



Polish Administrative Judiciary After 20 Years of Current Law on Administrative Court Proceedings

ACADEMIC ARTICLE

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ABSTRACT

In 2024, Poland marks twenty years since the current law regulating proceedings before administrative courts came into force. This article will argue that while the model of proceedings still fulfills its task, amendments are needed with regard to structural and procedural aspects.

The article is divided into three parts. Firstly, the historical background of administrative courts in Poland is presented. The analysis shows that the latest law was a milestone: the previous regulations only provided for single-instance review of selected public administration acts.

The second section is devoted to the model of proceedings resulting from the regulation adopted in 2002. Its most important features are: the systemic separation of the administrative courts, the broad jurisdiction of administrative courts, a cassation model of adjudication, limited evidence procedure, and the two-tier structure of administrative courts.

The third part presents the challenges to be faced by the administrative judiciary in the coming years. Those are: the speed of proceedings, the digitalization of proceedings, and the question of expanding the substantive catalog of administrative court decisions.

In the conclusion, the author emphasizes that the goal of the possible amendments should be to guarantee a high degree of trust in court.

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On 1 January 2024, Poland marks twenty years since the entry into force of the current law regulating proceedings before administrative courts (Law on Proceedings before Administrative Courts, LPAC).¹ The regulations adopted were the completion of almost eighty years of efforts to create a two-instance administrative judiciary in Poland.² On the day of its adoption, the act was highly valued both by legal scholars and by practitioners. It seems that after almost a quarter of a century, it is fitting to consider whether and to what extent a reform of the Polish administrative judiciary model is necessary. This paper will argue that although the model of administrative court proceedings adopted in 2002 still fulfills its tasks, it requires amendments with regard to structural and procedural issues.

The study consists of three parts. The first section will explore the historical aspect of the adoption of the legislation regulating administrative court proceedings in Poland. In this part, the analysis will rely on a historical and the comparative legal methodology. The second section will discuss the model of proceedings before administrative courts resulting from the 2002 regulation. The analysis will rely primarily on legal text analysis and dogmatic-legal methods. Lastly, the third section will focus on the challenges to be faced by the administrative judiciary in the coming years. In this section, dogmatic-legal and comparative-legal methods will prevail.

2. THE POLISH ADMINISTRATIVE JUDICIARY IN A HISTORICAL PERSPECTIVE

The history of judicial control of public administration in Poland dates back to the 17th century. At that time, treasury commissions were set up to control the state treasury.³ These first control structures had the character of *ad hoc* commissions. Later those commissions took the permanent form of the so-called Radom Commission (*Komisja Radomska*) and the Fiscal Tribunal (*Trybunał Skarbowy*).⁴ A modern idea of judicial control of public administration emerged in Poland after World War I. In the March Constitution⁵ it was stipulated in Article 73 that an administrative judiciary headed by the Supreme Administrative Tribunal (*Najwyższy Trybunał Administracyjny*) would be established to control the legality of administrative acts.⁶ Since the legislator used the word 'headed' it can be concluded that it was planned to create at least a two-tier

1 Act of 30 August 2002 – Law on proceedings before administrative courts (*Ustawa z dnia 30 sierpnia 2002 roku – Prawo o postępowaniu przed sądami administracyjnymi*), consolidated text Journal of Laws 2023, item 1634.

2 See Article 73 of the March Constitution. See also W. Piątek, Polskie sądownictwo administracyjne w ujęciu prawnoporównawczym, in *Postępowanie administracyjne i sądownictwo administracyjne*, ed. R. Hauser and A. Skoczylas (Warsaw, 2021), 352.

3 Piątek, Polskie sądownictwo administracyjne, 351–352, A. Skoczylas, M. Swora, "Administrative Judiciary in Poland in Search for Fairness and Efficiency – an Overview", *Transylvanian Review of Administrative Sciences*, 19 E/2007: 117–118.

4 Piątek, Polskie sądownictwo administracyjne, 351 and the literature cited therein.

5 *Journal of Laws* 2021, No. 44 item 267.

6 See more extensively R. Piotrowski, "Sądownictwo administracyjne w świetle konstytucji marcowej", *Zeszyty Naukowe Sądownictwa Administracyjnego*, No. 5–6 (2022), 111–120, A. Chmielarz-Grochal, "Projekty reform sądownictwa administracyjnego w Polsce", *Acta Universitatis Lodzensis Folia Iuridica* 98 (2022), DOI: <https://doi.org/10.18778/0208-6069.98.13>, 195–197, A. Kubiak, "Wpływ kodyfikacji austriackiej na polskie prawo o postępowaniu administracyjnym", in *Związki prawa polskiego z prawem niemieckim*, ed. A. Liszewska, K. Skotnicki (Łódź 2006), 81–101.

structure of administrative courts. In the end, however, only one level was retained, introduced by the Act of 3 August 1922 on the Supreme Administrative Tribunal (*Ustawa z dnia 3 sierpnia 1922 roku o Najwyższym Trybunale Administracyjnym*).⁷ Identical resolutions were adopted in the subsequent Decree of the President of the Republic of 27 October 1932 on the Supreme Administrative Tribunal (*Rozporządzenie Prezydenta Rzeczypospolitej Polskiej o Najwyższym Trybunale Administracyjnym*).⁸ In 1935, a specialized administrative court was also set up in the form of the Invalids Administrative Court (*Inwalidzki Sąd Administracyjny*). This court's tasks were to rule on the legality of decisions on the assistance to war and military disabled personnel. The review of decisions proceeded in the same way as with the Supreme Administrative Tribunal.⁹ Therefore, in the 1920s and 1930s, the administrative judiciary took a single-instance form, with the power of annulment of administrative acts reviewed for legality only.

After World War II, Poland became a satellite state of the Soviet Union. The systemic changes introduced were clearly not conducive to the development of judicial control of state power. For this reason, the administrative judiciary was not reactivated, despite the doctrine and practice reporting such a need.¹⁰ It was not until the 1970s that work began on a regulation that would only provide partial control of public administration activities.¹¹ The work culminated in the establishment of the Supreme Administrative Court (SAC; *Naczelny Sąd Administracyjny*) in 1980.¹² This court performed a single-instance review of the legality of administrative decisions. However, judicial oversight was excluded for decisions that clearly, and often did, violate individual rights and freedoms, such as those concerning security and order, press control, or the issuance of passports.¹³ In the following years, nevertheless, the SAC's jurisdiction was expanded. The political changes of 1989 led to the reform of the model of the administrative judiciary of Poland.¹⁴ The first stage, which took place in 1995, was the extension of judicial review to most activities carried out by the public administration.¹⁵ This was undoubtedly a major step forward. From this point onwards, individuals could demand control of every administrative authority activity concerning them.¹⁶

7 *Journal of Laws 1922*, No. 67 item 600.

8 *Journal of Laws of 1932*, No. 94, item 806.

9 Piątek, Polskie sądownictwo administracyjne, 353, W. Piątek and A. Skoczylas, "Geneza, rozwój i model sądownictwa administracyjnego w Polsce", in *System Prawa Administracyjnego. Tom X. Sądowa kontrola administracji publicznej*, ed. R. Hauser, Z. Niewiadomski and A. Wróbel (*Warsaw 2016*), 22–23.

10 See more extensively Piątek and Skoczylas, Geneza, rozwój, 28–29, J. Zimmermann, Projekt ustawy o sądownictwie administracyjnym z 1958 r., *Samorząd Terytorialny 1993*, no. 1–2, 108–124, W. Klonowiecki, "Odbudowa sądownictwa administracyjnego", *Samorząd Terytorialny* No. 5 (1999): 66–68, M.P. Sadłowski, "Projekty powołania sądownictwa administracyjnego w Polsce w latach 1944–52", *Miscellanea Historico-Iuridica* 16, no. 2 (2017): 97–112, Chmielarz-Grochal, supra note 6, 197–199.

11 Chmielarz-Grochal, supra note 6, 199–200.

12 Act of 31 January 1980 on the Supreme Administrative Court and amendments to the Act – Code of Administrative Procedure (*Ustawa z dnia 31 stycznia 1980 roku o Naczelnym Sądzie Administracyjnym i o zmianie ustawy – Kodeks postępowania administracyjnego*), *Journal of Laws 1980*, No. 4, item 8.

13 R. Orzechowski, *Nowelizacja kodeksu postępowania administracyjnego (Warsaw 1980)*, 69.

14 Chmielarz-Grochal, supra note 6, p. 200.

15 *Journal of Laws 1995*, No. 74, item 368.

16 Piątek, supra note 3, p. 355.

The groundbreaking step was the introduction of two instances of administrative justice. With this, the objectives on the shape of the administrative judiciary stipulated in the March Constitution were fulfilled. According to Article 236 sec. 2 of the 1997 Polish Constitution,¹⁷ the Parliament was obliged to ensure that laws regulating the administrative court system and proceedings were enacted. This had to be taken care of before the expiry of five years from the entry into force of the 1997 Constitution. In fulfillment of this obligation, two laws were enacted. The first one regulates the systemic matter (LSAC).¹⁸ The second one is dedicated to the proceedings before the administrative courts (the above-mentioned LPAC). The laws entered into force on 1 January 2004¹⁹ and, with only minor amendments, are still in force today.

3. MAIN FEATURES OF THE POLISH MODEL OF ADMINISTRATIVE JUSTICE

When talking about the Polish model of administrative court proceedings, it is necessary to point out its main features. These include: the systemic separation of the administrative courts, the broad jurisdiction of administrative courts, a cassation model of adjudication, limited evidence procedure, and the two-tier structure of administrative courts. At the end of this section, other principles of Polish administrative court procedure will be analyzed.

3.1. SYSTEMIC SEPARATION OF ADMINISTRATIVE COURTS

The first characteristic feature of the Polish model is the systemic separation of the administrative courts from other national courts. Polish administrative courts function as specialized courts, separate from the ordinary courts. This model is one of two systemic constructions used in many European countries.²⁰ The other model is one that integrates the judicial review of public administration acts into the jurisdiction of ordinary courts. This system is used in countries such as Denmark, Hungary and, until recently, Slovakia.²¹

17 Constitution of the Republic of Poland of 2 April 1997 (*Konstytucja Rzeczypospolitej Polskiej* z 2 kwietnia 1997 roku), *Journal of Laws of 1997*, No. 78, item 483.

18 Act of 25 July 2002 – Law on the system of administrative courts (*Ustawa z dnia 25 lipca 2002 roku – Prawo o ustroju sądów administracyjnych*), consolidated text *Journal of Laws of 2022*, item 2492.

19 See Article 1 and Article 2 of the Act of 30 August 2002 – Provisions introducing the Act – Law on the Administrative Court System and the Act – Law on Proceedings before Administrative Courts (*Ustawa z dnia 30 sierpnia 2002 roku – Przepisy wprowadzające Ustawę-Prawo o ustroju sądów administracyjnych i Ustawę – Prawo o postępowaniu przed sądami administracyjnymi*), *Journal of Law of 2002*, No. 153, item 1271.

20 E.g. Sweden, Germany, Austria, partially Czechia. See more extensively, e.g. H. Ragnemalm, *Administrative justice in Sweden* (*Stockholm 1991*), 43, D. Kryska, “Organisation of the Czech and Polish administrative judiciary”, *Review of International and Comparative Law* 12, no. 1 (2012), 81–102, DOI: [10.1515/iclr-2016-0080](https://doi.org/10.1515/iclr-2016-0080).

21 See e.g. B.O.G. Mortensen and F. Waage, “Deference to the Administration in Judicial Review in Denmark”, in: *Deference to the Administration in Judicial Review*, ed. G. Zhu, Ius Comparatum – Global Studies in Comparative Law 39, DOI: https://doi.org/10.1007/978-3-030-31539-9_18, 157–163, S.H. Mørup, “The principle of effective legal protection in Danish administrative law”, in: *The principle of effective legal protection in administrative law*, ed. Z. Szente and K. Lachmayer, 91–104, E. Varnay, M. Varju, “Whither Administrative Justice in Hungary? European Requirements and the Setting Up of a Separate Administrative Judiciary”, *European Public Law*, No. 3 (2019), 283–304.

Firstly, in Poland, the separation of the administrative courts from the ordinary courts has a historical justification. Secondly, there are considerations of expediency in favor of structuring the administrative courts in this way: the Polish ordinary courts remain under the supervision of the Minister of Justice and, therefore, the Executive.²² The separation of the administrative courts from the ordinary courts allows the full independent control of the activities of the Executive, including Ministers. The administrative courts are supervised and managed not by the Minister of Justice but by the President of the SAC (*Prezes Naczelnego Sądu Administracyjnego*).²³

The constitutional separation of the administrative courts from the ordinary courts is established by the 1997 Constitution. Article 175 sec. 1 states that the judiciary is comprised of the Supreme Court, the ordinary courts, the administrative courts, and the military courts. Administrative courts are, therefore, not related to the ordinary judiciary (civil and criminal) either structurally or professionally.²⁴ As regard to the lack of structural links, it should be noted that Polish administrative courts are not subject to the judicial supervision of the Supreme Court (*Sąd Najwyższy*). This means that it is not possible to appeal an administrative court judgment to the Supreme Court, as is the case with civil or criminal court judgments. From a procedural point of view, the administrative court proceedings are therefore fully separated from the proceedings before the ordinary court. In terms of professional links, as indicated earlier, administrative court judges have a different legal status, expressed in the rules of their appointment and disciplinary responsibility. Moreover, administrative courts are not subject to the supervision of the Minister of Justice (as is the case with ordinary and military courts). Figuratively speaking, the ordinary courts and the administrative courts are separate, non-intersecting rivers of justice: when taking a claim to one of them, there is no possibility to change course and ‘jump over’ to the other ‘river’.

3.2. THE JURISDICTION OF THE ADMINISTRATIVE COURTS

The second characteristic feature is the already mentioned broad jurisdiction of the Polish administrative courts. This is because they decide on complaints against various manifestations of public administration’s activity such as:

- decisions imposing obligations on individuals or granting them rights (e.g., a building permit or a decision imposing an administrative fine),
- procedural decisions made in the course of administrative proceedings (e.g., to suspend proceedings),
- acts or actions other than decisions concerning the rights or obligations of individuals (e.g., referral to a public sanatorium),
- enforcement actions taken to enforce obligations imposed on an individual,
- inaction of the administration or protraction of proceedings conducted by it.

²² See e.g. Article 29 § 3 LSAC.

²³ See more extensively J. Olszanowski, “Model of supervision of administrative courts in Poland”, *Bratislava Law Review*, No. 2 (2020), 173–188, DOI: <https://doi.org/10.46282/blr.2020.4.2.195>.

²⁴ R. Hauser, J. Drachal and E. Mzyk, *Dwuinstancyjne sądownictwo administracyjne* (Warsaw-Zielona Góra 2003), 18; W. Sawczyn, “Konstytucyjne podstawy sądownictwa administracyjnego”, in: *System Prawa Administracyjnego. Tom X. Sądowa kontrola administracji publicznej*, ed. R. Hauser, Z. Niewiadomski and A. Wróbel (Warsaw 2016), 78, 84.

Only a few cases from the scope of public administration actions remain outside the jurisdiction of the administrative courts. They are generally subject to the jurisdiction of ordinary courts. Examples of this type are retirement and disability benefits cases. In such cases a decision given by an administrative authority can be appealed to an ordinary court – the social insurance department.²⁵ Similarly, appeals against decisions of the President of the Energy Regulatory Office are heard by the Regional Court in Warsaw, acting as a court for the protection of competition and consumers.²⁶

When analyzing the jurisdiction of the Polish administrative courts, it should be clearly emphasized that these courts deal only with the control of the legality of an act, action or inaction of the public administration. This stems directly from Article 184 of the Constitution²⁷ and from Article 1 sec. 2 LSAC.²⁸ The administrative courts, therefore, decide whether the administrative authorities have lawfully established the facts of the case, whether they have applied the relevant provisions of law to that facts and whether the provisions of law have been correctly interpreted.²⁹ Importantly, the administrative courts will not make factual findings on their own, let alone settle a given administrative matter such as the grant of a building permit or revoking entitlements to practice a certain profession. The sphere of performance of tasks by the public administration is, therefore, clearly separated from the control of the performance of such tasks.³⁰

Incidentally, it should be pointed out that the administrative courts also perform other tasks, namely:

- (1) issuing resolutions aimed at resolving doubts that have arisen in a specific case or that have caused discrepancies in case law,³¹ and
- (2) indicating which of the authorities is competent to handle a given administrative case, if a dispute as to jurisdiction or competence has arisen between two or more authorities.³²

25 See Articles 477⁸ – 477^{14a} of the Act of 17 November 1964 – Code of Civil Procedure (*Ustawa z dnia 17 listopada 1964 roku – Kodeks postępowania cywilnego*), consolidated text *Journal of Laws 2023*, item 1550.

26 See Articles 479¹⁶ – 479⁵⁶ of the above-mentioned Code of Civil Procedure.

27 This article stipulates that the SAC and other administrative courts shall, to the extent prescribed by law, exercise control over the activities of the public administration.

28 This provision states that the control of public administration is exercised by the administrative courts from the legal point of view.

29 Judgment of the SAC of 5.04.2011, II GSK 408/10, CBOSA, A. Kurzawa and P. Szustakiewicz, “Komentarz do art. 1 p.p.s.a.”, in: *Prawo o postępowaniu przed sądami administracyjnymi*, ed A. Skoczylas, P. Szustakiewicz, (*Komentarz, Warsaw 2023*), 5, A. Kurzawa and P. Szustakiewicz, “Komentarz art. 2 p.p.s.a.”, in *Prawo o postępowaniu przed sądami administracyjnymi*, ed A. Skoczylas and P. Szustakiewicz (*Komentarz, Warsaw 2023*), 6, Sawczyn, supra note 24, 79.

30 See e.g. R. Hauser, “Założenia reformy sądownictwa administracyjnego”, *Państwo i Prawo*, no. 12 (1999), 23; R. Hauser, “Konstytucyjny model polskiego sądownictwa administracyjnego”, in: J. Stelmasiak, J. Niczyporuk, S. Fundowicz (eds.), *Polski model sądownictwa administracyjnego*, Lublin 2003, J.P. Tarno, *Zasady ogólne postępowania administracyjnego*, in *System Prawa Administracyjnego. Tom X. Sądowa kontrola administracji publicznej*, ed. R. Hauser, Z. Niewiadomski, A. Wróbel (*Warsaw 2016*), 212–213, W. Sawczyn, *Związanie kasacyjnym orzeczeniem Naczelnego Sądu Administracyjnego (Warsaw 2014)*, 7–9 and the literature cited therein.

31 For more see A. Skoczylas, *Działalność uchwałodawcza NSA (Warsaw 2004)*.

32 For more see e.g. A. Skoczylas, *Rozstrzyganie sporów kompetencyjnych i o właściwość przez NSA (Warsaw 2008)*, K. Defecińska, *Spyry o właściwość, Samorząd Terytorialny*, no. 7–8 (2000).

3.3. THE CASSATION MODEL OF ADJUDICATION

The consequence of the judicial review of public administration being based solely on the criterion of legality is that the case law of the administrative courts essentially and exclusively concerns cassation. The dispute before the administrative court is, therefore, purely an annulment dispute (*le contentieux de l'annulation*).³³ Indeed, the purpose of this control is not to settle an administrative matter but only to remove the illegality caused by the activity of the public administration.³⁴ This takes the form of:

- (1) annulment of an act or action that the court has declared unlawful, or
- (2) an order for the authority to deal with the case in the event of inaction on the part of the administration, understood as an unlawful state of not dealing with an administrative matter.³⁵

For example, if the administrative court finds that the authority did not apply the correct substantive law or misinterpreted the law, the court will annul the decision. The administrative case will be subject to re-handling by the administrative body. Similarly, an annulment will occur if it is found that the authority issued a decision by wrongly conducting the proceedings in the case (e.g., it did not guarantee the party's active participation in the proceedings): the court may only annul the decision and order the authority to conduct the proceedings in the case again. This is due to the assumption that the handling of administrative matters is the competence of the public administration bodies and the administrative courts cannot replace these bodies in the performance of their tasks. In fact, this would lead to the judiciary performing the tasks of the Executive.³⁶ This understanding of the cassation model of administrative court judgments is strongly rooted in the Polish tradition as it was present in laws prior to LPAC, and is a result of the construction of proceedings before administrative courts according to the Austrian cassation model.³⁷ It should be noted, however, that in recent years, the legislator has chosen to loosen up a rather strict regulation, which, although understandable from a dogmatic point of view, has led to a postponement of the moment when an authority deals with an administrative matter. Thus:

- (1) administrative courts were given the power of discontinuing administrative proceedings on their own in cases where they found a violation of law, they also found that in an administrative case, the authority should discontinue such proceedings.³⁸ In this case, the court discontinues the administrative proceedings 'in place of' the authority to accelerate the completion of the proceedings;³⁹

33 Z. Kmiecik, "Merytoryczne orzekanie przez sądy administracyjne w świetle konstytucyjnej zasady podziału władz", *Przegląd Legislacyjny* 92, No. 2 (2015), 9.

34 R. Hauser, K. Celińska-Grzegorzczak, "Kompetencja sądów administracyjnych", in: *System Prawa Administracyjnego. Tom X. Sądowa kontrola administracji publicznej*, R. Hauser, Z. Niewiadomski, A. Wróbel ed, (Warsaw 2016), 159; R. Hauser, J. Drachal, E. Mzyk, *supra* note 25, 22.

35 See e.g. Articles 145, 146, 147, 148, 150 LPAC.

36 R. Hauser, J. Drachal, E. Mzyk, *supra* note 24, 19, 29.

37 Kubiak, *supra* note 6, 98.

38 Article 145 § 3 LPAC.

39 Kmiecik, *supra* note 33, 11.

(2) the administrative courts have been given the power of establishing the existence or non-existence of a certain right or obligation if the circumstances of the case allow it, and when the administrative authority had not issued a decision in this respect despite being obliged to do so by the court;⁴⁰ in this case, the ‘substitution’ of the authority is dictated by the need to clarify the legal situation of the party.

However, these cases are exceptions. The rule is, as indicated earlier, the cassation of the judgment of the administrative court.

3.4. LIMITED EVIDENCE PROCEDURE

The consequence of only assigning to the Polish administrative courts oversight of the legality of administrative actions without the power to settle an administrative case is the reduced possibility of conducting an investigation. The activity of these courts is limited only to the analysis of administrative files submitted to the court by the authority.⁴¹ Put simply, the investigation procedure by the administrative court is reduced to a comparison between the actions necessary to be taken in the case and the actions that have been taken. Together with this, the administrative court will carry out an analysis of the correctness of the application of a specific legal basis in the light of the factual findings made by the administrative authority and provided by this to the court.

In many jurisdictions, administrative courts are able to conduct a full investigation, being able, for example, to hear witnesses, consult experts, or carry out visual inspections. This is not the case for the Polish administrative courts. According to Polish law, the administrative procedure from its initiation to the issuance of a decision is the sole responsibility of the administrative authority. The authority can only establish the facts but cannot carry out additional activities. In establishing the facts the Polish administrative courts are able to rely only on supplementary documentary evidence. This type of evidence is permitted if it is necessary to clarify significant doubts about the facts and this will not lead to a prolongation of the proceedings.⁴² In practice, it is assumed that the admissibility of evidence before an administrative court occurs solely if the document will allow the verification of the legality of the act or action subject to the court’s control.⁴³ Therefore, the Polish administrative courts are exclusively courts tasked with assessing the correct application of the law and generally do not make any factual findings.⁴⁴

⁴⁰ Article 145a § 3 LPAC.

⁴¹ Article 133 § 1 LPAC.

⁴² Article 106 sec. 3 LPAC.

⁴³ Judgment of the SAC of 17 November 2023, III OSK 2889/21, CBOSA, judgment of the SAC of 10 October 2023, III FSK 4399/21, CBOSA, judgment of the SAC of 6 October 2005, II GSK 164/05, CBOSA.

⁴⁴ J.P. Tarno, “Postępowanie rozpoznawcze i zasady orzekania przez sądy administracyjne”, in *System Prawa Administracyjnego. Tom X. Sądowa kontrola administracji publicznej*, ed R. Hauser, Z. Niewiadomski and A. Wróbel (Warsaw 2016), 342; H. Knysiak-Molczyk, “Głos do wyroku NSA z 22.06.2012 r.”, II FSK 2466/10, *Orzecznictwo Sądów Polskich*, No. 4 (2013), item. 42; M. Jagielska, A. Wiktorowska and K. Zalasńska, “Komentarz do art. 106”, in: *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz* ed R. Hauser, and M. Wierzbowski (Warsaw 2015), 504; K. Sieradzka, “Komentarz do art. 106”, in: *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz* ed A. Skoczyła and P. Szustakiewicz (Warsaw 2023), 255.

One of the most far-reaching changes contained in the LPAC was the structural expansion of the administrative judiciary. The reliance on a two-instance model was dictated by Article 176 sec. 1 of the 1997 Constitution, which gave this feature to all judicial proceedings in Poland.⁴⁵ As a result, as of 1 January 2004, administrative court proceedings became two-instance and two-level. The court of first instance (and first level) is the voivodship administrative court (*wojewódzki sąd administracyjny*), the court of second instance (and second level) is the SAC (Article 2 LSAC). There is only one SAC, and it is based in Warsaw. In addition to adjudicating appeals against the judgments of provincial administrative courts, the SAC also performs other tasks prescribed by law, such as, it adjudicates competence and jurisdiction disputes, complaints about the lengthiness of proceedings, adopts resolutions, and it is also a disciplinary court for judges of voivodship administrative courts and the SAC (Article 3 of the LSAC). Voivodship administrative courts are appointed by decree of the President of the Republic of Poland for at least one voivodship. The number of these courts has not changed since their creation. There is a total number of 16 courts, one for each voivodship.⁴⁶ One additional off-site department was established in 2005, based in Radom.⁴⁷

The model seems to be quite simple: in case of dissatisfaction with a decision of the public administration, the complainant may apply to the voivodship administrative court to examine the legality of the issued decision or other activity or inactivity in question. If the complainant is not satisfied with the judgment of the first instance court, he or she may appeal to the SAC. The introduction of the two-tier model was undoubtedly a necessity. Firstly, it was necessary in view of the international legal standard of protection of the interested individual arising from the right to a fair trial (Article 6 sec. 1 and Article 13 ECHR).⁴⁸ Secondly, the obligation to provide for an appeal was imposed on the legislator by the Article 78 of the 1997 Constitution. This provision of the Constitution stipulates that each party has the right to appeal judgments and decisions rendered at first instance. This architecture provides a high standard of protection for the individual.

3.6. OTHER FEATURES OF THE POLISH MODEL OF ADMINISTRATIVE COURT PROCEEDINGS

While analyzing the features of the administrative judiciary outlined above, it is worth noting that several Polish solutions give widespread access to proceedings before administrative courts. Firstly, there is a wide range of participants in administrative court proceedings. A complaint to an administrative court may be raised by a party to

⁴⁵ J.P. Tarno, "Zasady ogólne postępowania sądowoadministracyjnego", in: System Prawa Administracyjnego. Tom X. Sądowa kontrola administracji publicznej, ed R. Hauser, Z. Niewiadomski and A. Wróbel (*Warsaw 2016*), 209.

⁴⁶ Decree of the President of the Republic of Poland of 25 April 2003 on the establishment of voivodship administrative courts and determination of their seats and areas of jurisdiction, *Journal of Law of 2003*, No. 72, item 652.

⁴⁷ Decree of the President of the Republic of Poland of 16 December 2005 on the establishment of the Branch Faculty in Radom of the Voivodship Administrative Court in Warsaw, *Journal of Law of 2005*, No. 256 item 2144.

⁴⁸ See Guide on the application of article 6 ECHR – Right to a fair trial (civil limb), *Strasbourg 2022*, www.echr.coe.int, accessed 15 January 2024, Guide on Article 13 of the ECHR – Right to an effective remedy, *Strasbourg 2022*, www.echr.coe.int, accessed 31 January 2024.

administrative proceedings. This can be a person who was denied a certain right or on whom a certain obligation was imposed. However, a complaint may also be brought by another entity, such as the public prosecutor acting in the general interest or the Ombudsman.⁴⁹ Individuals who took part in the administrative proceedings, but who did not file a complaint, have the status of a participant with the rights of a party to the administrative court proceedings. Their rights are essentially the same as those of a party, such as the right to participate in the court hearing or the right to appeal.

Secondly, with such broad standing comes relatively low procedural formalism. For example, a party does not have to be assisted by an attorney. The only exception is the filing of an appeal against a voivodship administrative court judgment. As a rule, such an appeal has to be signed by an advocate, legal adviser, tax adviser, or patent attorney.⁵⁰ The other situation in which legal assistance is required are certain cases of challenging proceedings that have already been finally concluded, such as extraordinary reopening of the proceedings before SAC.⁵¹ Apart from that, the scope of procedural burdens is relatively low. For instance, the voivodship administrative court is not bound by the allegations and conclusions formulated by the complainant.⁵² Thus, although the complainant should indicate what, in his or her opinion, violation of the law has occurred in the case, the court investigates whether other violations have also occurred. However, in appeal proceedings, despite the considerable formalism of the appeal, SAC is obliged to interpret the fulfilment of the procedural rigors flexibly.⁵³

Thirdly, the proceedings are contradictory and involve an exchange of arguments between the complainant and the authority whose activity is being challenged in court. Both parties, the complainant and the authority, have equal arms.⁵⁴ They have an essentially identical catalogue of legal remedies in the proceedings.⁵⁵ The only exception is the entitlement to lodge a complaint with an administrative court. This entitlement is not held by the authority whose act, action or inaction is subject to challenge, nor by the authority which ruled in the first administrative instance.⁵⁶

As a general rule, the procedure shall take place at a public hearing or, exceptionally, in chamber. The latter occurs mostly when the case is referred to a simplified procedure, such as when qualified legal defects vitiate the contested decision or when none of the parties has requested a hearing.⁵⁷ Similar exceptions are provided for in appeal proceedings. This ensures a wide access to participation in court proceedings and a social control of the proceedings. As a rule, a panel of three professional judges will give the judgment in a case.⁵⁸ There are few exceptions to this rule and they concern,

⁴⁹ For more see W. Chróścielewski, "Strony i uczestnicy postępowania sądowoadministracyjnego", in: *System Prawa Administracyjnego. Tom X. Sądowa kontrola administracji publicznej*, ed R. Hauser, Z. Niewiadomski, and A. Wróbel (Warsaw 2016), 251–252.

⁵⁰ Article 175 LPAC.

⁵¹ Article 276 and Article 285f § 3 LPAC.

⁵² Article 134 § 1 LPAC.

⁵³ Resolution of the SAC of 26 October 2009, I OPS 10/09, CBOSA.

⁵⁴ For more see W. Piątek, *Zasada równości stron postępowania sądowoadministracyjnego*, Państwo i Prawo 2020, No. 4, p. 24–41.

⁵⁵ Piątek, supra note 54, p. 26.

⁵⁶ Ibid.

⁵⁷ Article 119 and Article 182 LPAC.

⁵⁸ Article 16 § 1, Article 120, Article 181 § 1, Article 182 § 3 LPAC.

for example, the settlement of appeals against judgments rendered following an appeal or against the cassation decisions of the appellate authorities.⁵⁹

4. CHALLENGES FACING THE POLISH ADMINISTRATIVE JUDICIARY VISIBLE AFTER 20 YEARS OF LPAC

Polish administrative courts currently face several challenges. These include the speed of proceedings, the digitalization of proceedings, and the question of possibly expanding the substantive catalogue of administrative court decisions. Due to the reforms adopted during the 'Law and Justice' government, it is also necessary to adopt legislation in the field of judicial appointment procedure.

4.1. THE SPEED OF PROCEEDINGS

Dealing with an individual's case without undue delay is undoubtedly one of the priorities of the judiciary, clearly emphasized in international law.⁶⁰ Under Polish law, the issue of speed of court proceedings is expressed in Article 45 sec. 1 of the 1997 Constitution⁶¹ and in Article 7 LPAC.⁶² The hearing of a case without undue delay is secured in the Polish legal system by the possibility of filing a complaint and obtaining compensation. Such action can be based on the Act of 17 June 2004 on a complaint for violation of the right of a party to have a case heard in preparatory proceedings conducted or supervised by a public prosecutor and court proceedings without undue delay (*Ustawa z dnia 17 czerwca 2004 roku o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki*).⁶³ Studies indicate that the speed of Polish administrative court proceedings is not the lowest in Europe, but this should not deter the legislator from undertaking the necessary reforms to improve it further.⁶⁴

⁵⁹ Article 182 § 2a LPAC.

⁶⁰ See Guide of the ECtHR on the application of article 6 – Right to a fair trial (civil limb), Strasbourg 2022, www.echr.coe.int, accessed 15 January 2024, F. Edel, *The length of civil and criminal proceedings in the case-law of the European Court of Human Right* (Strasbourg: Council of Europe Publishing, 2007), 7ff, M. Kowalski, *Prawo do sądu administracyjnego. Standard międzynarodowy i konstytucyjny oraz jego realizacja* (Warsaw 2019), 59. For more see A. Paduch, "Supervision over a court as a tool to protect the right to have a court case heard within a reasonable time", in: *Supervision over Courts and Judges. Insights into Selected Legal Systems*, ed W. Piątek, (Peter Lang Publishing Group 2021), 151–155; A. Paduch, "The Right to a Fair Trial Under Art. 6 ECHR during the Covid-19 Pandemic: The Case of the Polish Administrative Judiciary System", *Central European Public Administration Review* 19. No 2 (2021), DOI: [10.17573/cepar.2021.2.01](https://doi.org/10.17573/cepar.2021.2.01), 10–12; A. Paduch, Fair administrative trial after COVID-19 pandemic, *ELTE Law Journal* 2023, p. 73–76, W. Piątek, L. Potěšil, "A right to have one's case heard within a reasonable time before the Czech and the Polish Supreme Administrative Courts – standards, the reality and proposals for the future", *Utrecht Law Review* 17, vol. 17, no. 1 (2021), DOI: [10.36633/ulr.586](https://doi.org/10.36633/ulr.586), 20.

⁶¹ This provision states that everyone has the right to a fair and public hearing without undue delay by a competent, independent, impartial and independent tribunal.

⁶² This provision stipulates that the administrative court should undertake actions aimed at a quick resolution of the case and aim to resolve it at the first hearing.

⁶³ Consolidated text *Journal of Law of 2023*, item 1725.

⁶⁴ Piątek, Potěšil, supra note 60, 31.

The speed of proceedings is a challenge for the administrative judiciary primarily because the number of complaints received by the administrative courts has increased. For example, in 2004 – the first year of the LPAC being in force – the voivodship administrative courts received 58,815 complaints,⁶⁵ and the SAC received 6,167 appeals.⁶⁶ In 2014, the voivodship administrative courts received 84,162 complaints,⁶⁷ and the SAC received 17,787 appeals.⁶⁸ In the current decade, the numbers remain at a similar level, with 77,118 complaints filed with the voivodship administrative courts and 17,826 appeals filed with the SAC in 2022.⁶⁹ Statistics indicate that the speed of administrative court proceedings was maintained at a similar level in subsequent years: more than 70% of complaints were resolved within 6 months of their receipt at the voivodship administrative court.⁷⁰ In the case of appeal proceedings, however, the speed of handling cases is slowing down. Only about 30% of appeals are resolved within 12 months of their receipt.⁷¹ Putting this information together means that a case going through two instances of court proceedings may take even 2–3 years to be completed. Taking into account that the activity under judicial control is already enforced against the party challenging it,⁷² this timeframe should be considered too long. The Polish legislator should, therefore, provide procedural improvements that will improve the speed of proceedings before the administrative court, above all in appeal proceedings.

In my opinion, great caution is necessary when considering the actions that could be taken in this regard. The intention to speed up court proceedings cannot justify, for example, the elimination of appeal measures, the shortening of procedural deadlines (e.g., from 30 to 14 days), or an increase of requirements of formal pleadings. While the measures will probably lead to the actual speeding up of proceedings, they will also lead to a reduction in the scope of protection of the individual. The impossibility of removing appeals seems too obvious: it would be contrary to Article 6 ECHR. The shortening of procedural time limits, on one hand, may lead to a reduction in the quality of the reasons raised by a party and even to his or her abandonment of seeking legal protection before a court. On the other hand, excessive procedural formalism would speed up the proceedings in the sense that it would reduce the number of cases, some of which would not be heard due to the considerable difficulties in successfully filing a complaint.

⁶⁵ Informacja o działalności sądów administracyjnych w 2004 roku (*Information on the activities of administrative courts in 2004*), Warsaw 2005 (further ‘Informacja 2004’) <https://www.nsa.gov.pl/sprawozdania-roczne.php>, accessed 3 January 2024, 10.

⁶⁶ Ibid., 22.

⁶⁷ Sprawozdanie roczne z działalności sądów administracyjnych w roku 2014 (Information on the activities of administrative courts in 2014 – further ‘*Sprawozdanie 2014*’), <https://www.nsa.gov.pl/sprawozdania-roczne.php>, accessed 3 January 2024, 15.

⁶⁸ Ibid., 21.

⁶⁹ Sprawozdanie roczne z działalności sądów administracyjnych w roku 2022 (Information on the activities of administrative courts in 2022, further ‘*Sprawozdanie 2022*’), <https://www.nsa.gov.pl/sprawozdania-roczne.php>, accessed 3 January 2024, 13, 17.

⁷⁰ See e.g. *ibid.*, p. 14, Sprawozdanie roczne z działalności sądów administracyjnych w roku 2017 (Information on the activities of administrative courts in 2017 – further ‘*Sprawozdanie 2017*’), <https://www.nsa.gov.pl/sprawozdania-roczne.php>, accessed 3 January 2024, 18, Sprawozdanie 2014, 16.

⁷¹ Sprawozdanie 2014, 22, Sprawozdanie 2017, 22, Sprawozdanie 2022, 18.

⁷² This is because, as a general rule, the lodging of a complaint to an administrative court does not suspend the execution of the contested decision, act or activity. Only exceptionally is it possible to suspend implementation. This is possible because of the danger of causing significant damage or causing effects that are difficult to reverse – see Article 61 § 3 LPAC.

However, I believe that it is possible to introduce minor modifications to the procedural law, which, by introducing or transferring certain procedural burdens or modifying the rules for challenging court actions, would improve the proceedings. It also seems possible to move away from the extensive use of open hearings and introduce a hearing in chambers as the principal form of hearing a case in appeal proceedings.⁷³ This would naturally be acceptable while introducing the possibility of requesting a hearing by one of the parties to the proceedings.⁷⁴ It is also possible to limit the possibility of complaints to the SAC in favor of complaints heard by another composition of the voivodship administrative court (e.g., on the refusal to draw up reasons of a judgment – Article 194 § 1 p. 4 LPAC, on the dismissal to exclude a judge – Article 194 § 1 p. 6 LPAC, reimbursement of the costs of the proceedings if a party does not file a cassation appeal – Article 194 § 1 p. 9 LPAC),⁷⁵ or the introduction of complaints that are only examined together with the appeal (e.g., referral of the case to another administrative court or refusal to exclude a judge). The doctrine also states, albeit cautiously, the theoretical admissibility of introducing a leave to appeal in administrative court proceedings.⁷⁶

In my opinion, it is also possible to try to streamline proceedings by modifying procedural formalism. However, the legislator must be cautious: introducing new formal requirements for pleadings addressed to the court or imposing new procedural burdens on the parties may, in fact, block the judicial route.⁷⁷ Therefore, the modification of formal pleading requirements should be directed towards acquiring all the relevant circumstances of the case in possibly one first pleading of a party.

The problem of the court fee should also be noted. Because the court proceedings fees have not been raised since 2002 and they are generally low,⁷⁸ this can lead to abuse and sham proceedings. The reason for the introduction of the fees was to put safeguards against sham proceedings in place, but at present, they do not seem as effective as intended at their introduction.⁷⁹ In cases in which the procedure is abused, the introduction of a rejection of a complaint at an early stage of proceedings

⁷³ See, in the context of the provisions regulating court action in connection with the COVID-19 pandemic, A. Paduch, “Przeobrażenia prawa do jawnej rozpoznawania sprawy sądowoadministracyjnej wywołane pandemią COVID-29: aspekt normatywny i praktyczny”, in: *Dylematy wokół prawa do sądu*, ed. J. Ciapała, R. Piszko and A. Pyrzyńska (Warsaw 2022), 262.

⁷⁴ W. Piątek, “Przyszłość instancyjności postępowania sądowoadministracyjnego”, in: *Prawo administracyjne dziś i jutro*, ed. J. Jagielski and M. Wierzbowski (Warsaw 2018), 392.

⁷⁵ Piątek, *supra* note 74, 393.

⁷⁶ Piątek, *supra* note 74, 392.

⁷⁷ For more see M. Szwed, Nadmierny formalizm procesowy jako naruszenie art. 6 ust. 1 Konwencji o ochronie praw człowieka i podstawowych wolności, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2020, No. 82 (2), 10.14746/rpeis, pp. 123–136.

⁷⁸ For example, in typical cases in the field of construction and architecture, the fee is PLN 500, foreigners and passports – PLN 300, real estate – PLN 200, which is currently about 5%-10% of the current minimum salary in Poland (PLN 4242). In 2004, the fees were identical and at that time amounted to approximately 24–60% of the then minimum remuneration (PLN 824). See Regulation of the Council of Ministers on the amount and detailed rules for collecting entry fees in proceedings before administrative courts, original text *Journal of Law* 2003, No 221, item 2193 and consolidated text *Journal of Law of 2021*, item 535, *Regulation of the Council of Ministers of 9 September 2003* on the amount of the minimum salary in 2004, Regulation of the Council of Ministers of 14 September 2023 on the amount of the minimum salary and the amount of the minimum hourly rate in 2024, *Journal of Law of 2023*, item 1893.

⁷⁹ Hauser, Drachal, Mzyk, *supra* note 24, 103.

would be desirable. In the current state of the law, there is no legal possibility for the court to end such proceedings quickly. An abusive or sham complaint has to be examined in the same way as any grounded request. Perhaps allowing a preliminary refusal of such a case to proceed would be a beneficial solution from the perspective of speeding up the proceedings.

Two other alternatives for modifying the course of administrative court proceedings could be briefly mentioned. Firstly, one could be to increase the number of administrative court judges. Statistics indicate that the SAC's adjudicatory capacity is used to the full. Therefore, a solution to this problem could be periodical assignments of voivodship administrative court judges to the SAC. The disadvantage of this solution, however, is its *ad hoc* nature and the complications it introduces in terms of logistics or human resources. The number of judges of voivodship administrative courts is also limited, and the appointment of subsequent ones must also take into account the degree of professionalism of the candidates and their professional experience. Secondly, one can also see the necessity of increasing the professionalism of the administrative bodies' clerical staff so that the administration's decisions are accurate, which would not lead to them being challenged by those to whom they are addressed. However, this postulate should be treated in directional terms, and its purest form should be viewed as an idealization of reality. After all, it is not out of the question to challenge administrative rulings without rational grounds but only for emotional reasons. All the more so as the initiation and conduct of administrative court proceedings are not, as a rule, burdened with mandatory legal representation.

4.2. THE DIGITALISATION OF ADMINISTRATIVE COURT PROCEEDINGS

The speed of proceedings is also linked to the second issue undoubtedly posing a challenge to the administrative judiciary, namely: the digitalization of court proceedings. Generally speaking, the court proceedings in Poland, both before the common courts and before administrative courts, primarily take the form of paper-based submissions and face-to-face interactions. Efforts are being made to digitalize the above-mentioned procedural interactions. The advantages of digitalization are obvious: it speeds up the course of action itself, streamlines and facilitates the delivery of documentation, and makes it easier to consult case documents and formulate statements. Thus, it secures the individual's access to the court. It is also an environmentally friendly solution due to the limited use of paper. These solutions are, in fact, already partially implemented in the Polish courts, albeit these regulations are so far of a partial nature.⁸⁰ For example, an amendment to come into force in 2029 is devoted to the issue of electronic deliveries.⁸¹ I believe that the administrative judiciary could be a pioneer in implementing 'new technologies' in Polish judicial proceedings. Indeed, due to the limited scope of evidence proceedings and the analysis of only legal issues, there are no major difficulties towards the complete digitalization of administrative court proceedings.

⁸⁰ See E-PUAP, electronic submission system for official documents, <https://epuap.gov.pl/wps/portal>, accessed 11 January 2024, 'Passa' electronic access system for administrative court files, <https://portal.nsa.gov.pl/sessions/pz-signin>, accessed 11 January 2024.

⁸¹ See the Act of 18 November 2020 on electronic deliveries, consolidated text *Journal Laws of 2023*, item 285.

From a litigation perspective, the use of ‘new technologies’ as such should cover two levels:

- (1) digitalization of court support tools, and
- (2) digitalization of actions performed during the trial.

However, these two levels are separable in the sense that solutions for each of them can be introduced separately and independently of each other.

The first level of digitalization of the court-administrative procedure is the digitalization of court support tools. This category includes all instruments aimed at streamlining the work of the court or facilitating contact between the court and the participant in the proceedings. Therefore, it is not about the transfer of proceedings to the digital world as such, but about improving the work of the court when hearing a case. This group of solutions includes, first of all, specialized software which ensures efficient document circulation. This is, above all, the collection and transfer of case files in electronic form, which undoubtedly speeds up the process and, moreover, eliminates the possibility of losing paper files during transport from an administrative body to the court or from one court to another. Another interesting solution is software enabling voice transcription that can be used when drawing up minutes from court sessions or preparing the text of the judge’s orders. These solutions are already used in the Polish common courts, where they are effectively replacing the traditional protocol drawn up based on a judge’s dictation.⁸²

The above-mentioned first level also includes tools that make it possible to obtain information on cases conducted by the administrative courts, to become informed about court rulings, or even to determine the potential effectiveness of a chosen litigation strategy. The first two of these solutions are already partially present in Polish administrative courts. Parties in the proceedings can check the date of the hearing on the court’s website and they can also find out about the judgment.⁸³ Parties can also track the previous rulings of administrative courts, as a device called CBOSA (*Centralna Baza Orzeczeń Sądów Administracyjnych*, Central Database of Administrative Court Rulings)⁸⁴ has been functioning in Poland for many years. This database enables access to the judgments of administrative courts and to their reasoning. The use of the CBOSA tool allows, on the one hand, the development of an appropriate procedural strategy of the party and, on the other hand, leads to the unification of court or administrative rulings. The judgments in CBOSA are also available for consultation by the administrative authorities when they handle individual cases.⁸⁵

In terms of this group of solutions, the challenge is undoubtedly not only to create the right software in itself but also to ensure its secure use. Two problems arise here: the first is the security of the stored data, which remains at risk from potential hacker attacks and data theft, especially for sensitive information, and the second is the

82 See e.g. Article 157 § 1 above-mentioned Code of civil proceedings.

83 See e.g. the website of Voivodship Administrative Court in Poznań, <https://bip.wsa.poznan.pl/35/104/elektroniczna-wokanda.html>, accessed 11 January 2024.

84 See <https://orzeczenia.nsa.gov.pl/cbo/query>, accessed 11 January 2024.

85 See A. Skoczylas, “Wpływ uchwał NSA na wykładnię dokonywaną przez organy administracji”, in: *Koncepcja systemu prawa administracyjnego* ed J. Zimmermann (Warsaw 2007), 702–703.

need for adequate user verification to ensure that users access only the information appropriate for them. Then, there is the question of the completeness, reliability, and comprehensibility of the information provided by the described devices.⁸⁶ In this regard, in-depth cooperation between computer scientists, lawyers, and cybersecurity specialists is essential.

As far as the second level is concerned, it should be pointed out that the digitalization of actions performed during the trial means that the contact between the participants in the trial and the court (or between two courts) will take place with the support of technology. This entails that court and party pleadings will be submitted via an electronic sub-box, administrative and court files will be digitized or it will be possible to conduct hearings in a hybrid or remote format. The use of such solutions is critical to enhancing the accessibility to judicial proceedings, particularly for groups that otherwise lack access to a court according to the traditional model. Active participation in digital court proceedings is possible regardless of the state of health or physical distance of the party from the court's seat. It is particularly critical in cases involving elderly or disabled persons, who often act as complainants against unfavorable decisions on social assistance or social security. Electronic access to a court is also important for small enterprises, which are an important group of administrative court complainants. For them, a court visit involves being closed for several hours or an entire day – and they, therefore, may lose potential income. Additionally, the scope of protection for foreigners residing outside the territory of Poland who complain about actions or decisions taken against them in Poland would be increased. Currently, they may be obliged to appoint a proxy to receive correspondence from the court.⁸⁷ Moreover, they have no physical possibility of reviewing case files unless they reach the court's seat. Digital solutions would undoubtedly enable them to actively participate in the proceedings, regardless of their location, provided they have internet access.

However, when digitalizing court proceedings, it is important to bear in mind digitally excluded people. Therefore, the transition to a digital (or remote) form should be accompanied, at least for the first few years, by the possibility of switching to a traditional format in a given case if a party is unable to use the new technologies. I believe that the number of people using the traditional format on an exceptional basis would turn out to be low and, given the popularity of electronic formats in other areas of life, would decrease with each year.⁸⁸

⁸⁶ In the context of comprehensibility, the example of the Courts Information Portal, used by Polish civil and criminal courts, can be cited, which displays as 'completed case' the case in which a judgment has been rendered, regardless of whether that judgment is final or whether there is a possibility of appeal.

⁸⁷ Article 299 § 2 LPAC.

⁸⁸ This can be evidenced, for example, by the number of accounts on streaming services such as Netflix or HBO GO – see e.g. L. Brennan, "How Netflix Expanded to 190 Countries in 7 Years", *Harvard Business Review*, 12.10.2018, <https://hbr.org/2018/10/how-netflix-expanded-to-190-countries-in-7-years>, accessed 11 January 2024; J. Frączyk, "Użytkowników już sześć razy więcej niż mieszkańców Polski. Netflix zaskoczył wynikami", *Business Insider*, 19 April 2023, <https://businessinsider.com.pl/gielda/wiadomosci/netflix-zaskoczyli-wynikami-uzytownikow-szesc-razy-wiecej-niz-mieszkancow-polski/9lh4h99>, accessed 11 January 2024, D. Curry, "HBO Max Revenue and Usage Statistics (2024)", *Business of Apps*, 8.01.2024, <https://www.businessofapps.com/data/hbo-max-statistics/>, accessed 11 January 2024. The increasing popularity of digital devices and decreasing digital exclusion is also indicated by the number of smartphones – in Poland present in more than 80% of households – see Krajowy Instytut Mediów, *Usługi medialne i infrastruktura do ich odbioru w gospodarstwach domowych w Polsce w 2022 roku. Wyniki Badania Założycielskiego Krajowego Instytutu Mediów*, Warsaw 2023, <https://kim.gov.pl/wyniki-badan/>, 18, accessed 11 January 2024.

In the context of the digitalization of court proceedings, the question of using AI should be mentioned. AI technology can be useful for judges, for instance, in reviewing case law, or drafting a judgment or its reasons.⁸⁹ Nevertheless, the use of AI should be treated both as an opportunity and as a threat. Uncontrolled reliance on this technology may make AI *de facto* replacement of the judge in the administration of justice, making it, in fact, 'the administration of injustice'.⁹⁰ However, with the establishment of a specific legal framework, AI can greatly facilitate the work of judges and the clerical administration of courts, enabling them to hear other cases, for example.

4.3. CASSATION OR SUBSTANTIVE JUDGMENT MODEL?

Another challenge faced by the Polish administrative judiciary is the prevailing cassation model of jurisprudence. As indicated earlier, Polish administrative courts do not settle the cases of individuals by granting them rights or imposing obligations. Having found a violation of the law of an administrative body, the administrative court simply annuls the decisions issued in the case, indicating the direction in which the administration's decision should be taken.⁹¹ Therefore, the adjudicatory activity of the administrative courts is only a preliminary step to the proper settlement of the case.⁹² Due to this, the proceedings before the administrative court are sometimes erroneously perceived as another administrative instance, not leading directly to a substantive decision and even prolonging administrative proceedings.⁹³

For these reasons, expanding the substantive scope of court rulings should be considered another challenge.⁹⁴ From the individual's perspective, the immediacy of determining how their legal situation is shaped (and this can only be done by a decision in Poland) is of greater importance than the question of the separation of powers between the Judiciary and the Executive.⁹⁵ This is all the more so because in some categories of cases, such as in the already mentioned cases of social security or appeals against energy regulation decisions, the ordinary court issues a judgment on the merits when it reviews the appeal. Naturally, this cannot provide an inspiration for a complete departure from the cassation model.⁹⁶ It may, however, provide a reason to broaden the scope of substantive judgments of administrative courts, for

⁸⁹ For more see A. D. (Dory) Reiling, 'Courts and Artificial Intelligence', *International Journal for Court Administration* 11, No. 2 (2020), 8, DOI <https://doi.org/10.36745/ijca.343>.

⁹⁰ Reiling, *supra* note 89, p. 6–7.

⁹¹ Z. Kmiecik, "Efektywność sądowej kontroli administracji", *Państwo i Prawo*, z. 11 (2010), 22.

⁹² W. Sawczyn, "Prawomocność i skuteczność orzeczeń sądów administracyjnych", in: *System Prawa Administracyjnego. Tom X. Sądowa kontrola administracji publicznej*, ed R. Hauser, Z. Niewiadomski and A. Wróbel, (Warsaw 2016), 550–551.

⁹³ D. Gut, "Merytoryczne orzekanie polskich sądów administracyjnych w świetle Konstytucji RP", in: *Aktualne problemy sądowej kontroli administracji publicznej*, ed W. Piątek (Warsaw 2019), 11–13.

⁹⁴ See A. Paduch, Szwedzki i polski model postępowania sądowoadministracyjnego: analiza prawnoporównawcza, *Forum Prawnicze*, No. 5 (2023): 77.

⁹⁵ For more see Kmiecik, *supra* note 33 p. 12 and W. Piątek and A. Skoczylas, "Kasacyjny czy merytoryczny model orzekania – kwestia zmiany modelu sądowej kontroli decyzji administracyjnych", *Państwo i Prawo*, No. 1 (2019), 29–31 and literature cited therein.

⁹⁶ However, in the doctrine, interesting postulates are being formulated for a shift to strictly substantive adjudication with cassation jurisprudence left only for those cases where the expertise of the adjudicator is required, see A. Krawczyk, "Reformy sądownictwa administracyjnego w państwach młodej demokracji (analiza prawnoporównawcza)", *Acta*

example, with regard to those cases in which the court finds that a related decision was incorrectly issued, or the case involves the revocation of an erroneous decision of a second-instance administrative body, as long as the preceding decision of the first-instance body was, according to the court, correct. It seems that the possibility of substantive adjudication by administrative courts could also occur in the case of certain acts or actions other than decisions or rulings and interpretations of tax law.⁹⁷

In this context, one can also see the possibility of broadening the evidence procedure. Currently, only supplementary documentary evidence is possible before a Polish administrative court. Interestingly, Poland seems to be in the minority of European countries with this solution.⁹⁸ The question arises of whether it would be worthwhile to consider broadening the scope of supplementary evidence, for example, also with the testimony of a witness or an expert opinion. When verifying a particular circumstance with the help of an expert, it is necessary to annul the decision and repeat the administrative procedure.⁹⁹ Perhaps broadening the scope of evidence (combined with the introduction of substantive court judgments) would make it possible to shorten the time for deciding on the rights or obligations of an individual.

The problem of the effect of an administrative court judgment in the context of purely cassation powers has already been recognized in other countries.¹⁰⁰ For example, in 2012, Austria carried out a reform of the administrative courts, which shifted the center of gravity from cassation to substantive adjudication.¹⁰¹ There are also many legal orders in which the substantive powers of the administrative courts are not in doubt, such as the case with Austria¹⁰² or Sweden. In the latter country, the administrative courts can not only amend the decisions of the administrative authorities but can also conduct full substantive evidentiary proceedings.¹⁰³ However, an argument against the introduction of the discussed solutions may be the shape of administrative proceedings. In the case of Poland, it is two-instance and includes the possibility of two-stage substantive adjudication of a given case.¹⁰⁴ In the Swedish case, the broad powers of the courts stem from the fact that Swedish administrative proceedings are generally single-instance in nature.¹⁰⁵

Universitatis Lodzensis, Folia Iuridica 98 (2022), <https://doi.org/10.18778/0208-6069.98.01>, 16 and the literature cited therein.

⁹⁷ For more see Kmiecik, supra note 33, 16–17 and the literature cited therein.

⁹⁸ Krawczyk, supra note 96, 13. Kmiecik, supra note 91, 23.

⁹⁹ See M. Kopacz, “About the need to change the scope of the evidence proceedings and administrative court cases”, *Toruńskie Studia Polsko-Włoskie* XVII, Toruń 2021, DOI: <http://dx.doi.org/10.12775/TSP-W.2021.017>, 257.

¹⁰⁰ Kmiecik, supra note 91, p. 23, Gut, supra note 93, 11.

¹⁰¹ P. Chvosta, ““Reforma stulecia” sądownictwa administracyjnego w Austrii – “Nowa era” także dla sądownictwa administracyjnego w państwach młodej demokracji w Europie?”, *Acta Universitatis Lodzensis, Folia Iuridica* 98 (2022), DOI: <https://doi.org/10.18778/0208-6069.98.03>, 48–49, Kmiecik, supra note 33, 10.

¹⁰² Chvosta, supra note 101, 48.

¹⁰³ For more see Paduch, supra note 94, and the literature cited therein.

¹⁰⁴ W. Chróścielewski and J.P. Tarno, “Trójszczeblowy model sądownictwa administracyjnego a jednoinstancyjne postępowanie administracyjne”, *Państwo i Prawo*, No. 5 (1999), 23, Hauser, supra note 30, 148.

¹⁰⁵ See § 40 *Förvaltningslag*, 2017:900. See also H. Wenander, “Administrative Law”, in: *Swedish Legal System*, ed M. Bogdan and C. Wong (Nordtests Juridik 2022), 73–74, Paduch, supra note 94, and the literature cited therein.

The shape of judicial appointment procedure is another challenge. According to Article 179 of the 1997 Constitution, judges are appointed by the President at the request of the National Council of the Judiciary (*Krajowa Rada Sądownictwa* or NCJ). The politicization of this body during ‘Law and Justice’ party rule (2015–2023) raised doubts about the legality of the appointment of judges.¹⁰⁶ Furthermore, some doubts on the validity of the judgments by judges elected by the NCJ during this period arose.¹⁰⁷

The problem occurred due to the composition of the NCJ. From the constitutional point of view, this body shall include representatives of three powers: the executive (representative of the Minister of Justice), the legislature (representative of deputies and senators) and the judiciary (President of the Supreme Court, President of the SAC and representatives of the judges).¹⁰⁸ As originally intended, the representatives of each power were elected by these powers. For example, the representatives of judges were elected by judges themselves. However, this was changed in 2017, when the Law and Justice’s government introduced a reform.¹⁰⁹ Due to this new regulation, the representatives of the judiciary are elected not by judges themselves but by the lower chamber of Polish parliament (*Sejm*). Thus, the judges lost the opportunity to participate in determining the composition of the NCJ. That amendment has led to the above-mentioned doubts in the field of the legality of judicial appointment procedures undertaken after 2017 reform. Moreover, the question of legal status of judges elected under this new regulation and, what is more important, the validity of their judgments arose.¹¹⁰

In the current legal and political situation, the Polish judiciary, and administrative judiciary in particular, faces the problem of restoring the lawful judicial appointment procedure. Moreover, the regulation of the legal status of judges appointed under the 2017 law is needed.¹¹¹ The drafts of law in those fields are still under discussion.¹¹² The most probable solution appears to be to restore the pre-2017 reform system of electing members of the NCJ. This step would free the appointment procedures from

¹⁰⁶ A. Adamska-Gallant, “Backsliding of the Rule of Law in Poland – a Systemic Problem With the Independence of Courts”, *International Journal For Court Administration* 13, No. 3 (2022), 2. DOI: <https://doi.org/10.36745/ijca.474>, pp. 1–10; M. Szwed, Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR, *Hague J Rule Law* 15, 2023, <https://doi.org/10.1007/s40803-023-00191-3>, p. 353–384.

¹⁰⁷ For instance, in 2020, the Polish Supreme Court adopted a resolution according to which the filling of judges with judges designated by the National Council of the Judiciary shaped by the 2017 amendment renders the proceedings invalid – see resolution no. BSA I-4110-1/20.

¹⁰⁸ See Article 187 sec. 1 of 1997 Constitution.

¹⁰⁹ Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw, *Journal of Laws* 2018, item 3).

¹¹⁰ K. Grajewski, “Dysfunctionality of the National Council of the Judiciary in the Polish Constitutional System After Statutory Changes: Resolution of the Combined Chambers of the Supreme Court: Civil, Criminal, Labour Law and Social Security of 23 January 2020, BSA I-4110-1/20”, *Gdańskie Studia Prawnicze* 48, no. 4 (2020), <https://doi.org/10.26881/gsp.2020.4.12>, 161–169.

¹¹¹ For more see Szwed, *supra* note 106, pp. 358–361.

¹¹² See *draft law on the amendment of act on National Council of the Judiciary, no. 219*, <https://www.sejm.gov.pl/sejm10.nsf/PrzebiegProc.xsp?nr=219>, access date 6 July 2024.

constitutional doubts. That means that the representatives of the judiciary who elect the members of the NCJ would not come from the selection of *Sejm* but from the autonomous decision of judges again.

As it was said above, there is also the question of the status of judges appointed under the 2017 law.¹¹³ Recognizing them as non-judges has to be considered unacceptable: it would lead to the repetition of many proceedings in which they have adjudicated during almost a decade. It should also be noted that for many of these judges, appointment to office was a normal path of professional advancement based on knowledge and experience, not on their beliefs or political connections. However, a resolution that those judges are fully equal to those appointed before 2017 reform, should also be considered controversial as it might be contrary to ECHR case law.¹¹⁴

Under these circumstances, an interesting compromise draft was prepared by the Association of Polish Judges 'Iustitia'.¹¹⁵ According to this draft, the resolutions of the NCJ are invalid, with the exception of resolutions appointing to the position of a judge those candidates who had completed judicial training shortly before or during the period in which the 2017 law was in force. For those professionals the participation in judicial appointment procedure held by the 'invalid' NCJ was the only opportunity to start their professional life they had been trained for. In all the other cases, the positions held by judges appointed under the 2017 law become vacant. The judges in question should return to their previous official positions. In the case of persons who, before being appointed to the office of judge, were practicing other legal professions, a form of a declaration of return to that profession is drafted. However, the draft regulation has become the subject of a huge debate in Poland and to date a solution has not been found that satisfies everyone.

5. CONCLUSION

The idea of administrative judiciary in Poland has a long tradition. The current regulation has functioned essentially unchanged for twenty years. These solutions are based on the systemic separation of administrative courts, the cassation model of adjudication, the limited scope of investigation, and the two-tier organizational structure. This article argues that while the model of the current administrative court proceedings adopted in 2002 still fulfills its tasks, amendments are still needed with regard to structural and procedural issues. This need arises from the numerous challenges the administrative judiciary is facing nowadays.

Undoubtedly, the most important challenge is to ensure an appropriate speed of proceedings. The question of a reasonable timeframe for adjudication is not only a Polish problem; however, in the context of administrative courts in Poland, the activity of which is of a purely cassation nature, the problem acquires significant importance. Therefore, it is necessary to consider the adoption of such legal measures which will streamline the course of proceedings without introducing excessive restrictions on the right to a fair trial.

¹¹³ For more see Szwed, *supra* note 106, pp. 361–381.

¹¹⁴ See judgments of ECtHR: *Reczkowicz v. Poland*, app. no. 43447/19, 22 July 2021, *Dolińska-Ficek and Ozimek v. Poland*, apps. no. 49868/19 and 57511/19, 8 November 2021, *Juszczyszyn v. Poland*, app. no. 35599/20, 6 October 2022. For more see M. Szwed, *supra* note 106, pp. 355–357.

¹¹⁵ https://iustitia.pl/wp-content/uploads/2024/04/3U_eng-1.pdf, access date 7 July 2024.

The widespread use of new technologies, leading to the digitalization of administrative court proceedings, should be regarded as equally important. In fact, the process of digitalization concerns all areas of life. Providing judicial legal protection cannot be left behind in this respect. The necessity of transferring court proceedings to the digital world must be recognized. In the case of Poland, some of the available tools are already being implemented. It seems that this process should be intensified.

The most far-reaching demand is to gradually move away from the cassation model of jurisprudence to the substantive model. Substantive adjudication has the undoubted advantage of speeding up the process of settling an administrative case. Although a complete departure from the cassation model seems unlikely in the current Polish constitutional context, and the cassation model has many advantages, it is worth considering extending the possibility of substantive jurisprudence in administrative courts.

The challenges presented, however momentous, are technical in nature. Indeed, they involve consideration of the need to modify the judicial procedure in order to make it more efficient. However, it should be borne in mind that whatever the shape of the procedure, it is invariably the challenge of any court – including an administrative court – to guarantee a high degree of trust in its activities. This value is of a largely intangible nature. It is therefore necessary to ensure that the judicial appointment procedure is properly structured.

Furthermore, the level of trust in courts is undoubtedly a result of a high level of jurisprudential professionalism and particular judge's social sensitivity. In the case of administrative courts, the latter element takes on great importance; after all, these courts adjudicate conflicts between the state and individuals. The legislator should never forget this when amending the law to respond to the challenges faced by the administrative judiciary in Poland.

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COMPETING INTERESTS

The author has no competing interests to declare.

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