and manner in which they should be used*], in: *Koncepcja system...*, pp. 43–59.

<sup>10</sup> Judgment of 28.2.2007, the NSA, II GSK 223/06, LEX 325325. See also J. Starościan, *Prawo administracyjne* [Eng. *Administrative law*], Warszawa 1978, pp. 11ff.

<sup>11</sup> See. R. Hauser, in: *Zarys prawa administracyjnego* [Eng. *Outline of administrative law*], edited by Z. Leoński, Warszawa-Poznań 1985, p. 178. See also Z. Janku, *Gwarancje prawne wykonywania obowiązków publiczno-prawnych* [Eng. *Legal guarantees for performance of public legal obligations*] in: *Koncepcja system...*, pp. 557ff.

<sup>12</sup> R. Hauser, A. Skoczylas, in: K. Celińska-Grzegorzczak, R. Hauser, W. Sawczyn, A. Skoczylas, *Postępowania administracyjne, sądownoadministracyjne i egzekucyjne* [Eng. *Administrative, judicial administrative and enforcement proceedings*], Warszawa 2009, p. 189.

<sup>13</sup> Z. Leoński in: Z. Leoński in co-operation with R. Hauser and A. Skoczylas, *Zarys prawa administracyjnego* [Eng. *Outline of administrative law*], Warszawa 2006, p. 27.

<sup>14</sup> E. Ochendowski, *Prawo administracyjne* [Eng. *Administrative law*], Toruń 1994, p. 11.

<sup>15</sup> J. Boć in: *Prawo administracyjne* [Eng. *Administrative law*], edited by J. Boć, Wrocław 1994, p. 23.

of administrative procedural law governing the course of action taken by appropriate authorities defined under institutional law in the process of realization of norms of substantive law.<sup>16</sup> Their essential function is to ensure implementation of substantive administrative law, i.e. this law is distinctively subsidiary to substantive law. In addition, these norms define the rights and obligations of other participants in formal administrative proceedings that lead to a decision issued by an authority in the form of administrative act, as well as in enforcement proceedings instituted only on condition that an obligation has not been executed voluntarily (this procedure may serve enforcement of an obligation or application of administrative sanctions).<sup>17</sup> Thirdly, norms of substantive administrative law determine the subject matter of activities undertaken by public administration thus regulating “obligations and rights arising by operation of law or by concretization of a legal norm (issuance of administrative act).”<sup>18</sup> They relate to specific divisions of public administration that constitute sub-branches of administrative law (e.g. building law, law on foreigners, law on education).<sup>19</sup>

An extremely important feature of administrative law is the obligation imposed on public authorities allowing them to undertake any formal actions solely on the basis of the law in force. Administrative authorities may act only on the basis of and within the limits of applicable law. Moreover, they should ensure that applicable law is complied with by the parties and participants in any proceedings.<sup>20</sup> This means that an action is possible only on the basis of a legal norm in force, hence the need for the correct determination of the wording of that norm, non-faulty subsumption and the correct determination of legal implications. The above comments concern application of substantive, institutional and procedural administrative norms.<sup>21</sup> The principle in question is linked closely to constitutional principles, primarily the principle of legality (Article 7 of the Constitution of Republic of Poland), under which public authorities may act only on the basis of and within the limits of the law, which means that legal norms must specify their competences, tasks and procedures. A public authority may act only when so authorized, while any individual may do anything that is not prohibited by law.<sup>22</sup>

<sup>16</sup> Subsidiary function of procedural law does not, however, limit its role. The norms of that law create the basis for determination of rights and obligations under an administrative legal relationship in accordance with the principles of the democratic rule of law. Provisions of procedural law may in certain situations have a very beneficial impact on shaping administrative legal relationships, in particular when substantive regulations have become outdated in changing social and economic conditions. This role is played in particular by the principles of administrative proceedings – R. Hauser, *Rola przepisów procesowych w realizacji norm materialnego prawa administracyjnego* [Eng. *Role of procedural provisions in the process of implementations of norms of substantive administrative law*], w: *Rola materialnego prawa administracyjnego a ochrona praw jednostki* [Eng. *Role of substantive administrative law and protection of individual rights*], edited by Z. Leoński, Poznań 1998, p. 24; B. Adamiak, J. Borkowski, *Polskie postępowanie administracyjne i sądowniczoadministracyjne* [Eng. *Polish administrative and administrative judicial proceedings*], Warszawa 1992, pp. 16ff.

<sup>17</sup> See R. Hauser, *Rola przepisów...*, pp. 23–24; J. Filipek, *Prawo administracyjne. Instytucje ogólne* [Eng. *Administrative law, General institutions*], Vol. I, Kraków 1995, pp. 45–49; J. Boć w: *Prawo administracyjne...*, p. 23.

<sup>18</sup> J. Zimmermann, *Prawo administracyjne* [Eng. *Administrative law*], Kraków 2006, p. 42; See also Z. Leoński, *Materialne prawo administracyjne* [Eng. *Substantive administrative law*], Warszawa 2006, pp. 9–25.

<sup>19</sup> J. Zimmermann, *Prawo administracyjne* [Eng. *Administrative law*], Kraków 2006, p. 42; See also Z. Leoński, *Materialne prawo administracyjne* [Eng. *Substantive administrative law*], Warszawa 2006, s. pp. 9–25.

<sup>20</sup> J. Borkowski in: B. Adamiak, J. Borkowski, A. Skoczylas, *Prawo procesowe administracyjne* [Eng. *Administrative procedural law*], *System of Administrative law*, Vol. 9, Warszawa 2010, pp. 144ff. See also J. Lang, J. Służewski, M. Wierzbowski, A. Wiktorowska, *Polskie prawo administracyjne* [Eng. *Polish administrative law*], Warszawa 1995, p. 89.

<sup>21</sup> See judgment of Supreme Administrative Court (NSA) of 24 January 2001, II SA 55/00, LEX 75523.

<sup>22</sup> W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Eng. *Constitution of Republic of Poland. Commentary*], Kraków 1998, p. 15; P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.* [Eng. *Commentary to Constitution of Republic of Poland of 2 April 1997*], Warszawa 2000, p. 15. See also A. Błaś, in: *Konstytucja Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.* [Eng. *Constitutions of Republic of Poland and commentary to Constitution RP of 1997*], edited by J. Boć, Wrocław 1998, pp. 27–28.

In this context, very frequent doubts of authorities who apply administrative law, as to which legal provisions – new or old – should be applied in particular administrative proceedings, must be considered as an extremely important issue.

A response to the above indicated instability of administrative law is the so-called principle of validity – requiring an authority to resolve administrative matters taking into account all facts and provisions in force at the time of adjudication.<sup>23</sup> In other words, if there are no other regulations under specific laws, then the new normative acts of administrative law in regard to situations with an “ancient” element, i.e. to legal relations arising under the old law, apply directly.<sup>24</sup> Therefore, the principle of validity in administrative law corresponds to the principle of direct operation of the new law, proclaiming that as of its entry into force the “new law” determines legal situations also with an ancient element. This means that: a) in the absence of constitutional provisions concerning intertemporal law, b) in the absence of general provisions of administrative law (despite draft laws prepared by the representatives of the doctrine), c) in the absence of provisions governing the issue in the Code of administrative procedure<sup>25</sup>, d) in the absence of intertemporal provisions contained in any special laws, e) in light of inability to derive a cultural solution based on the principle of construction under a given sub-branch of administrative law – the new law will apply. In this way, no discrepancies will arise that require a resolution based on the indeterminate principle of *lex posterior derogat priori* – that, strictly speaking, concerns the issues of validity – and the radicalism of which could, paradoxically, lead to inconsistencies in the system (after all, conceptually excluded).

In this context, it should be noted that in case law and the doctrine of administrative law there is a perpetuated view that the principle of validity binds administrative authorities of both first and second instance. The result is that each of these authorities should assess the matter according to the legal provisions (substantive and procedural) in force at the date of the decision.<sup>26</sup> If there are no specific premises as to the “will of the legislator” as far as intertemporal decisions are concerned, then as of its entry into force “the new law” determines new legal situations and legal situations with an ancient element. As a side note, it should be mentioned that only in very few cases the legislator has decided to express this principle *expressis verbis* in any specific regulations. For example, Article 139 (1) of the Act of 23 July 2003 on the protection and care of monuments<sup>27</sup> provides that: “With respect to any cases initiated and not finalized with a final decision before the entry into force of the Act, the provisions of this Act shall apply”.

In practice, however, an administrative authority applying the law is repeatedly confronted with the so-called hard case<sup>28</sup>, in which not only the wording of the provisions – whose application is being considered – raises interpretation doubts, but doubts

<sup>23</sup> W. Jakimowicz, *Wykładnia w prawie administracyjnym* [Eng. *Interpretation in administrative law*], Kraków 2006, p. 297.

<sup>24</sup> J. Mikołajewicz, *Prawo intertemporalne...*, p. 84.

<sup>25</sup> Act of 14 June 1960 – the Code of Administrative Proceedings (consolidated text: J.L. of 2000, No. 98, item 1071) – hereinafter referred to as the “Code”.

<sup>26</sup> See e.g. Resolution of Supreme Administrative Court (NSA) of 19 January 1998, OPK 38/97, Wokanda 1998/5, p. 28, judgment of Supreme Administrative Court (NSA) of 1 June 1998, II SA 308/98, LEX 43186, judgment of Supreme Court (SN) of 17 April 1997, III RN 12/97, OSNAP 1997, No. 21, item 411 and M. Jaśkowska, A. Wróbel, *Kodeks postępowania administracyjnego, Komentarz* [Eng. *Code of administrative proceedings. Commentary*], Kraków 2000, p. 738 and B. Adamiak in: B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz* [Eng. *Code of administrative proceedings. Commentary*], Warszawa 2005, p. 595.

<sup>27</sup> Act of 23 July 2003 on the protection and care of monuments (J.L. of 2003, No. 162, item 1568, as amended).

<sup>28</sup> In J. Wróblewski’s terminology, *Stosowanie prawa przez Sąd Najwyższy* [Eng. *Application of law by Supreme Court*], “Nowe Prawo” 1985/5, pp. 24–25.

arise also in relation to the very scope of their application, and even the period of their validity, or semiotic nature of indication of their subjects. This applies particularly to situations where legal status changes during the period between the date of issue of a decision by the administrative authority of first instance until the date of issue of a decision by the authority of second instance. Lack of intertemporal regulations in situations of substantial changes in legal regulations, which at the same time change the qualification of the facts of a case, may indeed lead to emergence of a brand new case during pending proceedings.<sup>29</sup> A situation of this kind is not only specific to administrative law, but also leads to extremely important consequences in both the sphere of application of the law and the very structure of the legal system. It appears immediately that the previously developed intertemporal solutions – in particular the scopes of their applicability – in very many cases are completely irrelevant to intrinsic problems of the branch of law in question. W. Jakimowicz recommends that in such situations a cassation decision should be issued by the authority of second instance, as provided for in Article 138(2) of the Code.<sup>30</sup> It seems that this approach would allow a full materialization of the principle of two-instance proceedings. In case where a change to legal provisions leads to a change in identity of the case, its disposal by the authority of second instance must be assessed as a violation of the competence of instance<sup>31</sup> and Article 78 of the Constitution of the RP. By conducting any proceedings in this exceptional case the appeal authority would infringe the principle of two instances, thus depriving the party of its right to a double substantive examination of its case.<sup>32</sup> It should be noted that currently issuance of cassation decision is possible only if a decision of first instance authority has been issued in violation of procedural provisions, and simultaneously the scope of the case requiring examination has an important impact on the decision. Thus, if the proceedings conducted by the authority of first instance may not be reconciled with a new regulatory framework, and the scope of the case requiring examination has an important impact on the decision already issued, then a cassation decision must be issued. In this case we are dealing with a change in constitutive elements of an administrative case – and the “novelty” may concern both the legal norms applied to the case and the facts considered by these norms as relevant.<sup>33</sup> In other cases, when we have to deal only with the transformation of a case already adjudicated by a non-final decision (and in the absence of any other of the aforementioned legal flaws allowing the issue of a cassation decision), the authority of appeal should dispose of the case in accordance with Article 138.1.1-138.1.3. of the Code. For many years, both the jurisprudence and doctrine have presented a well-established view that cassation decisions should be permitted very exceptionally, because they represent a departure from the principle of substantive examination of a case by the authority of appeal, and therefore extensive interpretation may not be permitted.<sup>34</sup> The purpose of appeal pro-

<sup>29</sup> As regards definition of administrative case, see T. Kielkowski, *Sprawa administracyjna* [Eng. *Administrative case*], Kraków 2004, pp. 32ff.

<sup>30</sup> W. Jakimowicz, *Wykładnia...*, p. 276. Similarly, T. Kielkowski, *Sprawa...*, pp. 137–138.

<sup>31</sup> T. Kielkowski, *Sprawa...*, p. 138.

<sup>32</sup> Cf. the views of: B. Adamiak, *Model dwuinstancyjnego postępowania podatkowego* [Eng. *Two-instance model of proceedings in tax proceedings*], “Państwo i Prawo” 1998/12, pp. 58–63.

<sup>33</sup> T. Kielkowski, *Sprawa...*, p. 138.

<sup>34</sup> Judgment of Supreme Administrative Court (NSA) of 17 October 1996, I SA/Po 234/96, LEX 27339, similarly, see: decision of Supreme Administrative Court (NSA) of 16 December 1998, I SA/Lu 1292/97, Database of NSA rulings – available at: [orzeczenia.nsa.gov.pl](http://orzeczenia.nsa.gov.pl). See also Z. Janowicz, *Kodeks postępowania administracyjnego. Komentarz* [Eng. *Code of administrative proceedings. Commentary*], Warszawa – Poznań 1995, p. 328.



ceedings conducted by an appeal authority is re-examination and substantive settlement of a case. No cassation decision resulting in a referral of a case for re-examination may be issued without satisfying the conditions as set forth in Article 138(2) of the Code. Otherwise, the decision would significantly violate this provision and consequently also the regulations that oblige the authority of appeal to establish the objective truth in an astute and swift manner (see Article 12(1) of the Code).

Therefore W. Jakimowicz aptly notes that any entities appealing from a decision should be informed

“about the principle of validity applicable in administrative proceedings and the consequences arising therefrom for the subjects of the decision, which also does not result directly from any legal provisions, even with an extensive interpretation of the principle of information contained in Article. 9 of c.a.p.”

According to this researcher,

“Often, lack of knowledge about the mechanisms of administrative proceedings leads to a failure of the parties to supplement the facts of the case in the second instance, considered exclusively as a controlling instance, where that factual material may affect the process of interpretation.”<sup>35</sup>

We are dealing with a similar problem also in relation to control of decisions by administrative courts. If, in accordance with Article 145.1.1 of the Law on proceedings<sup>36</sup>, a voivodship administrative court quashes a decision in whole or in part, a cassation of the contested decision follows. In the case where the court has only quashed a decision of an appeal authority, the case is returned to the stage of judicial review proceedings (the review proceedings are resumed). However, when a decision issued in first instance is also quashed, the case is re-examined by the authority of first instance. In its case-law, the Supreme Administrative Court has expressed a view that substantive effect of such decisions lies in the fact that it eliminates all the implications of the quashed acts from the date of their issue (*ex nunc*). By contrast, a declaration of invalidity in relation to a decision by the administrative court in accordance with Article 145.1.2 of the Law on proceedings is declaratory in nature, and the substantive effect of such judgment lies in the abolition of all implications of an invalid decision with a retroactive effect.<sup>37</sup> A declaration of invalidity of a decision by the administrative court will therefore have effect *ex tunc*. Thus, the lapse of time required for a valid settlement of the case before the administrative court may also lead to a situation that an administrative authority that is to re-examine the case will have to deal with a new administrative case to which that “new” law will apply – the law that did not apply during previously pending administrative proceedings.

Not always, however, the content of intertemporal decisions of administrative law will be determined by the principle of validity, because sometimes the legislator introduces other principles in this respect – i.e. the principle of further operation of the law – in the light of which the “old law”, despite the entry into force of the “new law”, still

<sup>35</sup> W. Jakimowicz, *Wykładnia...*, p. 357.

<sup>36</sup> Act of 30 August – Law on the proceedings before administrative courts (J.L. of 2002, No. 153, item 1270, as amended) – hereinafter referred to as the „Law on proceedings”.

<sup>37</sup> A decision quashing the decision (ruling) appealed against is of constitutive nature; See the substantiation of judgment of the Supreme Administrative Court (NSA) of 24 September 1999, III SA 7166-7168/98, Database of NSA rulings – available at: [orzeczenia.nsa.gov.pl](http://orzeczenia.nsa.gov.pl).

determines legal situations of a defined subject, or the principle of a choice of law, according to which the choice as to applicable law – “old law” or “new law” – is left to the subject concerned.<sup>38</sup>

In practice, quite often the will of the legislator will require that an authority examining a case should apply the legal provisions in the wording in force before their amendment.<sup>39</sup> In those situations the legislator would typically use the technique of adjustment provisions and other appropriate techniques of implementing normative acts. In such cases, an interpreter must consult scattered intertemporal regulations that are strictly related to specific normative acts.

In this context, two different cases may be discriminated. The first case involves application of the existing provisions in their entirety (thus resulting in application of “old” provisions of both substantive and procedural law), whereas the second case involves application of the provisions of old law to a certain extent only. The first case is exemplified by Article 131.1 of the Act of 16 February 2007 on the protection of competition and consumers<sup>40</sup>, which provides that: “the provisions hitherto in force shall apply to the proceedings instituted pursuant to the Act of 15 December 2000 on the protection of competition and consumers prior and pending on the date of entry into force of this Act”. Similarly, Article 16 of the Act of 5 July 2001 on the prices<sup>41</sup> stipulates that: “the provisions hitherto in force shall apply the proceedings instituted prior and pending on the day of entry into force of this Act”, and Article 32.1 of the Act of 4 February 2011 on amending the Law on higher education, the Act on academic degrees and academic title and on degrees and title in the field of fine arts and on amending certain other acts<sup>42</sup>, provides that: “the provisions hitherto in force shall apply to any doctoral and habilitation proceedings and to any proceedings for granting of the title of professor pending on the day of entry into force of this Act”. In the aforementioned proceedings, applicable procedural solutions differ from the principles of the general administrative procedure contained in the Code (e.g. the principles concerning time limits for disposal of matters). Nevertheless, unless a specific provision provides otherwise, to the extent not regulated otherwise, the general administrative procedure applies. One may therefore wonder whether the formulation ordering application of the provisions hitherto in force (old law) also applies to the general administrative procedure (if a change to that procedure has also occurred). It seems that in this case it must be concluded that the new law should apply. For, if the meaning of intertemporal regulations is to retain the norms as valid norms of the legal systems, despite the entry into force of the new provisions – contrary to the principle of *lex posterior derogat priori*<sup>43</sup> – then lack of intertemporal regulations in this regard must be interpreted as a situation in which the legislator in a tacit – “implied” manner – requires application of the new provisions. The rationale for the principle requiring general recognition of the previously enacted provisions as quashed, where those provisions are inconsistent with subsequently estab-

<sup>38</sup> J. Mikołajewicz, *Prawo intertemporalne...*, pp. 62–63.

<sup>39</sup> See the views expressed in the Resolution of the Supreme Administrative Court (NSA) of 15 October 2001, OPK 18/01, ONSA 2002, No. 2, item 63; See also J. Mikołajewicz, *Prawo intertemporalne...*, pp. 62–63 and p. 84.

<sup>40</sup> The Act of 16 February 2007 on the Protection of competition and consumers (J.L. of 2007, No. 50, item 331, as amended).

<sup>41</sup> The Act of 5 July 2001 on the prices (J.L. of 2001, No 97, item 1050, as amended).

<sup>42</sup> The Act of 4 February 2011 r. on amending the Law on higher education, the Act on academic degrees and academic title and on degrees and title in the field of fine arts and on amending certain other acts (J.L. of 2011, No. 84, item 455).

<sup>43</sup> J. Mikołajewicz, *Prawo intertemporalne...*, p. 71.

lished provisions, is the belief that a provision enacted later is closer to the actual will of the legislator<sup>44</sup>, and is therefore a better reflection of the current legal relations.<sup>45</sup> In conclusion, in the absence of any basis for determination whether to apply procedural law previously in force or the new law, the new law should be applied.<sup>46</sup>

As already mentioned, sometimes the provisions of the old law apply to a certain extent only. An example of such a regulation is included in Article 54.1 of the Act of 20 April 2004 on the substances that deplete the ozone layer<sup>47</sup>, in the light of which: “The provisions of this Act shall apply to any proceedings in the matter of issue of any permissions instituted prior and pending on the date of entry into force of this Act law, providing that any acts previously performed under any proceedings shall remain in force”. The legislator therefore prescribed retaining in force of any acts under the proceedings performed prior to entry in force of the “new” law and carried out under the “old” law, while emphasizing that as of the date of entry in force of the new regulations any and all acts under the proceedings must be performed in compliance with the new law. At the same time, it is obvious that in the situation in question it is the old law that governs determination of effectiveness of any actions under the proceedings performed under the old law (both before the entry into force of the new law and thereafter).<sup>48</sup> Sometimes, however, such a solution raises very serious questions of interpretation – this applies e.g. to Article 103.1 -103.2 of the Act of 7 July 1994 Building law<sup>49</sup>, providing that: “The provisions of this Act shall apply to matters instituted prior to and pending on date of entry into force of this Act, subject to paragraph 2”, which stipulates as follows: “Provision in Article 48 does not apply to any works whose construction was completed before the date of entry into force of this Act, or in respect of which administrative proceedings were instituted prior to that date. The provisions hitherto in force shall apply to those works”. For some time, Article 48.1 of the building law provided for an unconditional demolition order with respect to any work, or its part, built without an appropriate permit. By contrast,

“Articles 103.1–103.2 of the building law differentiate a legal situation of perpetrators of building lawlessness, depending on whether completion of the work without permit occurred before 1 January 1995, i.e. before the entry into force of the Building law of 1994. Thus, if the construction was completed before 1 January 1995, the investor bears the consequences of building lawlessness according to the provisions of the building law of 1974 applied *mutatis mutandis*”,

whose provisions were more liberal in this regard. In the present state of the law, which in many cases allows for validation of building lawlessness, still one must also consider – on a case by case basis – the issues relating to operation of the principle of *lex mitior*

<sup>44</sup> K. Ziemiński, *Rola i miejsce reguł kolizyjnych w procesie dekodowania tekstu prawnego* [Eng. *Role and place of rules of conflicts in the process of decoding of legal text*], “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1978/2, p. 6 and literature cited therein.

<sup>45</sup> P. Tuleja, *Konstytucyjne podstawy prawa intertemporalnego* [Eng. *Constitutional basis of intertemporal law*], “Kwartalnik Prawa Prywatnego” 1997/1, p. 150.

<sup>46</sup> See J. Mikołajewicz, *Prawo intertemporalne...*, p. 102. According to P. Tuleja this opinion is dominant also in the jurisprudence of the Constitutional Court in: *Konstytucyjne podstawy...*, p. 150 and 155; See also W. Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym* [Eng. *Normative changes and intertemporal principles in penal law*], Kraków 2003, p. 513.

<sup>47</sup> Act of 20 April 2004 on the substances that deplete the ozone layer (J.L. of 2004, No. 121, item 1263, as amended).

<sup>48</sup> See M. Cieślak, *Polska procedura karna: podstawowe założenia teoretyczne* [Eng. *Polish penal proceedings, Basic theoretical assumptions*], Warszawa 1984, p. 182 and W. Wróbel, *Zmiana normatywna...*, pp. 631–635.

<sup>49</sup> J.L. of 2010, No 243, item 1623, as amended.

*retro agit*. In case law of administrative courts, this principle is primarily referred to with respect to administrative sanctions. For example, in the judgment of the voivodship administrative court in Poznan of 23 February 2011 (concerning the imposition of pecuniary penalties in connection with carriage by road without payment of the required tolls on national roads) the court emphasized that the application of the principle of *lex mitior retro agit* (less stringent law acts retroactively) to administrative sanctions prescribing retroactive application of less stringent provisions to any subjects who violate the law stems from Article 15.1 of International Covenant on Civil and Political Rights of 19 December 1966.<sup>50</sup> According to that court:

“the principle of *lex mitior retro agit* applies not only in relation to penal law, but equally to administrative penalties (cf. among others, the view as set out in the judgment cited above, T.K. dated 31 January 2005, P 9/04). At this point one should emphasize lack of explicit criteria for assigning administrative sanctions to a certain branch of law, as well as a number of common features of pecuniary penalties imposed under the provisions of administrative law and fines imposed based on the provisions of penal law.”<sup>51</sup>

The Supreme Administrative Court, in this context, also notes that although the provisions in force at the time of infringement should be applied in relation to the type and severity of the sanction, it must also be borne in mind that the principle prescribing retroactive application of less stringent law (*lex mitior retro agit*) is known to the legal doctrine, and therefore “the application of the new law may not be excluded, providing it is less stringent.”<sup>52</sup> However, in its resolution of 10 April 2006<sup>53</sup> in considering the question of pecuniary penalties for the passage of a non-normative vehicle without permit, the SAC clearly opted for the application of the principle of *lex severior retro non agit* (stricter law is not retroactive) prohibiting the application of stricter administrative sanctions imposed by the new provisions in relation to events that took place before their entry into force. In this resolution it was stressed that:

“the imposition of pecuniary penalties in relation to the infringement committed before the entry into force of the law stipulating the amount of that fine would constitute violation of Article 42 of the Constitution, where the fine in question would be more stringent than the fine that would have been imposed based on the provisions in force at the time of the infringement. Although the provisions imposing administrative fines may not be qualified as provisions of criminal or fiscal penal law, their repressive nature resulting from the amount of such fines that oftentimes may be comparable to or even higher than the fines that may be imposed in relation to crimes or misdemeanors, it would be inappropriate to underestimate them /judgment of Constitutional Court of 29 April 1998, the K 17/97-OTK 1998 No. 3 item 30/. It is not the name of a particular legal institution that determines its nature, but the content the legislator associates with it.”<sup>54</sup>

As a side note, it is worth mentioning that if there has been a change in the scope of competence of an administrative authority, it is still necessary to determine which authority is to continue the already pending administrative proceeding. Typically, the legislator provides that the proceedings should be conducted by the authority competent

<sup>50</sup> J.L. of 1977, No 38, item 167.

<sup>51</sup> Judgment of Voivodship Administrative Court in Poznań of 23 February 2011, IV SA/Po 1067/10, Database of NSA rulings.

<sup>52</sup> Judgment of (NSA) of the Supreme Administrative Court 13 May 2008, II GSK 104/08, Database of NSA rulings.

<sup>53</sup> I OPS 1/06, ONSAiWSA 2006, No. 3, item 71.

<sup>54</sup> I OPS 1/06, ONSAiWSA 2006, No. 3, item 71.

under the new law.<sup>55</sup> The already pending administrative proceedings must indeed be formally concluded – even if only by decision of discontinuance of the proceedings.

However, we face a different situation when the legislator introduces specific procedures for resolving certain types of administrative matters. The implementation of specific solutions in the field of administrative procedure (often correlated with a change in certain substantive regulations) is usually designed to simplify and accelerate disposal of matters. In these situations, relatively frequently (especially recently) statutory solutions have been enacted that allow for a choice by the subject concerned as to which law – “old” or “new” law – will determine its legal situation.

An example of this type of regulation is the regulation contained in Article 42.1 of the law of 10 April 2003 on the specific rules of preparation and implementation of the investment process concerning public roads<sup>56</sup>, according to which: “The provisions of this Act shall apply to any proceedings instituted prior and not concluded with a final decision on the date of entry into force of the final decision, upon request of the authorized entity”. A similar solution was adopted in Article 37.1 of the law of 12 February 2009 on the specific rules of preparation and implementation of the investment process concerning public use airports.<sup>57</sup> This type of legal construction was also used by the legislator in Article 32.2 of the Act of 4 February 2011 on amending the Law on higher education, the Act on academic degrees and academic title and on degrees and title in the field of fine arts and on amending certain other acts, providing that: “during the period of two years from the date of entry into force of this Act, at the request of the person applying for the award of the degree of doctor, habilitated doctor or of the title of professor, the hitherto in force provisions may apply to the conducting of the proceedings for granting the degree of doctor, habilitated doctor or the title of professor; or the provisions of the law referred to in Article 2, in the wording imposed by this Act, may apply to conducting such proceedings for granting the degree of doctor, habilitated doctor or the title of professor”.

The formula in the light of which the proceedings instituted prior to and not concluded with a final decision on the date of entry into force of the law may be governed by the new or the old law may give rise to certain questions of interpretation. In the situations in question, however, it is clear that if an authorized entity has made a choice of law before the date of completion of the proceedings, irrespective of their duration, the so chosen law must be applied. By contrast, the last of the above examples (relating to Article 32 (2) of the Act of 4 February 2011 on amending the Law on higher education, the Act on academic degrees and academic title and on degrees and title in the field of fine arts and on amending certain other acts) is not unequivocal in this regard. In-depth analysis must be conducted as to the meaning, according to the legislator, of the term “conducting of the proceedings” (e.g. proceedings for granting

<sup>55</sup> See e.g. Article 54 (2) of the Act of 20 April 2004 on the substances that deplete the ozone layer stipulating expressly that: „If the authority conducting the proceedings, referred to in paragraph 1, as of the date of the entry into force of this Act, is no longer competent, it shall refer the case, within 30 days from the entry into force of this Act, to the competent authority, unless such authority is the Commission”; Article 103 (3) of the Act of 7 July 1994 – Building law; Article 139(2) of the Act of 23 July 2003 on the protection and care of monuments – “The jurisdiction of the authorities competent to dispose of the cases, referred to in paragraph 1 (i.e. instituted, but not concluded with a final decision – author) shall be determined in accordance with this Act”.

<sup>56</sup> Consolidated text: J.L. of 2008, No. 193, item 1194, as amended.

<sup>57</sup> J.L. of 2009, No. 42, item 340, as amended.

the title of professor, doctoral proceedings or habilitated doctor proceedings). Based on the literal interpretation of that provision one would, in fact, have to accept that, if it has been so chosen by the subject concerned, for “a period of two years from the date of entry into force” of the revision of the law on academic degrees and academic title and on degrees and title in the field of fine arts, the proceedings may be conducted under the old rules. In the light of the intertemporal solution in question it follows that during this period it is possible to institute the proceedings and to take further legal actions under the proceedings subject to the previous provisions. But what is to happen if the proceedings have not resulted in a final decision (resolution) by 31 September 2013? After that date, i.e. as of 1 October 2013, should the proceedings instituted and not concluded with a final decision (appropriate resolution) be conducted in accordance with the rules as set out in the revision?

The adoption of such a concept would result in difficult consequences from a practical perspective – it follows from significant differences between the new and the existing procedures applicable in matters of academic degrees and academic title (e.g. there are different conditions required for obtaining an academic degree or title, there is a different number of reviewers in the proceedings; new entities will conduct certain proceedings – e.g. a habilitation commission) that retaining in force any legal actions under the proceedings performed prior to the entry into force of the new law and conducting the proceedings on a new basis does not seem reasonable. It would be equally difficult to assume the requirement for a repetition of all stages of the proceedings. From the standpoint of the kinetics of administrative proceedings, purposive interpretation of the provision in question dictates conducting the proceedings and disposing of the matter under the law previously in force. This conclusion would probably be justifiable under the so-called corrective functions of interpretation.

It is worth emphasizing that proceedings in the matters which under the new law are not subject to examination are typically discontinued. In accordance with Article 131 (2) of the Act of 16 February 2007 on the protection of competition and consumers: “Antitrust proceedings on concentration instituted pursuant to the Act of 15 December 2000 on the protection of competition and consumers shall be discontinued where the intent of concentration is not subject to notification under the provisions of this Act”. These proceedings are, in fact, superfluous in the light of Article 105(1) of the Code.

## 5. Intertemporal law and other intertemporal problems relating to the changes in legal regulations

Intertemporal problems are often linked, and unfortunately repeatedly confused, with other problems associated with the temporal aspect of the law. In particular, this applies to various legal situations governed by adjustment or transitional provisions in the strict sense of these terms. It so happens that the issue of (non)retroactivity of law is confused, and sometimes even identified, with solutions to intertemporal problems –in those cases where certain legal norms having essentially the same scope for a subject involved in a situation with an ancient element that as of a given moment is determined by legal norms in a specific sense materially similar to a retroactive effect. In particular, certain independence of “operation” of these two types of regu-

lations (decisions) is being overlooked. The fact that a legal norm associates with a certain event from the past the consequences that it itself determines differently from the consequences determined in the past, does not lead to the conclusion that such a legal norm is – in a technical legal sense – retroactive<sup>58</sup>; it is not the so characterized norm, but the legal provision (intertemporal decision) modifying the scope of the norms of the “old law” or enacting the “new law” as the law that determines a legal situation of the subject concerned, following the entry into force of the new legal provisions. Another issue is that it would appear bizarre from a teleological standpoint in case when legal norms of the new law were attributed a retroactive effect to issue an intertemporal regulation that would not enact these retroactive legal norms as defining those situations. It would appear that if a decision on retroactivity of legal norms defining “new” legal situations has been made, then it would be consistent to issue an intertemporal regulation ordering application of that “new law” also to legal situations with an ancient element. Confusing an intertemporal situation of an individual with other situations that are only linked with such intertemporal situation in different ways may sometimes lead to the improper formulation of the problem. This, in turn, substantially hinders a solution to the legal issue in question. For example, this applies to the issue of succession of legal entities competent to dispose of the request for an amendment of the final decision in extraordinary proceedings (e.g. resolution of a dispute between a self-government appeal board and the Minister on the indication of an authority competent to conduct administrative proceedings for declaring invalidity of a decision previously issued by the Minister). The following view should be considered as the dominant trend represented by the jurisprudence: since e.g. the proceedings for declaration of invalidity of a decision are conducted under the provisions of the Code, the authority competent to declare the decision invalid is as set out in Article 157 (1) and Article 17 of the Code:

“In accordance with Article 157(1) of the Code of administrative procedure – in the wording imposed by the provisions in force – it is the authority of higher degree that is competent to declare a decision invalid in the cases mentioned in Article 156, and where the decision has been issued by the Minister or a self-government appeal board, then it is that very authority that is so competent. The authority of higher degree is defined in Article 17 of the Code of administrative procedure. At the same time, it must be stressed that in the light of provisions of the Code of administrative procedure, it is irrelevant when a decision that is subject to proceedings on declaration of invalidity has been issued, and which authority is now competent in the first instance in a given category of cases. Proceedings in declaring invalidity of decisions are not there to determine which authority is now the competent one in a particular category of cases or which authority is of higher degree in these cases, but to determine which authority is competent to declare an identified decision invalid, i.e. the decision issued in a specific case by a specific authority.”<sup>59</sup>

Certain representatives of judiciary hold a view which contests the above findings and which comes down to a recognition that:

“in resolving disputes on competence or jurisdiction, establishment of an authority competent to dispose of a case in the current state of the law in force at this time, no significant importance should be attached to which authority issued the contested decision in the past,

<sup>58</sup> There are also substantive approaches to the question of retroactivity.

<sup>59</sup> Decision of the Supreme Administrative Court (NSA) of 11 August 2011 r., II OW 5/11, Database of NSA rulings.

since this issue is not of highest importance when the provisions establishing the competence of this authority are no longer in force. It should also be noted that in most cases disputes on competence or cases on jurisdiction relate to cases contested in extraordinary proceedings (Articles 145, 154, 156 of the Code) the decisions (rulings) issued previously under different legal regulations in force at that time, and which may no longer be the basis for any judgments on the establishment of the authority competent to dispose of the case. Therefore, it is not the name of the authority whose act is being contested that is so important, but which authority is currently competent in the area concerned.”<sup>60</sup>

According to the proponents of such claims, in matters relating to the declaration of invalidity of decisions, in accordance with Article 157 (1) of the Code:

“the authority of higher degree may not be identified in isolation from substantive provisions, defining the substantive jurisdiction of the first instance authority in a given case. In this case, the provisions of substantive law will be the provisions of the above Act on the consolidation and exchange of land, in the wording imposed by Article 3 of the Act of 23 January 2009 amending certain laws in connection with changes in the organization and distribution of the tasks of public administration in the Voivodeship (OJ No. 92, item 753). It should be noted that, as a result of the above changes in the law, currently it is no longer voivode who is the authority of higher degree within the meaning of the Code in relation to the staroste in matters concerning consolidation or exchange proceedings (Article 3(1) of the Act on the consolidation and the exchange of land). Therefore, the authority of higher degree should have been determined in accordance with the principle set out in Article 17 (1) of the Code, and it should have been concluded that the authority of higher degree in relation to the staroste is the self-government appeal board (Article 5§2(6) of the Code).”<sup>61</sup>

In this context, the Supreme Administrative Court in its ruling dated 18 March 2011 also noted that in this way

“the already determined competence of a self-governing appeal board refers also to all other decisions issued previously by other authorities in second instance or in extraordinary proceedings. As of the date voivode has ceased to be an authority of higher degree in relation to staroste in matters concerning consolidation and exchange of land, and also Minister

<sup>60</sup> Decision of the Supreme Administrative Court (NSA) of 18 March 2011 r., II OW 102/10, Database of NSA rulings. We are dealing with a similar situation in case of a dispute on jurisdiction between an authority of the local government and authority of the government administration (e.g. staroste and voivode) on identification of an authority competent to conduct administrative proceedings aimed at amending decisions concerning consolidation of land. In the same spirit in its decision of 15 July 2011 the Supreme Administrative Court (NSA) decided that in accordance with Article 155 of the Code, the authority competent to amend a final decision in those proceedings is the authority of public administration who issued that decision. However, in certain decisions, it has been emphasized that: “the interpretation of this provision should take into account the provisions in force on the date when the request for amendment of the decision pursuant to Article 155 of the Code will be examined. If from the date of issue of the decision that is to be amended the legal provisions in force have changed and the jurisdiction of authorities has also changed, it must be assumed that the authority competent to dispose of such a request is the authority that is currently the authority of first instance in a given case (if the final decision has been issued in first instance)”. As it is clear from the records of the case, all decisions with respect to which S. and W. H. requested changes, have been issued in first instance, although by different authorities. “In light of the above, the authority component to dispose of this request currently is Staroste of Pinczow, which follows from Article 3(1) of the Act of 26 March 1982 on the consolidation and exchange of land (J.L. of 2003 No 178, item 1749, as amended). It is of no relevance whether in the past a given decision would have been issued by a voivode, head of municipality or voit, since all these decisions have been issued in first instance. By contrast, the authority of higher degree towards staroste concerning consolidation and exchange of land (as of 1 August 2009) is in accordance with Article 17(1) of the Code self-government appeal board.” (Decision of NSA of 15 July 2011 r., II OW 29/11, Database of NSA rulings).

<sup>61</sup> Decision of NSA of 25 February 2011, II OW 90/10, Database of NSA rulings; similarly Decision of NSA of 22 July 2011 r., II OW 17/11, Database of NSA rulings.



of Agriculture and Rural Development has ceased to be an authority of higher degree in relation to voivode within the meaning of Article 157 (1) of the Code, it follows that under the same provision it also may not be the authority competent to declare as invalid its own decision issued prior to the change in the regulations. If the view of the Self-governing Appeal Board in (...) as presented in the request for resolution of the dispute on jurisdiction were to be accepted, it would lead to a dualism of decisions in such cases. A different authority would be competent to declare invalidity of decisions issued prior to 1 August 2009, and a different authority would be competent to declare invalidity of decisions issued after that date, which would be unacceptable under the existing legal order.<sup>62</sup>

The above case is not concerned with determination of a legal situation of the subject concerned in terms of its substance, but with determination of the authority that assumed competence to resolve a matter that is legally relevant to that subject, i.e. to conduct proceedings for declaring invalidity of a decision. In this sense, the intertemporal question could potentially relate to an authority competent to dispose of the above mentioned administrative matter, but it should be noted that *in casu* there is no intertemporal element, i.e. these authorities are not involved in an ongoing – from their perspective – legal situation with an ancient element. They are only competent, under the new law, to resolve a problem involving a legal situation with an ancient element. And if so, we only deal with provisions supporting the operation of institutions after a change in the law. Hence, the conclusion that these provisions should not be of substantive, but of procedural and organizational nature, since this is what the legal issue in question is concerned with. This conclusion leads us to a resolution of the problem in question that these are the procedural provisions that govern this resolution by identifying the Minister (Minister of Agriculture and Rural Development) as the competent authority on the basis of art. 157(1) of the Code.

## 6. Intertemporal law and changes to the (official) interpretation

Another issue to consider is how to classify a case of a change by an administrative authority of the previous interpretation applied either to the decisions already issued or of which the subject concerned has already been formally notified (e.g. in the documents on how to complete tax returns). In the case-law it is stressed that changes in interpretation do not constitute a basis for amending a final administrative decision (e.g. in extraordinary proceedings).<sup>63</sup> Therefore, it must be concluded that in accordance with the principle of confidence provided for in procedural regulations (Article 8 and Article 121 of Tax Ordinance<sup>64</sup>), in case of a change in the way of interpretation by an administrative authority, the following principle – stipulating that the new interpretation may not have a retroactive effect – should be adopted. The new interpretation may only apply as from the date the party has been notified of a change in the legal practice

<sup>62</sup> Decision of NSA of 18 March 2011, II OW 102/10, Database of NSA rulings.

<sup>63</sup> It may not constitute a premise for reopening of the proceedings because a) it is neither a new matter of fact nor a new evidence existing on the date of issue of the decision but unknown to the authority that issued the decision (Article 145.1.5 of the Code.) – judgment of the Supreme Administrative Court (NSA) of 13 July 1994, III SA 1800/93, ONSA 1995, No. 3, item 114; b) it's not a preliminary ruling in the meaning of Article 145.1.7 of the Code (which concerns the new interpretation of the provisions in the documents or guidelines of a central administrative authority e.g. Minister of Finance) – judgment of the Supreme Administrative Court (NSA) of 16 December 2002, III SA 252/01, LEX 82374; similarly judgment of the Supreme Administrative Court (NSA) of 7 September 1982, SA/Kr 588/82, ONSA 1982, No 2, item 83.

<sup>64</sup> The Act of 29 August 1997 – Tax Ordinance (J.L. No. 137 item 926 with subsequent amendments).

by the authority or could have familiarized itself with that practice (e.g. on the website of the office). Acceptance of this principle is of fundamental importance, in particular under tax law, if a taxpayer has paid the tax it has calculated itself.<sup>65</sup>

## 7. Conclusion

This study is only an outline of a wider intertemporal question of broadly understood administrative law. However, it also provides for practically useful conclusions. It should not remain unnoticed that intertemporal problems under administrative law, as well as under other branches of law, are always decidable (resolvable). Those decisions may not be reduced to a sheer application of intertemporal provisions, and – in their absence – to the conclusion that the issue should be resolved in accordance with the principle of direct application of the new law. From the contrary findings of this study as to the scope of applicability of the principle of *lex mitior retro agit*, it follows that the search for intertemporal resolutions, including under administrative law, would not be groundless amongst the decisions that haven't been adopted in a positive form. These decisions belong to the deep structure (layer) of jurisprudence. The need for an in-depth study is also substantiated by so far insufficiently examined question of changes in the law resulting from changes in the interpretation of a legal text, which does not have to amount to the analogue for direct application of the new law while not attributing any retroactive effect (the principle of retaining the actions performed under the proceedings in force). Finally, the positioning of the problem paves the way to research not only on structure, but also axiology of administrative law, research that is more subtle than this conducted so far. In particular, the principle of validity with regard to administrative cases in the course of changes in the law.

Translation Andżelika Godek

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<sup>65</sup> See judgment of Voivodship Administrative Court in Gdańsk of 27 November 2007, I SA/Gd 861/07, Database of NSA rulings.