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Changes to the Scope of Jurisdiction of Administrative Courts – Remarks *de lege lata* and *de lege ferenda*[2]

Abstract

The judicial review of administrative courts covers the legality of acts and actions of public administration bodies. The oversight over the activities of bodies of other authorities is, therefore, excluded from this review. However, there are cases in which administrative courts, invoking the so-called pro-constitutional interpretation, attempt to extend their jurisdiction also to be able to review the acts, actions or inactions of legislative and judicial authorities. Despite the fact that according to the Constitution of the Republic of Poland, the executive power (equated by legal scholars, commentators, and practitioners with the exercise of public administration) is exercised by the President of the Republic of Poland and the Council of Ministers, the dominant judicial practice is that the acts of the President, which constitute the exercise of his prerogatives, are not subject to the jurisdiction of administrative courts. The author argues against this practice.

The discussion addresses also the demands and proposals made in the literature dealing with the subject for entrusting administrative courts with the review of decisions issued in social insurance cases, as well as the establishment of a separate judiciary in tax or – more broadly – financial cases. The author strongly opposes these demands and proposals as well.

Keywords: scope of jurisdiction of administrative courts, expanding the jurisdiction of administrative courts, pro-constitutional interpretation of law, subjecting the acts of the President of the Republic of Poland to judicial review.

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1. Article 1 of the Act of 3 August 1922 on the Supreme Administrative Tribunal[3] stated that the Tribunal was established to adjudicate on the legality of orders and rulings issued in the last instance by national and local government administrative authorities.[4] At that time, the term "order" was considered to include constitutive acts, and the term "ruling" covered declaratory acts.[5] However, according to Article 3 of this law, the Tribunal did not have jurisdiction over cases:

- falling within the jurisdiction of ordinary courts or special courts,
- in which administrative authorities were entitled to exercise discretion within the limits left to that discretion,
- concerning appointments to public offices and positions, provided that this did not involve a violation of the statutorily guaranteed right to fill them or to present candidates for them,
- concerning the representation of the State and citizens in dealing with foreign states and authorities – and matters directly related thereto,
- matters concerning warfare and the organisation of the armed forces and mobilisation – with the exception of matters of supply and replenishment of the army,
- disciplinary cases.

Also, the Regulation of the President of the Republic of Poland of 27 October 1932 on the Supreme Administrative Tribunal,[6] defining the scope of the SAT's jurisdiction similarly to the NTA Act, however, extended the list of exclusions from the Tribunal's jurisdiction to: cases heard by general assemblies or administrative colleges of any court; cases concerning professional liability; and other cases if special provisions so provided.

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3 Journal of Laws of the Republic of Poland no. 67, item 600, as amended.

4 For the avoidance of any doubt, it should be added that Article 72(1) of the Regulation of the President of the Republic of Poland of 22 March 1928 on Administrative Procedure (Journal of Laws of the Republic of Poland of 1928, no. 36, item 341) read: "In the course of proceedings, the administrative authority shall issue decisions (rulings and orders) as often as necessary"; thus, only administrative decisions fell within the scope of the Tribunal's jurisdiction.

5 W. Supiński, *Postępowanie administracyjne*, Warszawa 1934, p. 27.

6 Journal of Laws of the Republic of Poland no. 94, item 806.

The Act of 31 January 1980 on the Supreme Administrative Court and Amendments to the Act – the Code of Administrative Procedure,[7] which reactivated the administrative judiciary in Poland, delimited the jurisdiction of the restored administrative court in a completely different way. Article 196 § 1 of the Code of Administrative Procedure provided that an administrative decision could be appealed to an administrative court on the grounds that it was unlawful, which could be regarded as a general clause delimiting the jurisdiction of the SAC. However, § 2 of the same article included 20 points forming a list of – objectively defined – categories of cases in which decisions made could be appealed to an administrative court. S. Zawadzki, one of the main initiators of the restoration of administrative judiciary, argued that "a problem then arose as to whether the above list was exhaustive or exemplary, whether the list contained the majority of administrative cases or an insignificant part thereof, and – finally – what the specific categories of cases actually meant …".[8] Leaving aside this rather isolated statement, legal scholars, commentators, and practitioners agree that the possibility of appealing decisions to the SAC was based on the principle of positive enumeration – only decisions included in this list, as well as those that were subject to judicial review on the grounds of special regulations, could be challenged in court.[9] It must be clearly emphasised at this point that, as with the Supreme Administrative Tribunal, only administrative decisions could be appealed to the Supreme Administrative Court. However, in contrast to the proceedings before the SAT, the failure to issue such decisions within the statutory deadline was also subject to a complaint to the SAC. The activity of administrative bodies pursued in other legal or factual forms did not fall within the scope of review exercised by this judicial institution. At the same time, the provision of Article 12(3) of the SAC Act made it clear that the norms of this Act were without prejudice to the enumerative indication of the seven categories of provisions governing the jurisdiction of common courts and the bodies of the State Economic Arbitration in terms of cases settled in administrative proceedings (e.g. cases indicated in: Article 26 of the Decree of 8 June 1955 – Law on Civil Registry Records;[10] Articles 112 and 113 of the Act of 19 October 1972 on Inventive Activity,[11] Article 38 sections 1 and 2 of the Act of 24 October 1974 – the

7 Journal of Laws of the Republic of Poland no. 4, item 8; on the now largely forgotten background of revival of administrative judiciary, see: *Mój życiowy sukces*, *Rozmowa z prof. Sylwestrem Zawadzkim* [in:] *XX lat Naczelnego Sądu Administracyjnego*, Warszawa 2000, p. 102 *et seq.*

8 *Mój życiowy sukces…*, p. 108.

9 Cf. e.g. A. Zieliński [in:] J. Borkowski (ed.), *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 1985, p. 282.

10 Journal of Laws of the Republic of Poland no. 25, item 151, as amended.

11 Journal of Laws of the Republic of Poland no. 43, item 272.

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Water Law[12]). This meant that in such cases, it was not the Supreme Administrative Court, but common courts that continued to review the administrative decisions issued. Interestingly enough, they were subject to the application of Article 269 of the Code of Administrative Procedure, maintaining the concept of "final decision" in legal circulation.

The political changes that began in Poland in 1989 led to a significant expansion of the SAC's area of jurisdiction. The most important of them include:[13]

1) the abandonment of the positive enumeration and its replacement by a general clause set out in the then-Article 196 § 4 of the Code of Administrative Procedure, excluding judicial review in:
   - cases arising from organisational and official superiority and subordination in relations between state administration bodies and refusal to appoint (nominate) to managerial positions and to perform functions in state bodies unless the obligation to appoint or nominate is imposed by law,
   - disciplinary cases,
   - cases of granting visas, granting the right of asylum, obtaining a residence permit and deportation unless the foreigner is lawfully present in Poland,
   - cases falling within the jurisdiction of the Patent Office and the Appeals Committee of that Office,
   - falling within the jurisdiction of other courts;
2) subjecting certain categories of decisions issued in administrative and enforcement proceedings to judicial review (with the application of positive enumeration in Article 196 § 3 of the Code of Administrative Procedure);
3) extension of judicial review also to resolutions of municipal bodies and the supervisory decision of bodies supervising local governments.

Thus, already in the early 1990s, the objective scope of judicial review of administration exercised by the Supreme Administrative Court was much broader than that exercised by the Supreme Administrative Tribunal.

Articles 16–18 of the Act of 11 May 1995 on the Supreme Administrative Court[14] defined the scope of the jurisdiction of this court in a manner that differed little from the one shaped in the period before its entry into force. However, from the

[12] Journal of Laws of the Republic of Poland no. 38, item 230.

[13] Cf. Z. Janowicz's analysis of the provisions in force after this amendment, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa–Poznań 1995, p. 454 *et seq*.

[14] Journal of Laws of the Republic of Poland no. 74, item 368.

point of view of the subject of this study, the factor that had a major impact was the inclusion of a legal definition of the term "public administration body" in Article 20(2) of the Act.[15] According to that provision, "the public administration bodies within the meaning of this Act are the supreme and central bodies of state administration, field bodies of government administration, bodies of local governments, and other bodies to the extent to which they have been appointed by law to deal with matters of public administration."[16]

2. Revisiting the definition of a public administration body provided in the 1995 Act on the Supreme Administrative Court is quite important, as the current Act of 30 August 2002 – Law on Proceedings before Administrative Courts (hereinafter: the LPBAC)[17] does not contain such a definition. Its absence has led to the fact that the literature dealing with the matter recognises that in determining whether an entity can be regarded as such a body, it is necessary to use an objective criterion in the form of "execution of public administration."[18] If an entity performs public administration tasks in the forms specified in Article 3 of the LPBAC, this will mean that it must – at least to the extent of the performance of these tasks – be treated as a public administration body, and its activities will be subject to the supervision and review of administrative courts. It seems, however, that in the context of the validity of the principle of the tripartite separation of powers, it is important to make a rather relevant reservation. It cannot be assumed that such a body will be a body of the executive or the judiciary, as this would undermine the sense of this very important systemic principle established in the Constitution – one upon which the State's entire system is based.

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15 Prior to the entry into force of this Act, the definition of a "state administration body" was included in Article 5 § 2(3) of the Code of Administrative Procedure, but the separate regulation of the issues of judicial review of administration in the 1995 Act made it necessary to incorporate the definition into the Act.

16 With the introduction of local governments at all levels of the territorial division in 1999, this definition was amended by replacing the term "local government bodies" with "bodies of local government units," which did not have any major impact on the definition itself.

17 Journal of Laws of the Republic of Poland of 2002, no. 153, item 1271, now: uniform text in the Journal of Laws of the Republic of Poland of 2023, item 1634.

18 Cf. A. Kabat, *Właściwość sądów administracyjnych* [in:] *Prawo o postępowaniu przed sądami administracyjnymi, Zagadnienia wybrane* (resources for the Conference of Judges of the Supreme Administrative Court in Popowo on 20–22 October 2003, reproduced typescript), p. 7; T. Woś [in:] T. Woś (ed.), H. Knysiak-Molczyk, M. Romańska, *Prawo o postępowaniu przed sądami administracyjnymi, Komentarz,* edited by T. Woś, Warszawa 2016, p. 18; see also: W. Chróścielewski, *Organ administracji publicznej a sądowa kontrola jego działalności*, ZNSA 2023, special issue – *Granice właściwości sądów administracyjny*ch, pp. 88–89; B. Adamiak, [in:] B. Adamiak, J. Borkowski, *Postępowanie administracyjne i sądowoadministracyjne,* Warszawa 2017, p. 372.

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In the current state of the law, the jurisdiction of administrative courts includes the examination of the legality of acts and activities of public administration bodies in the constitutional or functional sense. This means acts and activities aimed at "managing, organising community life, arranging it, coordinating it, running it, etc., which only includes the execution of the law."[19] At the same time, these must be authoritative actions, as non-authoritative actions are taken in forms typical of private law, assuming an equal position of the parties to a legal act – they are subject to common courts' review.[20]

Thus, only authoritative actions of public administration bodies will be subject to the jurisdiction of administrative courts – and only those specified in Articles 3 § 2, 2a, and 3 of the LPBAC. It is also necessary to take into account the fact that an appeal regarding inaction or protracted conduct of proceedings, as a rule, is admissible only in those cases in which the acts or actions of public administration bodies are subject to review by administrative courts.[21] It can be thus considered that such an appeal is, so to speak, secondary to referring such actions of the entity in question to the revision of administrative courts.

The substantive (objective) scope of jurisdiction of administrative courts has been exhaustively analysed in existing literature.[22] The judicial decisions issued thus far do not leave any major doubts as to the limits of this scope either, so there is no need to duplicate these considerations. However, it should be strongly emphasised that this scope, compared to the area of substantive jurisdiction of the Supreme Administrative Tribunal or the Supreme Administrative Court until 1990, where the review of legality covered only administrative decisions, has been significantly extended. This issue cannot be left aside, especially when attention is drawn to the still long duration of administrative court proceedings. It is obvious that it is,

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19 J. Zimmermann, *Alfabet prawa administracyjnego*, Warszawa 2022, p. 16.

20 Cf. S. Kasznica, *Polskie prawo administracyjne. Pojęcia i instytucje podstawowe.* Poznań 1946, p. 7; W. Chróścielewski, *Imperium a gestia w działania administracji publicznej*, PiP 1995, issue 6, p. 49; it should be noted, however, that in the increasingly frequent proposals for the introduction of an administrative contract into the Polish legal system, it is assumed that the issues of the invalidity of such a contract or the execution of its provisions would fall within the jurisdiction of administrative courts – cf. e.g. A. Krawczyk, *Umowa administracyjna (art. 1 pt. 1, art. 13, art. 35 § 5, art. 104 § 1 art. 113l–113 r, art. 156 § 1 pkt 3)* [in:] Z. Kmieciak (ed.), *Raport zespołu eksperckiego z prac w latach 2012–2016*, *Reforma prawa o postępowaniu administracyjnym*, Warszawa 2017, pp. 132–133; cf. also: A. Krawczyk, *Umowa administracyjna w kodeksie postępowania administracyjnego (propozycja regulacji)*, PiP 2015, 2, p. 112.

21 Cf. e.g. A. Kabat [in:] B. Dauter, A. Kabat, M. Niezgódka-Medek, *Prawo o postępowaniu przed sądami administracyjnymi*, *Komentarz*, Warszawa 2016, p. 84; T. Woś, *op. cit*., p. 102; J. P. Tarno, *Prawo o postępowaniu przed sądami administracyjnymi, Komentarz*, Warsaw 2012, p. 43; J. Drachal, J. Jagielski, P. Gołaszewski, [in:] *Prawo o postępowaniu przed sądami administracyjnymi, Komentarz*, R. Hauser, M. Wierzbowski (eds.), Warszawa 2021, p. 93.

22 Cf. e.g.: A. Kabat [in:] B. Dauter, A. Kabat, M. Niezgódka-Medek, *op. cit*., pp. 38–90; J. P. Tarno, *op. cit.*, pp. 24–51.

to a serious extent, a consequence of the number of appeals lodged with administrative courts – not only against administrative decisions, but also against other acts and actions indicated in Article 3 of the LPBAC, as well as the necessity to resolve jurisdiction- and competence-related disputes (Article 4 of the LPBAC).

One may wonder, without elaborating further on this issue due to the limitations of the study, whether such a wide range of complaints against decisions issued by public administration bodies is really necessary. The Central Database of Administrative Court Judgements includes 91491 appeals against decisions, of which 7246 concerned decisions issued in administrative proceedings.[23] It seems to me that, apart from decisions that close proceedings and resolve cases – which should obviously continue to be subject to appeal to the court, the contestability of the remaining decisions is at least debatable. One could consider extending the Law on Proceedings before Administrative Courts by incorporating a provision based on Article 142 of the Code of Administrative Procedure, which states: "Decisions which are not subject to complaint may be challenged only in an appeal against the decision." Thus, decisions issued in administrative proceedings, as a rule, should not be the subject of a separate appeal to the administrative court.

It may be added that the Act of 17 June 1966 on Enforcement Proceedings in Administration provides for the possibility to issue decisions against which a complaint may be lodged in 68 cases. It is possible to imagine a rather bizarre situation in which a complaining party would try to frustrate or obstruct the enforcement by making use of the option to file complaints against enforcement decisions and – later – appeals with the court. It is true that neither the lodging of a complaint nor the filing of an appeal to the court, as a rule, suspend the execution of the contested order, but it is a notorious fact that administrative bodies adopt a rather play-safe practice, so to speak. They often prefer to wait for the decision to become final rather than continue the enforcement proceedings. It would be appropriate to argue that the issuing of a new law on enforcement proceedings, the number of decisions that may be appealed against with a complaint be seriously reduced because the fact that the law currently in force needs to be replaced with a new act is indisputable from my point of view.[24]

The provisions of Article 5 of the LPBAC exclude five enumerated categories of cases from the jurisdiction of administrative courts. By adopting a certain approximation, they can be divided into two groups. The first of them, comprising the cases specified in items 1-3 of this Article, are those that can be classified under the

[23] Data as at 8 May 2024.

[24] Cf. W. Chróścielewski, P. Dańczak [in:] W. Chróścielewski, J. P. Tarno, P. Dańczak, *Postępowanie administracyjne i postępowanie przed sądami administracyjnymi*, Warszawa 2021, pp. 385–386.

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internal sphere of administrative activity (organisational and official superiority and subordination and refusal of appointment to a position (to serve). However, this exclusion does not apply to cases in which "the obligation to appoint or nominate results from the provisions of law." The second category of exemptions includes cases indicated in items 4 and 5 of this Article, concerning visas [with the exception of those indicated in Article 5(4)(a) and (b)] and low-level cross border traffic permits.

I am not sure if all these categories of exemptions should continue to exist. It is true that they are modelled on the provisions concerning the Supreme Administrative Tribunal, the regulations of Section VI of the Code of Administrative Procedure in force after the 1989 political changes in Poland, and the provisions of the Act on the Supreme Administrative Court. Yet, the practical aspects of the public life in our country in recent years question the rationality of excluding some of the categories of cases listed under Article 5 of the LPBAC from the jurisdiction of administrative courts.

It is enough to recall the issues related to the pathologies in the issuance of visas in the past years.[25] In this context, the exclusion of visa issuing cases from the review of administrative courts may not be the best idea. One should also take into account the fact that the repercussions of the aforementioned pathologies may result in a stricter visa policy, which sometimes leads to actions contrary to the law in force. Judicial review in such cases would be desirable from the point of view of the implementation of the constitutional principle of a democratic state of law.

Article 5(1) of the LPBAC, which excludes "cases arising from organisational superiority and subordination in relations between public administration bodies" from the jurisdiction of administrative courts also gives rise to doubts. In its decision of 7 September 2017, II OSK 1790/17,[26] the Supreme Administrative Court argued that a complaint filed with a provincial administrative court against the regulation of the Minister of Culture and National Heritage on the merger of state cultural institutions was inadmissible. The SAC held that the relationship between the museum and the minister establishing it falls into the category of internal relations. The organisational dependence of these entities only proves it. As a result, in the SAC's view, this leads to the necessity of qualifying these relations as those listed under Article 5.1 of the LPBAC. For the sake of full clarity of the argument, it needs to be added that by way of the aforementioned minister's regulation issued pursuant to Article 18.1 and 19.1-3 of the Act of 26 October 1991 on the Organisa-

25 https://orka.sejm.gov.pl/zapisy10.nsf/0/4A560923EA2A4DF6C1258ADD003C7E78/%24File/0001810.pdf

26 Lex no. 2348658; cf. also the decisions of the Supreme Administrative Court; of 24 January 2017, II OZ 1432/16 and of 5 April 2017, II OZ 299/17 – CDACJ.

tion and Conduct of Cultural Activity,[27] the Museum of the Second World War in Gdańsk and the Museum of Westerplatte and the War of 1939 were merged to become the Museum of the Second World War in Gdańsk.

In light of said provision, it seems reasonable to ask the question of whether Article 5(1) of the LPBAC may, in fact, be applied to the abovementioned relations. The relations between the minister and the cultural institutions established by the minister definitely fall into the category of relations "resulting from organisational superiority and subordination." However, I am not sure if a cultural institution such as a museum can be included in the category of "public administration bodies" – even in functional terms.[28] This matter would require an extensive and in-depth analysis of the provisions of the aforementioned Act of 26 October 1991, but this exceeds the scope of this paper and is not relevant to this discussion. For even if one were to accept the accuracy of the SAC's ruling that the ties linking the minister with the cultural institutions the minister created fall into the category of relations "arising from organisational superiority and subordination in relations between public administration bodies" within the meaning of Article 5(1) of the Act, there are still doubts as to the need to apply this provision to cultural institutions. Given the fierce political conflict we are dealing with in Poland, its application may lead to the fact that the political forces currently in power represented by public administration bodies will liquidate (change, reorganise) subordinate institutions whose activity, in their opinion, does not align with the state's current policy direction. In the case of the aforementioned museums, this would mean the historical policy promoted by the ruling camp. In the statement of reasons to the SAC's ruling of 7 September 2017, it was stated as follows: "as the Ombudsman stressed, if we accept the idea that the act of transforming or liquidating a cultural institution is an act of internal management, the public authority will be able to use this procedure to close any theatre that exhibits, in its opinion, a politically incorrect play, or to close to the public any museum exhibition that does not correspond to the currently promoted historical policy, and its decisions in this regard will not be subject to any external review." It seems to me that this quotation should trigger a deeper reflection as to whether it is really appropriate to apply a strongly expansive interpretation of the concept of "public administration body" in relation to Article 5(1) of the LPBAC.

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27 Journal of Laws of the Republic of Poland of 2012, item 406; currently in force: uniform text in the Journal of Laws of the Republic of Poland of 2024, item 87.

28 Cf. W. Chróścielewski, *Organ administracji publicznej w postępowaniu administracyjnym*, Warszawa 2002, p. 15 *et seq.*

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3. The acts, actions and inactions of the legislative and judicial authorities remain – and must remain – outside the scope of the review exercised by administrative courts. Article 1 § 1 of the Act of 25 July 2002 – Law on the Organisational Structure of Administrative Courts[29] entrusts these courts with the oversight of public administration activities in a clear, unambiguous manner. Also, according to Article 1 of the LPBAC, the provisions of this Act regulate the proceedings in cases covered by the "scope of public administration and in other cases to which its provisions apply by virtue of specific acts (administrative court cases)." Thus, only the review of public administration activities falls within the jurisdiction of administrative courts. These courts may oversee and review other cases only on the grounds of specific acts. And if there are no such specific acts, the acts, actions and inactions of the legislative and judicial authorities remain – and must remain – outside the jurisdiction of these courts.

For the above reasons, the legal view expressed by the Supreme Administrative Court in its judgement of 14 December 2022, III OSK 4968/21,[30] according to which the actions of the Marshal of the Sejm related to the transmission of a motion to hold an MP liable under civil law are actions from the realm of public administration and, consequently, the delay of this body in transmitting the motion to the relevant parliamentary committee is subject to the oversight and review of administrative courts.[31]

It is also impossible to agree with the standpoint included in the final ruling of the Provincial Administrative Court in Gdańsk of 15 December 2022, III SA/Gd 1173/21.[32] In the ruling, the court assumed it was competent to examine the appeal against the regulation of the president of the regional court concerning the immediate discontinuation of a judge's duties. The court in question recognised this order as an act referred to in Article 3(2)(4) of the LPBAC. I believe that it is completely wrong to regard the president of the regional court as a public administrative body and, consequently, to subject their actions to the review of administrative courts. Since we are dealing with two independent branches of the judiciary, subjecting the acts of common court authorities to the oversight of administrative courts is unfounded.[33]

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29 Journal of Laws of 2022, item 2492.

30 OSP 2023, issue 10, item 83 with my gloss published in the same issue of OSP – pp. 144–153.

31 More extensively on the matter: W. Chróścielewski, *Organ administracji publicznej a sądowa kontrola…*, p. 90 *et seq.*

32 CDACJ.

33 Cf. W. Chróścielewski, *Organ administracji publicznej a sądowa kontrola…*, p. 92 *et seq.*

4. The issue of subjecting the acts of the President of the Republic of Poland to the review of administrative courts has given rise to substantial controversy.

According to the constitutional principle of the separation of powers – Article 10(1) of the Constitution of the Republic of Poland, the terms "executive power" and "public administration" should be treated as synonyms.[34]

Executive power is exercised by the President of the Republic and the Council of Ministers, which manages the government administration (Article 146(3)), as well as ministers, who, according to Article 149(1) of the Constitution, head specific branches of public administration "or perform tasks assigned to them by the Prime Minister." Thus, since the President of the Republic of Poland is defined as a body of executive power, at least those powers that may be qualified as exercising public administration in objective terms should be subject to the oversight of administrative courts – unless constitutional provisions or provisions of ordinary acts would exclude the jurisdiction of administrative courts in such matters. The greatest differences emerge from the approach to the issue of admissibility of administrative courts' oversight and review of the acts of the President of the Republic of Poland regarding the appointment to the position of a judge,[35] or the President's inaction concerning the determination of the date of retirement of a judge.[36] The root of this controversy is the inconsistency of terminology with which we are dealing on the grounds of the legal regulations in force in Poland. Constitutional law and administrative law use different nomenclature in relation to the state bodies which do not perform legislative or judicial functions. The Constitution, in Article 10(1), uses the term "executive power," while acts in the field of administrative law (including the Law on Proceedings before Administrative Courts) use the term "public administration body." Without going into all the reasons for this state of affairs, I believe that the constitutional principle of a democratic state of law, which is fundamental to the Polish system, should make all manifestations of activity of state bodies subject to oversight and review by independent courts. In my opinion, the concept of discretionary, "completely autonomous, personal, fully subjective powers of the President of the Republic of Poland, i.e. to the so-called prerogatives,"[37] which has

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34 J. Zimmermann, *op. cit.*, p. 17; cf. also e.g. E. Ochendowski, *Prawo administracyjne, Część ogólna*, Toruń 1999, p. 19, who argued that "public administration in the substantive (objective) sense is the state's activity the subject of which includes administrative matters or, in other words, tasks and competences within the scope of executive power."

35 Cf. e.g. decisions of the Supreme Administrative Court: of 9 October 2012, I OSK 1872/12, I OSK 1873/12; I OSK 1874/12; or of 7 December 2017, I OSK 857/17, I OSK 858/17 – available in the Central Database of Administrative Court Judgements (CDAJ) – https://orzeczenia.nsa.gov.pl/cbo/query.

36 Cf. judgement of the Supreme Administrative Court of 30 September 2020, II GSK 295/20.

37 Cf. resolution of the Supreme Administrative Court of 9 November 1998, OPS 4/98, ONSA 1999, no. 1, item 6; cf. also A. Frankiewicz, *Kontrasygnata aktów urzędowych Prezydenta RP*, Warszawa 2004, p. 14.

set the foundation for the rulings of administrative courts on the inadmissibility of judicial review of presidential acts concerning the appointment to the position of a judge, has no rational justification in the 21st century. However, it is a fact that cannot be ignored. And, unfortunately, this is to the detriment of the principle of the tripartite separation of powers.

5. The literature on the subject includes occasional, tentative, and indirect references to the possibility of establishing separate courts in Poland to handle tax cases. A. Krawczyk points to the reform of the administrative courts in Austria from the beginning of 2014[38], which separated the financial judicature in organisational and procedural terms. She believes that this prompts reflections "on the practicality of our solutions in this regard, adopting uniform principles of judicial review of decisions issued under different procedural regimes."[39] The trend towards the separation of tax law from the framework of administrative law, and – perhaps in the future – of financial judiciary from the structure of administrative courts[40] was strongly articulated in the resolution of the Supreme Administrative Court of 27 March 20023, I FPS 2/22.[41]

I believe that there is currently no need for a separate tax or financial court in Poland. The differences between the tax proceedings regulated in the Tax Ordinance and the general administrative proceedings, whose significance should not be exaggerated, do not – and cannot – constitute sufficient grounds for the separation of a tax judiciary. The fact that Austria's legislation, included in particular in the law of 1925,[42] constituted a model for Polish laws on administrative procedure and judicial review and oversight of administration does not justify the adoption of revolutionary solutions in the field of judicial review of administration – especially the judicial review of administrative decisions in Poland – either. I do not see the need to overturn the existing – and quite efficient – structure of the administrative judiciary just because it has been modified in other countries. It is necessary to bear in mind, by the way, that tax cases are dealt with by one of the three

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38 Verwaltungsgerichtsberkeits – Novelle 2012, BGBl. 2012 issue 5.

39 A. Krawczyk, *Sądowa kontrola decyzji podatkowych sprawowana przez Federalny Sąd Finansowy w Austrii* [in:] *Idea kodyfikacji w nauce prawa administracyjnego procesowego, Księga pamiątkowa Profesora Janusza Borkowskiego*, Warszawa 2018, pp. 165-166; cf. also J. Małecki [in:] A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warszawa 2013. Available from: https://sip.lex.pl/#/monograph/369301384/273/gomulowicz-andrzej-malecki-jerzy-podatki-i-prawo-podatkowe?keyword =%22odr%C4%99bne%20s%C4%85downictwo%20finansowe%22&cm=SREST (accessed: 5.06.2024).

40 Such a proposal was, however, not formulated explicitly in this resolution.

41 ONSAiWSA 2024 issue 1, item 1; cf. the critical gloss to this resolution, especially regarding the emanci pation of tax law, by A. Krawczyk – "Kwartalnik Prawa Podatkowego" 2023, 3, pp. 159–160.

42 Das Bundesgesetz vom 21 Juli 1925 über das allgemeine Verwaltungsverfahren, Bundesgesetzblatt no. 274.

chambers of the Supreme Administrative Court – the Finance Chamber, and provincial administrative courts also have departments dealing with this category of cases.

6. Proceedings in social insurance cases may be defined as hybrid proceedings. In the case of first-instance bodies, which will most often be the bodies of the Social Insurance Institution, the proceedings are conducted on the basis of the provisions of the Code of Administrative Procedure, while the appeal proceedings are conducted, in most cases, on the basis of the provisions of the Code of Civil Procedure. This is because in accordance with Article 181 of the Code of Civil Procedure, the appeal bodies in these cases are determined by separate regulations. The provision of Article 83(2) of the Act of 13.10.1998 on the Social Security System,[43] which is exactly one such "separate regulation," reads as follows:"Decisions of the Social Insurance Institution may be appealed to the competent (common – W. Ch.) court within the time limit and in accordance with the rules set out in the provisions of the Code of Civil Procedure." Only the President of the Social Insurance Institution's decision on the granting of a benefit by way of exception issued pursuant to Article 83 of the Act of 17 December 1998 on Retirement Pensions and Other Pensions from the Social Insurance Fund[44] and the Prime Minister's decision issued pursuant to Article 82 of the same Act, granting the so-called "special benefit" are not subject to appeal to a common court. As a result, these decisions, subject to Article 52 § 3 of the LPBAC, are subject to the jurisdiction of administrative courts pursuant to Article 3 § 2 item 1 of the LPBAC.

The Supreme Court, in its judgement of 09.02.2010, I UK 151/09,[45] emphasised that court proceedings conducted before common courts in social security-related cases focus only on substantive law defects, while the court considers procedural defects when they "disqualify the decision to the extent that they deprive it of the features of an administrative act as the subject of an appeal." A similar view was expressed in the judgement of the Supreme Court of 02.12.2009, I UK 189/09.[46] Such a standpoint can be considered as discriminating against the administrative procedure and as treating this procedure as an instrument of secondary or tertiary significance.

For years, there have been proposals in the literature dealing with the subject to eliminate the indicated dualism by transferring all insurance cases to administrative

43 Journal of Laws of the Republic of Poland of 2024, item 497.

44 Journal of Laws of the Republic of Poland of 2023, item 1251.

45 Lex no. 585708.

46 OSNP 2011, issues 13–14, item 187.

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courts.[47] It is emphasised that insurance cases are administrative cases, and that they have been given the status of civil cases only in a formal sense – by way of a decision of the legislator.[48] A. Góra-Błaszczykowska aptly points to the enormous financial and organisational costs that would have to be incurred in order to transfer these cases to be examined by administrative courts. At the same time, she reports that in 2017 there were 130 thousand such cases submitted to common courts, but in 2002, this number was 300 thousand. In 2017, 72426 appeals were filed with provincial administrative courts.[49] Social insurance-related cases would dominate the other categories of cases examined by administrative courts. Nevertheless, it would be appropriate in such a case to allow administrative courts to conduct evidentiary proceedings and adjudicate on the merits. The cited author is in favour of transferring insurance cases to the jurisdiction of administrative courts "in the long run."[50] I believe, however, that such a solution has no rational grounds for several reasons. Firstly, social insurance cases would become the majority of cases dealt with by administrative courts. Secondly, there would be, as has already been argued, the need to conduct evidentiary proceedings in these cases, which is contrary to the current model of administrative court proceedings. Third – and most importantly, social insurance courts now issue reformatory rulings. This solution aims to accelerate and simplify the proceedings. However, it is difficult to reconcile with the principle of the tripartite separation of powers. In light of the importance of the issues under consideration and the real need to conclude the proceedings as quickly as possible, the legislator made a certain concession here for social insurance cases. Adapting such a solution to administrative court proceedings and adjudication on the merits by administrative courts on a wider scale would constitute administrative acts – i.e. an encroachment on the competences of the executive.[51] To carry out such a major reorganisation of the judiciary just to meet the requirements of "legal purism" – to transfer the jurisdiction of all cases to a single court – does not seem reasonable. Besides, there are many opponents of such

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47 Cf. E. Warzocha, *Postępowanie administracyjne i sądowe w sprawach emerytalnych – w świetle wyników badań ankietowych,* Warszawa 2009, pp. 20–21; A. Góra-Błaszczykowska, *O możliwości przekazania spraw z zakresu ubezpieczeń społecznych do wyłącznego rozpoznawania sądom administracyjnym – głos w dyskusji,* "Ubezpieczenia Społeczne. Teoria i Praktyka" 2021, 2, p. 1 *et seq.*

48 Cf. W. Broniewicz, A. Marciniak, I. Kunicki, *Postępowanie cywilne w zarysie*, Warszawa 2016, p. 40; E. Warzocha, *op. cit*., p. 3.

49 A. Góra-Błaszczykowska, *op. cit*., pp. 7–9.

50 *Ibidem*, p. 14.

51 Cf. A. Kabat [in:] B. Dauter, A. Kabat, M. Niezgódka-Medek, *op. cit*., p. 34 and R. Hauser, A. Kabat, *Właściwość sądów administracyjnych*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2004, 2, p. 25 *et seq.*

a transfer of social insurance cases among recognised of legal scholars and researchers.[52]

7. It is clear that there is a direct causal link between the scope of jurisdiction of administrative courts and the length of time it takes to hear both an ordinary appeal and a last resort appeal.

In proceedings before provincial administrative courts, the waiting time for a resolution is over 4 months. However, in second-instance proceedings, the situation is much worse, with 43.06% of cases being examined within 12 months and 58.37% within 24 months.[53] A reason to be rather optimistic is that 2023 was the first year in which the Supreme Administrative Court recognised more last resort appeals than received in that year,[54] which means that there is a chance that the time limit for handling cases by this court will gradually shorten.

Irrespective of the organisational measures employed within administrative courts (increasing the number of cases in the judges' offices, abandoning the mechanism of all judicial officers, e.g. deputy chairs of adjudicatory departments or members of the SAC Adjudication Office, having a reduced number of sessions, examination of a part of cases in closed sessions), other solutions could also contribute to the acceleration of the recognition of administrative court cases.

One such solution may involve increasing the amount of complaint/appeal fees. It seems necessary to recall that under Article 13(3) of the SAT Act of 1922, the amount of the fee on a complaint/appeal depended on the value of the matter of the dispute, just as it does now. However, the amount of this fee on "complaints and appeals with an unspecified value of the matter of the dispute" was determined by the Tribunal, and it ranged from PLN 40 to PLN 200. The average weekly wage of a labourer at that time was around PLN 30.[55] Pursuant to Article 92 of the President of the Republic of Poland's Decree on the Supreme Administrative Tribunal of 1932, fees were paid in the same amount as before. The average salary in the 1930s in Poland was approximately PLN 250 per month.[56] At present, the fixed fee

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52 Cf. e.g. W. Sanetra, *Właściwość sądów powszechnych (sądów pracy i ubezpieczeń społecznych) i sądów administracyjnych w sprawach z zakresu ubezpieczeń społecznych* [in:] M. Błachucki and T. Górzyńska (eds.). *Aktualne problemy rozgraniczenia właściwości sądów administracyjnych i powszechnych*, Warszawa 2011, p. 83.

53 Informacja o działalności sądów administracyjnych w 2023 r., p. 22. Available from: file:///C:/Users/wchro/Downloads/Informacja_NSA_za_2023_rok_do_druku%20(1).pdf

54 Speech by the President of the Supreme Administrative Court at the annual General Assembly of Judges of the Supreme Administrative Court on 15 April 2024, p. 4. Available from: https://www.nsa.gov.pl/wydarzenia-wizyty-konferencje/doroczne-zgromadzenie-ogolne-sedziow-nsa-informacja-o-dzialalnosci-sadow-administracyjnych-w-2023-roku,news,24,1052.php

55 https://niepodlegla.gov.pl/o-niepodleglej/statystyka-w-ii-rzeczypospolitej/

56 https://historia.org.pl/2018/07/22/ile-zarabiano-i-co-mozna-bylo-za-to-kupic-w-przedwojennej-polsce-pensje-i-ceny-w-ii-rp/#google_vignette

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paid in cases not covered by a proportional fee, pursuant to § 2 section 3 of the Regulation of the Council of Ministers of 16 December 2003 on the Amount and Detailed Rules for Collecting the Fee in Proceedings before Administrative Courts,[57] depending on the subject-matter specific category of cases, ranges from PLN 200 to PLN 1,000, with the fee for a last resort appeal being half of that amount (§ 3 of that Regulation). Therefore, there is no doubt that the costs incurred by the complaining party in connection with initiating administrative court proceedings are now significantly lower than they were during the Second Republic of Poland.

In addition, it is important to bear in mind that parties to proceedings conducted before the Supreme Administrative Tribunal were legally represented by attorneys (Article 20, sentence 1 of the SAT Act and Article 54(1) of the SAT Regulation). In my opinion, it would be appropriate to consider returning to this solution, given that the judicial review of administration is not a review of the expediency of its actions, but only a review of its legality. Thus, administrative courts would handle legal disputes over the lawfulness of acts, actions and inaction (including delays) of public administration. The participants of such disputes – parties to proceedings – should, as a rule, be represented by professionals. And the same solution should be adopted in administrative proceedings the subject of which is to revoke a final administrative decision affected by disqualifying defects. This could change the currently prevailing – and completely wrong – belief that these procedures are *sui generis* additional manners of complaining or appealing against decisions.

Secondly, the adjudication of cases by administrative courts could be accelerated to some extent by reducing the volume of the statements of reasons currently drawn up as part of court decisions. Currently, these documents span over more than a dozen of pages even in cases of not the greatest gravity, so to speak. Judges often tend to write them like scientific papers. Interestingly, law journals have actually been able to impose a maximum word count of scientific papers on contributing authors. It seems that the Supreme Administrative Court College could make some attempts to follow suit.[58]

8. In a democratic state under the rule of law, all manifestations of the activities of public authorities should be subject to judicial review. However, Article 177 of the Constitution of the Republic of Poland stipulates that "common courts shall implement the administration of justice concerning all matters save for those

[57] Journal of Laws of the Republic of Poland of 2021, item 535; in his speech at the General Assembly of the Supreme Administrative Court on 15 April 2024, the President of the Supreme Administrative Court said that he had requested the Prime Minister to increase these fees.

[58] It could also be suggested, by the way, that there is no need to point to theses and legal views that have already been presented by other court judicial panels, which is relatively often the case.

statutorily reserved to other courts." Thus, expanding the scope of judicial review by administrative courts must come at the expense of limiting the scope of the common courts' jurisdiction. And this conclusion applies to both increasing the scope of jurisdiction of administrative courts in a statutory manner, and to attempts to bring acts, actions, or inactions of other authorities – such as legislative bodies (inaction of the Marshal of the Sejm) or judicial bodies (regulation of the president of a common court) – within the jurisdiction of these courts. It is important to realise that the increase in the scope of jurisdiction of administrative courts translates, as already mentioned, into an increase in the number of complaints and appeals received by them, and consequently – into longer times for the courts to examine them. The organisational efforts of the court administration to increase the number of cases handled by the courts have their natural limitations – for example, the limited number of full-time judges and court administration staff, as well as of courtrooms. Therefore, an inevitable consequence of expanding the jurisdiction of administrative courts without significantly increasing the amount of funding must be an increase in the waiting time for these courts to hear cases. According to Article 7 of the LPBAC, in turn, an administrative court should take steps to resolve cases quickly, without undue delay.

Expanding the jurisdiction of administrative courts without a significant increase in funding for their operation must inevitably involve longer proceedings.

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