

Rafał Stasikowski, *Funkcja regulacyjna administracji publicznej. Studium z zakresu nauki prawa administracyjnego oraz nauki administracji*
[*The regulatory function of public administration. A study of the science of administrative law and the science of administration*]
Branta Publishing Company, Bydgoszcz 2009, 336 p.

The last twenty years can be described as a period of development of the so-called information society, i.e. a type of society characterized by a new shape of social and economic relationships. The information society has emerged as a result of ongoing technological progress accompanied by a global crisis of the welfare state theory. The opportunities accompanying technical progress, globalization and the growing costs of the direct provision of public services, covered by states with increasing effort only, caused the beginning of the demonopolization and privatization of infrastructure sectors (state monopoly domain) in Europe at the end of the 1980ties. Services provided by network sectors used to be called public services. They were traditionally provided by public administration or through an agency of companies closely connected to public administration. As a result of the abandonment of the support policy for state monopolies in sectors important to them, it was necessary to create a new regulatory system adequate to the occurring changes. In addition, fundamental modifications of the state regulatory authorities were needed. The liberalization process created the danger of market dominance by former monopolies as well as a risk that the market itself would not have been able to open a way to free competition. It was agreed that removing trade barriers required the creation and enforcement of clear competition rules. In the initial stage of liberalization, state intervention was needed for an optimal allocation of resources, which would have been impossible considering the strong position held by incumbents and the reliance on market forces only. It was also clear that the liberalization of network services markets could not proceed without some degree of control exercised by public authorities responsible for the provision of access to basic network services.

The introduction of competition into infrastructure markets was connected with a transitional period characterized by a strong position of incumbents with market shares initially hindering free competition. The method and scope of state intervention into the market had to be regulated by law in that period¹. Liberalization

¹ See on the subject: F. Kamiński, 'Rola państwa w rozwoju telekomunikacji – doświadczenie historyczne' [A role of a state in a development of telecommunications – historical experiences']

was accompanied by sector deregulating mechanisms to enable market entry by new companies (operators), the elimination of administrative constraints connected with access to the provision of services and the derogation of laws hindering the functioning of free competition in a sector². Doctrine defines state activities undertaken within that scope as 'state self-regulation'³ or 'state re-regulation'⁴. Both terms express a necessity to allow the economy to work in accordance with market mechanisms with corrective state actions where necessary (taken only when they do not distort the economy).

State intervention into the economy is dictated by the need to continue social policy based on state responsibility for the provision of basic public services to consumers. Even where the state stops providing them directly as a result of privatization, it remains responsible for ensuring access to a given set of services. It must also ensure their appropriate quality even if they are delivered by the market itself. The state must therefore apply effective intervention mechanisms in order to guarantee the continuity, affordability and adequate quality of services. Thus, it goes without saying that a modern state has to apply adequate regulatory mechanisms in the new demonopolized socio-economic reality.

However, regulation as an autonomous mechanism of state intervention into the economy is not mentioned in any of the best textbooks on public or administrative economic law neither in Poland nor Europe. It is also no use looking for such terms as 'regulatory administration' or 'regulatory body' because they are not included in the descriptions of legal branches or in the typology of administrative tasks or instruments listed in textbooks⁵.

German literature presents a slightly different picture. It contains a broad concept of the term 'regulation' which refers to all instruments used by the state to control

(2003) 3-4 *Telekomunikacja i Techniki Informacyjne* 4 et seq.; T. Skoczny, 'Wspólnotowe prawo regulacji in statu nascendi' ['Community regulation law in statu nascendi' [in:] C. Mik (ed.), *Prawo gospodarcze Wspólnoty Europejskiej na progu XXI wieku [Community economic law at the turn of the 21st century]*, Dom Organizatora, Toruń 2002, p. 234.

² See on the subject: M. Ratajczak, *Infrastruktura w gospodarce rynkowej*, Poznań 1999, p. 96 et seq.; A. Szablewski, 'Teoretyczne przesłanki deregulacji infrastruktury' ['Theoretical conditions for deregulation of infrastructure'] (1992) 3 *Ekonomista* 401 et seq.; P. Jeżowski, 'Restrukturyzacja krajowych monopolii naturalnych w Polsce' ['Restructurization of national natural monopolies in Poland'] (1999) 4 *Gospodarka Narodowa* 33; T. Skoczny, 'Ochrona konkurencji a prokonkurencyjna regulacja sektorowa' ['Competition protection and procompetitive sector-specific regulation'] (2004) 3 *Problemy Zarządzania* 9 et seq.

³ See e.g.: T. Skoczny, 'Wspólnotowe prawo regulacji...', p. 234.

⁴ Johannes Masing defines re-regulation as a process of introducing new law regulations with the aim of privatizing economy sectors and, ultimately, deregulating them. J. Masing, 'Stan i tendencje rozwojowe regulującego prawa administracyjnego' ['State and development tendencies of regulatory administrative law'], [in:] *Ius Publicum Europeanum. Dwunaste Polsko – Niemieckie Kolokwium Prawników Admistratywistów. Warsaw, 20 – 22 September 2000*, Warszawa 2003, p. 165.

⁵ See e.g.: T. Skoczny, 'Stan i tendencje rozwojowe administracji regulacyjnej' ['State and development tendencies of regulatory administration'] [in:] *Ius Publicum Europeanum...*, p. 161.

and supervise the economy⁶. This means that in the literature of the subject the term 'regulation' encompasses all instruments used by the state as intervention in the economy. With reference to the legislation of EU Member States, the term appears primarily in the context of the laws governing infrastructure sectors⁷.

That is why, the book by Rafał Stasikowski *The regulatory function of public administration. A study of the science of administrative law and the science of administration* is worthy of interest. The Author presents a thorough and comprehensive analysis of the new tasks of public administration that appear in a changed, privatized model of public tasks fulfilment. He assesses the tasks and functions of administration from a historical and legislative perspective considering the influence of non-regulatory elements on the developments in the last two centuries. The book contains also a thorough regulatory analysis. Its focus is placed on functional modifications of public administration as an element of broader socio-economic and technological changes. The evolution of the tasks and the structure of public administration is assessed on the basis of traditional research instruments, which leads the Author to the conclusion about the evolutionary character of the changes in academic research in the subject matter of administration and about the beginning of the so-called new academic research on administrative law.

The book is divided into three parts. They focus, respectively, on basic legal instruments and definitions (Part 1), classic functions of public administration (Part 2) and the regulatory function of public administration (Part 3). The first part starts with methodological reflection. The Author refers to classical research methods associated with administrative law and the science of administration and proposes the use of a new research instrument – the concept of 'steering', defined as an intentional activity of a system. The aim of the introduction of the steering system into the methodology of the science of administration is a comprehensive and interdisciplinary analysis of the interrelationships between the activities undertaken by different administrative bodies.

The Author presents a very mature vision of new administrative law science stressing however that it requires developing still. Emphasised first is the need to expand the applicable research perspective and to analyse, aside of the law, other relevant elements such as the market, personnel and organisation. The Author states that new administration law science should focus no less on the process of law formulation than on the process of its application and interpretation. The Author proposes therefore a quite significant change in the science of administration concerning the shift in emphasis towards the formulation of the law (the stage preceding its application).

⁶ T. Skoczny, *op. cit.* and quoted R. Schmidt, *Öffentliche Wirtschaftsrecht. Allgemeiner Teil*, Springer – Verlag, Berlin 1990, p. 48.

⁷ In the Polish law one can find them e.g. in article 1(1)(5) of the Act of 16 July 2004 – Telecommunications Law, as well as, in article 25 of the act, titled 'Regulatory decisions' in part II, titled 'Telecommunications market regulation' (Journal of Laws 2004 No. 171, item 1800), and article 3(15) of the Act of 10 April 1997 – Energy Law (Journal of Laws 2006 No. 89, item 625, as amended).

The second and the third chapters of Part 1 present a set of definitions which acts as the basis for further assessment.

The second part of the book concerns the classical functions of public administration and is divided into four chapters. The first chapter presents its policing-regulatory function, the second focuses on administrative supervision, the third concerns the provision of services by administration and the fourth deals with the planning function of public administration. All of these chapters open with a historical analysis of the conditions influencing a given function and close with a description of the legal relationships appearing as a result of the fulfilment of a given function by administration bodies. Interestingly, Stasikowski presents here also the privatization of legal relationships whereby individuals purchase now specific public services on the basis of administrative relations as well as on the basis of civil law – the Author seems particularly interested in this very change. The attempt to determine the legal position of entities placed in the new reality of privatized public tasks becomes a fundamental aim of his assessment.

Part 3 of Stasikowski's book is entitled 'The regulatory function of public administration'. The first of its six chapters concerns the concept and essence of the regulatory function of administration covering its historical conditions and the views of the doctrine. His analysis regarding the definition of regulation is highly interesting and original. According to the Author, the term 'regulatory function' refers to those activities of public administration which take the form of continuous activities meant to achieve the common good – they guarantee the continuity, universality and quality of services ensured by law but provided by private entities fulfilling privatized public tasks. The definition refers explicitly to the concept of public services characterized by continuity, affordability and appropriate quality. In the opinion of reviewer, the reference made to the theory of Adam Chełmoński concerning continuity is not sufficiently convincing. It seems that it is not the element which is solely characteristic of the regulatory function, but of other functions of public administration with the reglementary function at the top.

The next chapters focus on highlighting the legal basis of the regulatory function of administration and on the connotations of the term 'regulation' as well as other related terms. The fourth chapter of the third part is interesting since it concerns the subjective structure of a regulatory steering system. The Author divides the structure into regulatory bodies *sensu stricto* and other regulatory bodies which are dispersed at all levels of public administration such as the UOKiK President or given ministers. The fifth chapter concerns regulatory instruments. Stasikowski proposes the extension of the classical theory of legal forms of the activities of public administration and to consider it as a part of the conception based on the acts of will and the acts of knowledge of public administration. The concept of 'a sequence of regulation activities' is also presented here which proves that regulatory instruments are connected and interact with each other.

The last chapter contains an analysis of the legal position of an entity in the era of regulation. The Author rightly claims that, taking entity protection into consideration, it is vital to specify the scope of the accountability of public administration with

respect to the provision of specific services. It is also important to determine the legal relationship between those receiving them and their providers. The analysis concerning the legal relationships on which service purchases are based is extremely interesting. Indeed, the concept of “legal relationships” is very complex in itself. On the one hand, it is a civil law relationship concluded with a private entrepreneur. On the other hand, the relationship is preceded by an administrative act (a regulatory element) which shapes the legal position of an entity at the same time.

The quality of Stasikowski’s book manifests itself in the comprehensive, non-regulatory analysis of the factors shaping the structure and mechanisms of administrative activity. He correctly emphasizes the significance of economic and technological progress as the most important factor influencing current developments. Indeed, the present is primarily associated with a high speed of the spread of new communication techniques especially considering that over 200 000 years have passed between the appearance of speech and the invention of writing and another 10 000 years until Gutenberg and the publication of the very first book. After that however, the telegraph, telephone and finally wireless communication were invented in a few hundred years only⁸. New communication technologies are now appearing every few years with the number of people using the internet doubling every four years. Knowledge-based economy (even if the Author does not mention the term, it seems that his book concerns this kind of economy) is a basic source of impulses for modern changes. The role of administration is in the new knowledge-based society primarily to create new socio-economic relations. According to the Author, this creation takes place in a regulatory steering system based on the cooperation of regulatory administration bodies (steering entities) with private entities fulfilling privatized public tasks (steered entities). This new relationship is created in order to shape the new legal position of entities receiving the services so as to ensure their appropriate protection in light of the fact that the state stopped providing them directly. The attempt to outline the legal position of an entity in its new relationship with a private provider of public services seems to be the fundamental aim of Stasikowski’s book. Furthermore, it is worth mentioning that the Author prefers a definition of regulation which does not refer to infrastructure sectors only but which also encompasses state influences on different socio-economic processes.

The book under review covers the most interesting trends in the science of administrative law. First, it refers to highly relevant challenges to the structure of administration posed by the development of new communication technologies in the information society. Second, issues connected with the new concept of public governance, which are essential for its regulatory function, lay in the background of the entire analysis. Third, in the face of a strong trend to extend the range of entity rights in relation to administrative bodies, it seems correct to place the issues of an entity’s legal position in the center of the discussion on the new function of public administration. Presenting its regulatory function against the backdrop of the topical

⁸ See M. McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man*, University of Toronto Press, Toronto 1965, *passim*.

(on the global scale) problems of administrative law is commendable. It acts as the ideal lens through which the concept of new administration law science, proposed by the Author, can see specific phenomena, evaluate them and create new instruments, institutions and rules.

The book is not free from small errors, such as the divergences in the title of a subchapter in the list of contents and in the book itself (p. 133), but this does not lower its overall quality. The book reflects a mature and well-thought-out vision of the new function of regulatory administration.

It is worth mentioning that treating regulatory law as a transitional phenomenon can be found in the literature on the subject matter at hand. In accordance with the principles of regulatory legislation, regulatory administration should be introduced in absence of effective competition. However, once that is achieved, regulation should be abolished and regulators should cancel any regulatory obligations previously imposed on specific companies. It seems that the book by Stasikowski makes a considerable contribution to refuting a thesis of a short-term and transitional character of regulatory law.

Dr. Justyna Nawrot

Maritime Law Department,

Faculty of Law and Administration, University of Gdańsk