

**THE NEED FOR RESEARCH ON PUBLIC SUBJECTIVE RIGHTS  
OF PERSONS WITH DISABILITIES  
FROM THE PERSPECTIVE OF POLISH ADMINISTRATIVE LAW**

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ABSTRACT

When dealing with citizens, public administration has numerous opportunities for abuse of its privileged position. The study of public subjective rights of disabled persons in public law is important because the relation under administrative law is not an equal relation. The state is always the stronger party. When a party to this relation is a person with a dysfunction of the body, a situation is created which is highly unfavourable for this person because of the natural tendency of the state system (including public authorities) to use its privileged position. This can result in actual discrimination of persons with disabilities. The purpose of the law is the common good and welfare of individual persons. Respecting the welfare of persons with disabilities in the public law guarantees the realization of the common good. One can not create the law while ignoring the rules governing human life. As Petrażycki wrote, “the highest good to which we should strive in policy in general and legal policy in particular – is the moral development of man and the rule of highest rational ethics among human beings, namely, the ideal of love” (Petrażycki, 1968, translation mine).

**Key words:** disabled person, administrative law

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Is every person fully functional? What are the criteria of “complete functionality”? Does the mode of human existence naturally include periods of incomplete functionality? The question of disability is the question of the mode of human existence, also as a biological being subject to the laws of nature. The mode of man’s life involves periods when the human being needs the help of others. No one is self-sufficient. Since in the course of human existence there occur periods when one needs the support of others (childhood, old age, sickness, etc.), this social dimension of human functioning has to be taken into account by those who manage the community.

The law is the expression of the will of the state. The study of public subjective rights of disabled persons in public law is especially important because the relationship under administrative law is not an equal relationship. The state is always the stronger party. When a party to this relationship is a person with a dysfunction of the body, a situation is created which is highly unfavourable for this person because of the natural tendency of the state system (including public authorities) to use its privileged position. This can result in actual discrimination of persons with disabilities. In extreme situations, in totalitarian countries, discrimination can even lead to murdering persons with bodily dysfunctions under the framework of the state activity – as it was the case in Nazi Germany where mentally ill persons were being killed by state functionaries<sup>1</sup>. For these reasons, this research field is not an area of solely theoretical considerations, but the status of the disabled in public law is also an important legal problem from a practical point of view<sup>2</sup>. The attitude of the state towards people with

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<sup>1</sup> See: Y. Ternon, S. Helman, *Eksterminacja chorych psychicznie w III Rzeszy. Od teoretyków narodowosocjalistycznych do praktyków z SS*. Warszawa, 1974.

<sup>2</sup> Comp. Convention on the Rights of Persons with Disabilities (Dz. U. z 2012 r., poz. 1169) art. 12.1 “States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests”; art. 16.1 “States Parties shall take all appropriate legislative, administrative,

a dysfunction of the body determines the nature of the state – whether it is a state of solidarity, a liberal, a caring or a totalitarian state, etc.<sup>3</sup>

In order to determine the scope of research, it is important to identify the persons being the subject of law. There are different terms describing persons with a dysfunction of the body: invalids, disabled persons, etc. In the Polish system of certification of disability, for purposes other than disability pension, the legislative body uses the term “disabled person”. One should note, however, that for the purposes of consideration of the rights of people with dysfunction of the body, this term is too narrow a concept because the legislator counts among such persons those who possess an appropriate document from a relevant certifying institution. From the point of view of public subjective rights, it is important to verify whether obtaining the legal status of a disabled person ensues specific public subjective rights. The object of the planned research are the public subjective rights of people who possess such a document. For this reason, the author uses in the title the term “disabled person”, which reflects the range of persons and the studied norms which concern them. The objective of this scope of research is to answer the question: does obtaining the legal status of a disabled person ensue any public subjective rights in the Polish law? Or maybe it is the legal status of a disabled person and not the subjective rights which gives that person only apparent rights with regard to state authority?

Administrative law is the area which gives great opportunities to researchers, in particular with regard to determining the quality of the law defining the legal status of persons with disabilities. The research results will show the most important problems related to administrative law and its philosophy against the background of contacts between disabled persons and the state. Studies need to show in what way disability affects the equality of civil rights during contacts with the state. I wish to claim

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social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects”; Comp. Ustawa z dnia 15 czerwca 2012 r. o ratyfikacji Konwencji o prawach osób niepełnosprawnych, sporządzonej w Nowym Jorku dnia 13 grudnia 2006 r. (Dz. U. poz. 882).

<sup>3</sup> Comp. T. Sienkiewicz, *Status człowieka niepełnosprawnego w prawie publicznym*. Warszawa 2007, p. 11.

that the Polish system of clinical, occupational and social rehabilitation of persons with disabilities is malfunctioning. Identifying the causes of this state of affairs in the field of law can provide the basis for new legislative measures in this regard. There is a lack of professional, legal literature on administrative law in this area (public subjective rights of disabled people) – few works on the rights of people with bodily dysfunctions have been written<sup>4</sup> by lawyers. Instead, it is subject to studies in medicine, psychology, political science, sociology, but not legal studies dealing with administrative law in scope of public subjective rights. Through law, the legislator determines the activity of the state with regard to persons with disabilities. Art. 7 of the Polish Constitution provides that “The organs of public authority shall function on the basis of, and within the limits of, the law.” Therefore, since there is no state authority or executive power without a legal basis, the study of the legal status of persons with disabilities is an important social activity, because the legislature, through legal norms, creates public subjective rights or fakes their existence. Discussion on public subjective rights of persons with disabilities is needed, as the rights of persons with disabilities apply to all members of society, including those currently considered to be fully functional.

Law is made in a given society for a specific purpose. This objective is implemented by influencing through legal norms the behaviour of individuals and human communities. Thus, legislation concerning a social group of a few million people, e.g. persons with disabilities, necessarily influences the behaviour of members of the group those norms are addressed to. “The law is (...) meant to work”<sup>5</sup>. It is therefore necessary to raise some basic questions. “What are the main objectives of the law? Who does it serve?

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<sup>4</sup> E.g. in recent years: J. Blicharz, *Sytuacja osób wykluczonych w dobie współczesnej globalizacji ekonomicznej. Wybrane problemy*. [in:] A. Błaś (ed.), *Pewność sytuacji prawnej jednostki w prawie administracyjnym*. Warszawa 2012; M. Wenclik, *Zmiany w podejściu administracji publicznej do klientów niepełnosprawnych*. [in:] J. Zimmermann, P.J. Suwaj, (ed.), *Wpływ przemian cywilizacyjnych na prawo administracyjne i administrację publiczną*. Warszawa 2013; I. Sierpowska, A. Kogut, *Status osoby niepełnosprawnej w polskim systemie prawa*. Wrocław 2010; Z. Wasiak, *Zadania powiatu w rehabilitacji społecznej osób niepełnosprawnych*. Krajowa Izba Gospodarczo-Rehabilitacyjna, Warszawa 2006.

<sup>5</sup> A. Podgórecki, *Socjologia prawa*. Warszawa 1962, p. 8, translation mine.

What is the scope of the effectiveness of its action?”<sup>6</sup>. One needs to note that the “sociology of law deals with defining, formulating and verifying all these general dependencies which feature legal factors as one variable and a factor of some other kind as the second variable. Of interest will therefore be cases where a change in the law induces a change in another factor, as well as cases in which a change of some other factor affects the change in the law”<sup>7</sup>. It is therefore concluded that the model which reflects this relationship is the legal status of persons with disabilities, in which legal and factual factors determine who is treated under the Polish law as a disabled person, as the law on vocational and social rehabilitation of persons with disabilities defines a disabled person as a person who possesses an appropriate document from a relevant certifying institution. Thus, the mere change of the law may result in an increased or decreased number of people with disabilities, regardless of their unchanged physical and medical characteristics. The law can also modify the behaviour of members of the community interested in obtaining the legal status of a disabled person. The study should include both legal consequences unintended by the legislature, as well as those which the legislature anticipated, because “the law works in such a way that when people consider the command of legal norms they either comply or not. Therefore, the law works in so far as it is reflected in people’s behaviour”<sup>8</sup>. Sociological and legal approach to research on the legal status of persons with disabilities should provide a clear picture of the law in action which is consistent with the legislature’s intention, or vice versa, the law which does not work as intended by the legislator. “The central issue here is the empirical study of cases in which given legal solutions work efficiently or work with some interference, or even block the realization of the needs on account of which they were brought to life. One needs to establish the conditions for the adequacy or inadequacy between social needs and the corresponding solutions”<sup>9</sup>. It should also be noted that “the law works effectively only when it has been

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<sup>6</sup> Ibidem, p. 10, translation mine.

<sup>7</sup> Ibidem, p. 15, translation mine.

<sup>8</sup> Ibidem, p. 27, translation mine.

<sup>9</sup> Ibidem, p. 31, translation mine.

designed rationally (and thus it is not encumbered with various adverse and unpredictable effects) and when it is socially recognized”<sup>10</sup>.

When dealing with citizens, public administration has numerous opportunities for abuse of its privileged position. The study of public subjective rights of disabled persons in public law is important because the relation under administrative law is not an equal relation. The state is always the stronger party. When a party to this relation is a person with a dysfunction of the body, a situation is created which is highly unfavourable for this person because of the natural tendency of the state system (including public authorities) to use its privileged position. This can result in actual discrimination of persons with disabilities. In extreme situations, in totalitarian countries, the situation may breach the limits of the term discrimination and even lead to murdering persons with bodily dysfunctions with the concession of the state. For these reasons, this research field is not an area of solely theoretical considerations, but the status of the disabled in public law is also an important legal problem from a practical point of view. The attitude of the state towards people with a dysfunction of the body determines the nature of the state. Public subjective rights of persons with disabilities relate to different legal and administrative situations, eg., in terms of access to public administration offices, the use of an assistance dog in public buildings, employment in public administration, communication with public administration, as well as obtaining from public administration certificates confirming the dysfunction of the body, administrative decisions or other documents (parking card, etc.). However, many administrative and legal situations have been designed by the legislature so as to deprive the disabled person of their public subjective right, and put them at the free disposal of officials. **My hypothesis is that the legislator only seemingly regulates public subjective rights of persons with disabilities with regard to the execution of a number of tasks of public administration**, and especially local government administration. This applies for example to district (powiat) tasks set out in article 35a of

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<sup>10</sup> Ibidem, p. 35, cf. p. 71, translation mine.

the act on vocational and social rehabilitation and employment of disabled persons<sup>11</sup>.

When attempting to identify research problems related to public subjective rights of persons with disabilities, one should formulate universal problems concerning these rights in order to render the conclusions of the study suitable for the evaluation, i.a., of the entire system of these rights.

**Problem one: to examine the scope of obligations of the state with regard to persons with disabilities.**

**Problem two: to examine the potential for interference of public administration bodies in the implementation of public subjective rights of persons with disabilities.**

**Problem three: to determine the permissible limits of free decision-making in the activities of public administration authorities with regard to persons with disabilities**

**Problem four: determine the effect of the degree of formalization of legal forms of activity of public administration authorities on the effective realization of public subjective rights of persons with disabilities**

**Problem five: determine the nature of the rights of persons with disabilities with regard to the state – whether these are public subjective rights or these powers are solely apparent?**

In order to determine the scope of research, it is important to identify the persons being the subject of law. There are different terms describing persons with a dysfunction of the body: invalids, disabled persons, etc. In the Polish system of certification of disability, for purposes other than disability pension, the legislative body uses the term “disabled person”. For the purposes of consideration of the rights of persons with dysfunction of the body, this term is too narrow a concept because the legislator counts among such persons those who possess an appropriate document from a relevant certifying institution. The object of the research should be the

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<sup>11</sup> Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych (consolidated text Dz. U. of 2016, item 2046); About art 35a see in: M. Paluszkiwicz [in:] M. Włodarczyk (ed.), *Ustawa o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych. Komentarz*. Warszawa 2015, pp. 732-737.

public subjective rights of people who possess such a document. For this reason, the author uses in the title the term “disabled person” (rather than: disabled man), which best reflects the range of persons and the studied norms which concern them.

Administrative law is the branch of law which provides ample opportunity to researchers studying the discussed research matter, in particular with regard to determining the quality of the law defining the legal status of persons with disabilities. The planned research should reveal the most important problems related to administrative law and its philosophy against the background of contacts between disabled persons and the state.

Studies need to show in what way disability affects the equality of civil rights during contacts with the state. I wish to claim that the system of clinical, occupational and social rehabilitation of persons with disabilities based on the actions of public institutions is malfunctioning as a result of numerous incorrectly designed and legislated administrative and legal situations. Identifying the causes of this state of affairs in the field of law can provide the basis for new legislation in this regard. Discussion on public subjective rights of persons with disabilities and the scope of their implementation is needed and must be conducted with due diligence as a precondition of correct legislation. The legislator determines through law the activity of the state with regard to persons with disabilities. Art. 7 of the Polish Constitution provides that “The organs of public authority shall function on the basis of, and within the limits of, the law.” Therefore, without a legal basis there is no state authority, nor its competence.

Administrative law consists of systemic (personal, property, organizational), substantive and procedural norms. Task norms are also distinguished as a separate type of norms not fitting the classic system of administrative law<sup>12</sup>. The planned studies should analyse the norms defining the person of a special legal status being the subject of law – “the disabled person”, and then the object – the public subjective rights associated with persons having such a status with examples of those rights, and, finally, the values underlying the realization of human rights. The study will be

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<sup>12</sup> Cf. M. Matczak, *Kompetencja organu administracji publicznej*. K.W. Zakamycze 2004, pp. 153-163; Comp. S. Fundowicz, *Decentralizacja administracji publicznej w Polsce*. Lublin 2005, p. 49.

conducted in the light of the common good, the implementation of which is to be ensured by the public subjective rights of persons with disabilities.

The studies should also take into account international determinants of the protection of rights of the disabled. There are many international initiatives in this regard; for example, the year 2003 was a special year for the disabled people. Council of the European Union established it as the European Year of People with Disabilities<sup>13</sup>. Unfortunately, this fact did not in any way encourage a verification of the legal provisions of the Polish system of human rights protection.

**The objective of the planned research is the analysis of the normative status of a disabled person under public law in the context of public subjective rights of those persons.**

The present study attempts to consider the disabled person in the context of public law. It is important, therefore, that the relation between the state and the citizen is not an equal relation. Disability deepens this inequality to the disadvantage of the inquirer. Studies of this relation need to show at least part of the significant issues related to administrative law and affecting the administrative and legal situation of this specific group of applicants. A very important issue is the impact of discrimination on the formation of an administrative and legal relation between a public administration body and a citizen with a dysfunction of the body certified by an appropriate state authority. Due to the occurrence of numerous documents from different systems of jurisprudence, this research area should be subjected to careful analysis; however, already at the outset of research one can argue that there is an inconsistency in the legal system of certification of dysfunctions of the human body by the authorities.

Another important focus of the planned research is the question of the scope of realization of public subjective rights of persons with disabilities. In particular, are the countermeasures against discrimination respected and does the public law currently facilitate or hinder the realization of these rights?

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<sup>13</sup> Cf. *Decyzja Rady w sprawie Europejskiego Roku Osób Niepełnosprawnych 2003*. [in:] *Unia Europejska. Dokumenty, publikacje, informacje*. No. 2, Warszawa 2001, p. 11.

Problems related to the functioning of persons with disabilities in the Polish legal system is rarely of interest to Polish lawyers<sup>14</sup>. Very scarce are works by Polish scholars analysing the legal status of a person with a disability from the point of view of administrative law. Perhaps on account of this phenomenon, the legal status in this matter is characterized by a kind of inconsistency. It is certainly also a consequence of the political changes and the ensuing frequent changes in legislation. One of the objectives of research should be to collect and organize the values that provide the basis for the valid creation of the normative status of a disabled person in public law.

The studies should show the relationship between human rights, natural law, and the legal status of the disabled person. They should also seek the justification for the separation as a distinct normative reality of the public subjective rights of persons with disabilities. The research process must include examples of public subjective rights of disabled persons, also in order to illustrate the thesis that these rights can be effectively distinguished and located in the national legal system.

Constitutional and international values particularly important for the realization of public subjective rights of persons with disabilities should be studied in detail. Of course, regulations of the Polish Constitution should justly refer to persons with bodily dysfunctions as well as fully functional members of society. This requires a formula of justice taking into account the impact of disability on the realization of one's rights with regard to the state. From this point of view, it is clear that for vulnerable groups certain values are of particular importance in the implementation of the principle of equality. Solidarity is a concept that has a practical application – it defines the character of our state. It is also a legal concept. The obligation of solidarity is expressed in the preamble to the Polish Constitution. According to the will of the legislature, we are to create a community where there will be room also for the disadvantaged members of our society. In addition, article 69 of the Polish Constitution states that “Public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social com-

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<sup>14</sup> Comp. T. Sienkiewicz, *Status człowieka niepełnosprawnego w prawie administracyjnym*. Warszawa 2006, pp. 12-13.

munication.” In the present study, special attention will be paid to those principles, which are of significant importance for the implementation of the postulate of the solidarity state. As indicated by W. Piwowski, the basic ethical and social principles are: the common good, subsidiarity and solidarity<sup>15</sup>. Focus should be on the values associated with the executive and their relation with the disabled persons. In the current legal system of rehabilitation of disabled persons, subsidiarity should be the primary value that is enacted, if Poland is to be a state of solidarity. Correct application of subsidiarity determines the implementation of solidarity. “The social disease” of the lack of responsibility for one’s own action, nourished not so long ago by the illusory, apparent social justice of the socialist state now requires the legislative enactment of subsidiarity in order to repair social relations. The concept of solidarity has been abused in recent years. Commonly it is confused with understanding it as a principle of neo-socialist welfare state. But this can not constitute the basis for denial of the value of solidarity. The planned research should reveal the foundations of the state of solidarity, which guarantees the realization of public subjective rights of persons with disabilities.

In the research, the analysis of law should be done in the context of its purpose. The aim is to show the ultimate purpose of the use of public subjective rights that is the purpose of protection of human rights concerning persons with a dysfunction of the body. Public subjective rights of persons with disabilities are the implementation of the common good and thus they have been put also in this scope of research. The law must provide persons with disabilities the opportunity to leave their isolation and lead a “normal life” as an ordinary part of society. The planned research must therefore focus on the common good and the policy of law. Public Law securing the welfare of persons with disabilities realizes the rights of all members of society.

As follows from the above mentioned observations, the study of the normative status of a disabled person in public law will have a multifaceted character. Public subjective rights are included in the positive law as certain rules contained in statements in a specific language. These statements express obligations concerning particular behaviour and the consequences

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<sup>15</sup> Cf. W. Piwowski, *Ład społeczny w państwie*. Warszawa 1993, p. 9.

if one fails to observe them. These rules, scattered in a number of legal acts, create a system protecting the rights of persons with disabilities, including the rights realised under public law.

The normative status of persons with disabilities is in the state of permanent development and is characterized by expanding areas of life in which legal standards require the adaptation of actual situations to the needs of the disabled. Theoretical postulates are reflected in the legislation, which should be noted with satisfaction. What worries, however, is the low quality of this law regulating new matters, which have remained until recently outside the scope of Polish legal research. The astonishing instability of the legal status and various ill-considered – random as it seems – legal experiments by the legislature, provide ample opportunity for researchers studying those phenomena from the point of view of administrative law.

The planned study will reveal the shortcomings of legislation in the realization of human rights guaranteed in the Polish Constitution. Its article 1 stipulates that “The Republic of Poland shall be the common good of all its citizens” – also the disabled ones. However, the Republic of Poland does not guarantee adequately the rights of persons with disabilities. It also fails to ensure their safety (Cf. Constitution of the Republic of Poland, art. 5). It is enough to inspect a few courts, prosecutor’s offices, police stations, or other state institutions to realize that many of these buildings cannot be entered by disabled persons, e.g., using wheelchairs. And yet (theoretically), all citizens are equal before the law and are entitled to equal treatment by public authorities (Cf. Constitution of the Republic of Poland, art. 32, section 1).

One can mention a number of examples of the rights of human beings and citizens of the Republic of Poland. This, however, raises the question: if we have formulated human rights, including the rights of disabled persons, why are they not realised? The planned studies attempt to answer also to this question because public subjective rights constitute the basis for the actual realisation of human rights.

The term “subjective right” can take different meanings. Numerous possible definitions of this concept are given in the monograph by K. Opalek<sup>16</sup>. This right can be understood, among others, as a right<sup>17</sup> or

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<sup>16</sup> K. Opalek, *Prawo podmiotowe. Studium z teorii prawa*. Warszawa 1957.

<sup>17</sup> Cf. *ibidem*, p. 16, 26.

a sum of rights<sup>18</sup>, a sphere of individual freedom<sup>19</sup>, legal relation, “as a legal norm realised in practice or applied to specific entities”<sup>20</sup>, a sum of entitlement and obligation<sup>21</sup>, a legal norm<sup>22</sup>, as well as a claim or legal possibility<sup>23</sup>. Without going into a detailed discussion on this topic<sup>24</sup> it should be stated that the subjective right is a reality associated not only with a civil law relation. Numerous rights of individuals are realised in a relation under administrative law and there is a catalogue of claims with regard to administrative authorities. In view of the fact that these laws are implemented in the domain of public law, they are called public subjective rights. The essence of this right on the part of the state is respect for human freedom, the limits of which (both for persons – applicants and public administration bodies) are set by legal norms and the implementation of statutorily defined rights of citizens with regard to public administration.<sup>25</sup> Determining the scope of authority intervention has a very practical dimension. This especially applies to situations where, if legal prerequisites are met, a citizen has a claim with regard to the administration for the issuance of a specific administrative act. S/he also has the right to expect that, during actual proceedings, public administration will not interpret its mandate broadly and respect the established range of freedom.

“In general, one can distinguish between two types of public subjective rights:

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<sup>18</sup> Cf. *ibidem*, p. 26, 33.

<sup>19</sup> Cf. *ibidem*, pp. 16-17.

<sup>20</sup> *Ibidem*, p. 17, translation mine.

<sup>21</sup> Cf. *ibidem*, p. 18.

<sup>22</sup> Cf. *ibidem*, p. 20.

<sup>23</sup> Cf. *ibidem*, p. 50.

<sup>24</sup> More on this problem in K. Opałek’s above-mentioned monograph.

<sup>25</sup> When defining public subjective rights, A. Blas and J. Boć indicate that “two types of situations for a citizen are involved:

**The First one** involves the citizen whose actions cannot be interfered with or nullified (...) if they ensue from specific freedom of action guaranteed by a statutory norm (...), while the **Second one** means that the citizen enjoys an unquestionable legal possibility guaranteeing the issuance of an authorization ; in other words, s/he can effectively demand it” – J. Boć (ed.), *Prawo administracyjne*. Kolonia Limited 2007, p. 502, translation mine.

- a) negative subjective right involving an individual's claim with regard to the state, which limits its interference in the sphere of freedom specified in the Constitution,
- b) positive public subjective right, consisting in one's claim with regard to the state, which should guarantee an individual's freedom to exercise his powers (benefits) " – wrote A. Błaś and J. Boć (translation mine).  
The authors provide examples of classifications of public subjective rights:

- a) "subjective right involving a claim for issuing a normative act with a specific content";
- b) "subjective right involving the request to the authority to follow a specific procedure defined by law, eg. a request for an administrative decision, but not necessarily with a specific content";
- c) "subjective right consisting in demanding not only any positive decision, but also a particular, specific positive decision";
- d) "subjective right consisting in a request to the state to abandon any interference with the already recognized freedom";
- e) "subjective right to cooperate with the administration in settling public affairs"<sup>26</sup>;

They also distinguish, on account of subject matter concerned by public subjective rights, "the four fields of those rights:

- a) freedom rights,
- b) political rights,
- c) right to state benefits,
- d) personal rights."<sup>27</sup>

It should be studied what administrative and legal situation is formed by the occurrence of such right on the part of a subordinate entity. "Public subjective right of a citizen is like a substantive claim against the state, enjoyed by a citizen, which is meant to protect his legal interest guaranteed by law, combined with the right to a complaint to the administrative court"<sup>28</sup>.

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<sup>26</sup> Ibidem, pp. 502-503, translation mine; cf. J. Zimmermann, *Prawo administracyjne*. Warszawa 2008, p. 273.

<sup>27</sup> J. Boć (ed.), *Prawo...*, p. 503, translation mine.

<sup>28</sup> Ibidem, p. 503, translation mine.

An assessment of the regulations will be facilitated by characteristics of the above-mentioned rights, in particular an indication of the duties that they generate for the administration. J. Zimmermann indicates the following characteristics of public rights.

1. "The objective of public subjective rights is determined by the inequality of subjects of an administrative and legal relation. These rights are to mitigate this inequality within the scope defined by law, without the participation of the parties to a given legal relation. They concern only the relation between the state and the citizens, and not the relations between citizens themselves.
2. Public subjective rights make it possible to realize the public interest not only to public authorities, but also the citizens.
3. A public subjective right is thus always a correlate of an obligation of the public administration, that is, its competence in the strict sense of the word. The existence of a subjective right is ultimately determined by the action of the administrative body. The given authority must comply and take action.
4. Public subjective rights are personal and in principle they are not subject to succession. One can not invoke public subjective rights of a third party.
5. Public subjective rights are inalienable. This means that one can not effectively waive them, and any statement of resignation from public subjective rights is invalid. It is not compulsory, however, to exercise those rights; it can thus be stated that they are indeed objective, but in the phase of their realization they are subjective. As long as these rights are not exercised, they are potential.
6. A public subjective right is valid, that is, it is related to a valid legal norm. This also means that one can not speak of public subjective rights as potential or hypothetical.
7. A public subjective right is based on a legal norm being part of administrative law, which may be distinguished and fully established. The fact that a public subjective right is contained in a legal norm also means that this right is never derivative, that is, it can never derive from other subjective rights, or specific powers or obligations."<sup>29</sup>

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<sup>29</sup> J. Zimmermann, *Prawo...*, p. 272, translation mine.

A. Błaś and J. Boć define public subjective right as “a legal situation of the citizen (collective entity), within which a citizen (collective entity), based on legal norms protecting his legal interests, can effectively request anything from the state or achieve something in a manner undisputed by the State”<sup>30</sup>. J. Zimmermann notes that “public subjective rights” are «stronger» than legal interests. (...) In other words, a public subjective right is a legal interest reinforced by the category of claims that this right gives to a citizen in relation to public administration (the state).”<sup>31</sup> As indicated by B. Adamiak, the content of the concept of “legal interest” “will be a public subjective right, understood as specific benefits granted by a legal provision to an entity, which can be realised in administrative proceedings, because they are adjudicated in administrative proceedings”<sup>32</sup>. Therefore, the public interest is to promote the realization of individual interest. As indicated by J. Boć, “in a situation of conflicting interests, existing rights of citizens can be restricted or burdened with new obligations only if it is necessary for the state or local governments to ensure the achievement of objectives set out precisely on account of these citizens. In other words, the issue here is protection of the public interest as a stage of individual interest.”<sup>33</sup> Hence, the study of public subjective rights of disabled persons is so important.

The significance of the research from the point of view administrative law consists in its universal, humanistic character. The mode of man’s life involves periods when the human being needs the help of others. Research issues do not just concern a specific part of the community, but potentially also apply to persons currently regarded as healthy, because every person can potentially be incapacitated on account of the biological dimension of human existence. The planned research has therefore a legal but also a social dimension. The study of public subjective rights of people with disabilities is grounded in the values arising from the human rights recognized in the European civilization.

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<sup>30</sup> A. Błaś, J. Boć, *Publiczne prawa podmiotowe*. [in:] J. Boć (ed.) *Prawo administracyjne*. Wrocław 2007, p. 501, translation mine.

<sup>31</sup> J. Zimmermann, *Prawo...*, p. 271, translation mine.

<sup>32</sup> B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*. Warszawa 2004, p. 226, translation mine.

<sup>33</sup> J. Boć (ed.), *Prawo...*, pp. 22-23, translation mine.

The problem of the legal status of persons with disabilities was primarily dealt with by T. Bulenda<sup>34</sup> and J. Patyk<sup>35</sup>. The subject of human rights of the disabled has already been partially analysed and discussed by T. Sienkiewicz, especially in the books: *Prawo człowieka niepełnosprawnego do życia w środowisku ukształtowanym funkcjonalnie* (Lublin 2004), *Status człowieka niepełnosprawnego w prawie administracyjnym* (Warszawa 2006), *Status człowieka niepełnosprawnego w prawie publicznym* (Warszawa 2007). **Apart from them, T. Sienkiewicz has published several articles and chapters in monographs in this area, but he has not yet conducted studies of public subjective rights of persons with disabilities. Other authors have not analysed this problem either.** In the absence of scientific studies in the field of public subjective rights of persons with disabilities, this issue deserves an in-depth scientific study. Although the problem of interference of public structures in human freedom in the form of administrative and police restrictions is discussed in a considerable bulk of literature, the same can not be said of studies in the field of public subjective rights of persons with disabilities. This justifies the planned research and allows one to come to a conclusion regarding their significance from the point of view of the development of the doctrine of administrative law.

The overall plan of studies should consist of the following four main stages:

- 1) critical analysis of existing sources of law and a comparison of the results of analyses with the constitutionally defined countermeasures against discrimination and the obligations of the state with regard to persons with disabilities resulting from art. 69 of the Polish Constitution;
- 2) scientific survey of the latest critical evaluations regarding the actions of public administration authorities concerning persons with disabilities;
- 3) the search for jurisprudence and its analysis with regard to application of legal forms of action by public administration bodies towards persons with disabilities;

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<sup>34</sup> E.g. T. Bulenda, *Prawo wobec osób niepełnosprawnych*. [in:] B. Szczepankowska, J. Mikulski (ed.), *Osoby niepełnosprawne w środowisku lokalnym. Wyrównywanie szans*. Warszawa, Centrum Badawczo-Rozwojowe Rehabilitacji Osób Niepełnosprawnych, 1999.

<sup>35</sup> J. Patyk, *Status prawny osób niepełnosprawnych*. Wydawnictwo Prawnicze, Warszawa 1999.

- 4) analyses of practical applications – assessment of the law in action, by means of the institution of access to public information.

Specific objectives result from the scientific objectives of the research. These are the following objectives: Analysis of the legal perspective on “the disabled person”, as well as the analysis of the conceptual network that will allow us to determine the legal situation of persons with disabilities in the system of Polish law. Justification of admissibility of application of the institution of subjective rights in the framework of assisting persons with disabilities in securing their subsistence, adaptation to work and social communication, review of basic typology of subjective rights followed by a discussion of the theoretical concept of public subjective rights. The analysis should concern the model of constitutional freedoms and rights of individuals in the context of the concept of public subjective rights, together with a detailed description of the rights which are essential for the disabled. Presentation of examples of the application of the concept of public subjective rights in the system of legislation on the rights of persons with disabilities. Study of the possibility of interpreting applicable Polish laws to arrive at a theoretical concept of a unified individual’s right to social justice, under which public subjective rights of individuals play a key part and define the substantive and legal scope as well as constitute the formal guarantee of realization of this right. The logical and linguistic analysis of normative acts should focus on assistance to disabled persons ensuing their subsistence. In addition, the logical and linguistic analysis should concentrate on normative acts dealing with assistance to disabled persons in adaptation to work, and also normative acts on assistance to disabled persons in social communication. The result of the analyses will serve as the basis of assessment of legal regulations.

Preliminary studies of public subjective rights of persons with disabilities have already been conducted by T. Sienkiewicz, but they never constituted the main scope of research. The most recently issued in-depth work covering a small portion of this problem, serving as an introduction to further research in this area, is a monograph authored by him entitled *Status osoby niepełnosprawnej w prawie publicznym*, Warszawa 2007. Based on experience from research on this problem one can demonstrate the need and the possibility of examining public subjective rights of persons with disabilities. Results of preliminary studies give grounds for conclud-

ing that the most important drawbacks regarding the rights of the disabled are the indeterminate limits of free decision-making. The limits in the decision-making process are often set by extralegal customs as well as judicature in similar cases. Legislative works undertaken in the near future should aim at ensuring legal certainty by clarifying the conditions to be evaluated and eliminating procedures which have been excluded from the application of the Code of Administrative Procedure<sup>36</sup>.

Article 1 of the Polish Constitution stipulates that “The Republic of Poland shall be the common good of all its citizens”. Human beings exist in communities. And therefore one’s own individual good and the common good are mutually dependent.

Realization of the common good requires a rational policy. The law, which is created by politicians can interfere with or support vocational and social rehabilitation of disabled people. Petrażycki distinguished, among others, the educational function of the law, which consisted in “integrating the action of the law that supports people’s adaptation to life in a social group. The law – according to Petrażycki – is stronger than morality; it educates active people with a high sense of self-respect”<sup>37</sup>. The current system of rehabilitation ignores this asset of the law, the consequences of which are unfortunately borne above all by the weakest. The law can also be a means to repair the system of supported employment enterprises. “Law regulates and channels human activity by means of psychological influence, for example (...) by means of exciting various motives in our psyche”<sup>38</sup>. Due to the fact that in the current system of vocational and social rehabilitation there is inadequate incentive for people with disabilities to undergo the process of rehabilitation, as well as incentive for potential employers to employ those persons, citizens should be careful when casting their votes in elections in order to make sure that no norms stipulating incentives which oppose the idea of rehabilitation are established.

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<sup>36</sup> Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego (tekst jedn. z 2016 r., poz. 23, z późn. zm) – consolidated text Dz. U. of 2016, item 23, as amendment.

<sup>37</sup> H. Leszczyzna, *Petrażycki*. Warszawa 1974, p. 26, translation mine.

<sup>38</sup> L. Petrażycki, *Wstęp do nauki o państwie i prawie*. Warszawa 1968, p. 26, Comp. p. 45, translation mine.

The law “can demoralize people; its unreasonable provisions can spread moral plague and degeneration”<sup>39</sup>. “The psychological impact of the law on a person is not limited to the direct result in the form of achieving a desired action or the lack of it, but it also leaves a good or bad trace in the human soul, it introduces various elements to one’s nature, and creates crystallizations and deposits in terms of changes in the very psychological nature of individual persons and the social masses.”<sup>40</sup>. If the purpose of the law – the common as well as individual good are not realised, these norms should be viewed as administrative terror<sup>41</sup> and not as the law.

Legal policy must be expressed in well-thought-out legislation of norms. The legislator must know the specific goal to be achieved as well as appropriate means for this. The law needs to allow for a correct interpretation. Public law may not be only a random set of general clauses. As Petrażycki wrote: “If lawyers abandoned the solid ground of positive law and began to >>freely<< refer to the sources, then instead of a strong and solid foundation of the legal life of society, i.e., what jurisprudence should be, it would lead to the tower of Babel, which would inevitably crumble. Instead of the law, it would lead to arbitrariness; instead of calm conviction of citizens that their lives, freedoms and economic activity are not threatened under the protection of the law as long as they comply, it would lead to fear and apathy, loss of all entrepreneurial spirit, and unwillingness to comply with the law, which is interpreted in various ways depending on time or a given court”<sup>42</sup>. In pursuing the common good, one should not overlook the significant role of the quality of the law, which can become a barrier in the professional and social rehabilitation of persons with disabilities.

Activities of public administration authorities with regard to persons with disabilities reflect the philosophy behind the organisation of support for the disabled – whether those persons have the right to effectively request anything from the state or whether the state may but does not have

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<sup>39</sup> Ibidem, p. 29, translation mine.

<sup>40</sup> Ibidem, p. 50, translation mine.

<sup>41</sup> Comp. T. Sienkiewicz, *Przestanki przemiany prawa w terror*, Roczniki Wydziału Nauk Prawnych i Ekonomicznych KUL, 2006, Tom II, zeszyt 1, 35-50.

<sup>42</sup> L. Petrażycki, *Wstęp...*, p. 69-70, translation mine.

to provide assistance. It is of fundamental social importance to determine the support procedure. Public subjective rights of persons with disabilities apply to all members of society, because every person can potentially be incapacitated. This, however, raises the question: why study those rights as a separate conceptual category? Is it not sufficient to study public subjective rights without any special focus on persons with disabilities? Disability, especially related to mental retardation, puts a person who expects of public administration the implementation of claims arising from administrative law in a situation more unfavourable than in the case of a person with no dysfunctions of the body. It is worthwhile to examine this sphere of impact of power between the state and natural persons. In the context of applied legal solutions one must answer the question which status carries better guarantee of the implementation of public rights, and consequently human rights – the status of applicant under administrative law or the status of a specific type of beneficiary – client of civil service? What model was adopted by the Polish legislator? Having a legal interest as defined by the provisions of the Administrative Procedure Code and exercising one's rights under this procedure differs entirely from having the mere status of a beneficiary of the benefits provided by the administration. One should also note that the act on vocational and social rehabilitation and employment of disabled persons refers to the Code of Administrative Procedure in Article 66 (In the matters not regulated by the provisions of this Act, the Administrative Procedure Code, the Civil Code and the Labour Code shall apply). Despite the occurrence of publications on public subjective rights<sup>43</sup> and the legal status of persons with disabilities<sup>44</sup> (includ-

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<sup>43</sup> E.g. A. Wróbel, *Prawo podmiotowe publiczne* [in:] *System prawa administracyjnego*, Tom I, *Instytucje prawa administracyjnego*, (ed.) R. Hauser, Z. Niewiadomski, A. Wróbel, Wydawnictwo C. H. Beck, Warszawa 2010; W. Jakimowicz, *Publiczne prawa podmiotowe*, Kantor Wydaw. Zakamycze, Kraków 2002; J. Trzewik, *Publiczne prawa podmiotowe jednostki w systemie prawa ochrony środowiska*. Wydawnictwo KUL, Lublin 2016; M. Kulesza (ed.), *Materiały do nauki prawa administracyjnego (z orzecznictwa sądowego)*, Państwowe Wydawnictwo Naukowe, Warszawa 1989, pp. 123-144.

ing, among others, disabled persons with mental disorders<sup>45</sup>), as well as publications resulting from the activities of the Commissioner for Human Rights<sup>46</sup> and the Constitutional Court decisions<sup>47</sup> related to the rights of disabled people, the author of the article believes there is a lack of in-depth analyses of public subjective rights of persons with disabilities viewed from the perspective of administrative law. Certainly, justification of this type of research requires a broader analysis of literature than it is possible in the article, which features barely an outline of the problem.

The purpose of the law is the common good and welfare of individual persons. Respecting the welfare of persons with disabilities in the public law guarantees the realization of the common good. One can not create the law while ignoring the rules governing human life. As Petrażycki wrote, “the highest good to which we should strive in policy in general and legal policy in particular – is the moral development of man and the rule of highest rational ethics among human beings, namely, the ideal of love”<sup>48</sup>.

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<sup>44</sup> E.g. M. Bosak (ed.) *Prawo a niepełnosprawność. Wybrane aspekty*, Wydawnictwo C. H. Beck, Warszawa 2015.

<sup>45</sup> E.g. D. Pudziańska (ed.), *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, Lex a Kluwer business, Warszawa 2014; J. Niczyporuk, Z.R. Kmieciak, E. Czech, M. Szewczak, M. Grzeszczuk, *Status prawny osób z zaburzeniami psychicznymi*. Instytut Spraw Administracji Publicznej, Lublin 2015. [http://opiekapsychiatrycznalubelskie.pl/sites/isap/files/pliki/publikacje/2016/status\\_prawny\\_osob\\_z\\_zaburzeniami\\_psychiicznymi.pdf](http://opiekapsychiatrycznalubelskie.pl/sites/isap/files/pliki/publikacje/2016/status_prawny_osob_z_zaburzeniami_psychiicznymi.pdf) (dostęp: 2017-03-10).

<sup>46</sup> E.g. K. Kurowski, *Wolności i prawa człowieka i obywatela z perspektywy osób z niepełnosprawnościami*, Wydawca: Biuro Rzecznika Praw Obywatelskich, Warszawa 2014; *Obstęga osób głuchych i głuchoniewidomych w urzędach administracji publicznej. Analiza i zalecenia*. Zasada równego traktowania. Prawo i praktyka nr 13; <http://www.pzg.org.pl/rokdownloads/SC/oog.pdf> (dostęp: 2017-03-09). Biuletyn Rzecznika Praw Obywatelskich 2014, nr 5.

<sup>47</sup> E.g. Wyrok TK z 7 lipca 2015 r., sygn. K 47/12; wyrok TK z 28 czerwca 2016 r., sygn. K 31/15.

<sup>48</sup> L. Petrażycki, *Wstęp*, p. 25, translation mine; comp. T. Sienkiewicz, *Status człowieka niepełnosprawnego w prawie publicznym*, pp. 244-245.

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