Administrative Judiciary

Administrative Judiciary

edited by András Patyi

Wydawnictwo Instytutu Wymiaru Sprawiedliwości **Warszawa 2023**

Polsko-Węgierska Platforma Badawcza 2021
Lengyel-Magyar Kutato Platform 2021
Polish-Hungarian Research Platform 2021

REVIEWERS *prof. dr hab. Marcin Kamiński*
dr hab. Agata Kosieradzka-Federczyk, prof. UKSW

PROOFREADING *Małgorzata Przybyłowicz-Bandeira*

TYPESETTING AND COVER DESIGN *Tomasz Smołka*

ISBN 978-83-67149-29-7

WYDAWNICTWO INSTYTUTU WYMIARU SPRAWIEDLIWOŚCI
ul. Krakowskie Przedmieście 25, 00-071 Warszawa
SEKRETARIAT tel.: (22) 630 94 53, e-mail: wydawnictwo@iws.gov.pl

BOUND AND PRINTED BY *"Elpil", ul. Artyleryjska 11, 08-110 Siedlce*

Table of Contents

Editorial preface

The effective judicial review of administrative decisions is an indisputable integral part of a constitutional state (i.e. a state under the rule of law). Administrative justice has been under permanent pressure for reforms in the last decades both in Hungary and Poland.

The structure, the powers and the procedure of administrative courts is under constant development. Therefore, the Research Team named as "*The Reform of the Administrative Judiciary*" in the Polish Hungarian Research Platform 2021 aimed to present the actual and crucial dilemmas of administrative judiciary regarding Hungary and Poland with suggestions *de lege ferenda*. András Patyi's contribution examines the theoretical and historical aspects and the realisation of administrative justice in Hungary, highlights the challenges regarding the judicial interpretation of the administrative law. The author also focuses on the impact of the Fundamental Law (the Constitution) on administrative justice and presents the importance of the uniformity complaint procedure of the Curia which is a new tool for ensuring the uniformity of law in Hungary. Noémi Suri's paper gives a comprehensive overview of the system of legal remedies in the Hungarian Code of Administrative Court Procedure and presents some anomalies regarding the application of the Code through empirical research. Przemysław Ostojski's paper verifies with comparative analysis the thesis that due to the

jurisprudence of the Court of Justice of the European Union, in the area of the EU Member States there is harmonization in the field of judicial powers of administrative courts. This also applies to the reformatory judgments of courts. Rafał Wielki in his paper draws attention to the issues related to the use of evidence in administrative court proceedings. Several other problems such as whether the general theory of evidence can be applicable in administrative court proceedings or whether the administrative judiciary come into contact with electronic evidence are also being discussed. This last topic is also related to the next paper, in which Mateusz Pszczyński comprehencivly analyses the questions related to digitalisation and automatisation of the Polish administrative judiciary. AI and digitalisation of administrative justice is a hot topic in today's society, surely we are going to hear a lot about this subject in the upcomings years.

It is understandable that the authors with different professional and theoretical background focus on and discuss administrative justice from different points of view, but in all of the papers of the book one topic is undisputable, the need for an effective administrative judiciary. Consequently, this book aims at providing help to improve administrative justice both in Poland and in Hungary.

October 5th, 2022

András Patyi
Scientific editor

PROF. DR. ANDRÁS PATYI
University of Public Service

Precedents, legal certainty, and predictability of the law in the Hungarian administrative judiciary

1. Introduction

The rule of law is one of the common values for all the Member States of the European Union. In Hungary it is considered as the backbone of the definition of a constitutional state as well. It is important to note that according to the Council of Europe the effective judicial review of administrative decisions is an integral part of a state under the rule of law[1].

Furthermore, administrative judiciary constitutes an indisputable part of the constitutional identity[2]. The judicial review of all the administrative activities requires the application, including the interpretation of administrative law, which has a significant

[1] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee, and The European Committee of the Regions, 2020 Rule of Law Report The rule of law situation in the European Union, Brussels 2020.

[2] 22/2016. (XII. 5.) Decision of the Constitutional Court of Hungary. See: A.Zs. Varga, *Constitutional Identity as Interpreted by the Council of Europe and the European Union – Conflict of Laws – Conflict of Courts*, [in:] *2016 Hungarian Yearbook International Law & European Law*, 2016, pp. 385–405; A.Zs. Varga, *Role of Constitutional Courts in the Protection of National/Constitutional Identity*, [in:] *2018 Hungarian Yearbook International Law & European Law*, 2018, pp. 333–340.

constitutional importance, as the control over the administration occurs through the application and the interpretation of the administrative law.

In Hungary, important regulations affecting the entire administrative judiciary have been enacted in recent years. First, the Fundamental Law of Hungary (therein after: Fundamental Law) was entered into force in 2012, which brought changes in the scope of the constitutional review and introduced the real constitutional complaint procedure of the Constitutional Court. The formulation and introduction of a new Code of Administrative Court Procedure in 2018 also ushered in major changes. Furthermore, the idea of a new administrative court system was suspended in 2020. The uniformity complaint procedure of the Curia was entered into the legal system in 2020. Finally, the Chapter also recognizes the contemporary challenges arose regarding the interpretation of administrative law, such as great latency in interpretation[3], and dilemmas regarding the hierarchy of interpretation of law.

Regarding the above, it is inevitable to analyse the entire system in its context. Doing so, the Chapter gives a comprehensive analysis of the current questions on Hungarian administrative judiciary by first presenting the theoretical and historical aspects of the administrative justice in Hungary. Then, it examines the impact of the Fundamental Law on administrative justice, including the constitutional complaint procedure. The Chapter also draws attention to the importance of the new tool for ensuring the uniformity of law, the uniformity complaint procedure of the Curia. Finally, in the light of the above, it highlights the challenges regarding the judicial interpretation of the administrative law.

[3] However, there are a great number of registration decisions, a lot of administrative case stay hidden from the superior authorities.

2. Theoretical and historical issues of administrative justice in Hungary

Administrative justice has never been the "darling" of Hungary's legal and public administration system. Laws regarding the administrative judiciary have always been changing over the centuries, for this reason various subjects have been in the centre of administrative law discourses. This subchapter aims to facilitate the understanding of contemporary administrative judiciary, reflecting the main theoretical and historical issues from the 19th century to the present.

2.1. ADMINISTRATIVE JUSTICE BETWEEN 1884 AND 1949, AND ITS CONSTITUTIONAL SIGNIFICANCE

The proposal of the seventh amendment to the Fundamental Law referred to the former Administrative Court as an achievement of Hungary's historical Constitution. It is justified to review the circumstances under which the **Administrative Court** (which was disbanded in 1949 without any meaningful justification) had been established, along with its characteristics, i.e. its powers, organisation and **constitutional** significance. Back then, **organisationally separate** administrative justice was in place in Hungary, even though it was dispensed by a single-instance court (of a supreme court's status). This situation resulted from an **incomplete organisational setup**[4].

2.1.1. Emergence of administrative justice in the late 19th century

The creation of the Royal Hungarian Administrative Court was preceded and accompanied by two decades of very fruitful discussions

[4] Contemporaries were also aware of the incomplete organisation of the Administrative Court. See: *A Közigazgatási Bíróság reformja titled presentations at the Administrative Section of the Hungarian Bar Association*, "Jogászegyleti Szemle" 1947, No. 2, p. 58.

in the legal profession[5]. During 50 years of operation, the court formulated extensive legal practices[6]. Hungary's administrative justice actually emerged in **two phases** in the last quarter of the 19th century. The **first phase** involved the establishment of a Financial Administrative Court in 1883, and the start of its actual operation on **27 February 1884**[7]. This date, if any, could be regarded as the **day of Hungarian administrative justice**. The second (completion) phase was marked by the creation of the Royal Hungarian Administrative Court. Understandably enough, it was the establishment and launch of these two institutions that generated the above-mentioned lively professional debates. Contemporary legal literature provided in-depth analyses of the bills related to financial justice and attempted to discuss the principles and general theses of the upcoming administrative court's operation. Győző Concha's ground-breaking work[8] published in 1877 played a key role in laying the theoretical and scientific foundations of administrative justice.

The roots of public law in Hungary as a modern state go back to the times of the anti-Habsburg revolution in 1848, as a sort of rudimentary administrative (or rather public law) justice can be

[5] In the context of the establishment of the Administrative Court see the following selected scholarships: I. Stipta, *A közigazgatási bíráskodás előzményei Magyarországon*, "Jogtudományi Közlöny" 1997, No. 3, pp. 117–125; G. Schweitzer, *Közigazgatás – igazságszolgáltatás – jogállamiság, avagy a közigazgatási bíráskodás kezdetei Magyarországon*, "Állam- és Jogtudomány" 1996–1997, No. 1–2[98], pp. 21–35; A. Patyi, *Közigazgatási bíráskodásunk modelljei. Tanulmány a magyar közigazgatási bíráskodásról*, Budapest 2002, pp. 18–33.

[6] The creation and functioning of the Administrative Court have been accompanied by more than a hundred academic works and countless publications, of varying quality, of course. The scholarships include both studies and comprehensive, systematic works. When the Administrative Court first began its work, three complete commentaries were published, describing and commenting on both procedural and jurisdictional law, and in the 1930s and 1940s, three editions were published of the two-volume commentary on the Administrative Court's case-law, which ran to 1 500 and 1 600 pages.

[7] According to István Stipta, the newly appointed judges held their first session on 27 February 1884, followed by 98 more deliberations that year. See: I. Stipta, *A pénzügyi közigazgatási bíróság archontológiája*, "FORVM Acta Juridica et Politica" 2017, vol. VII, No. 1, Szeged, p. 104.

[8] G. Concha, *A közigazgatási bíráskodás az alkotmányosság és az egyéni joghoz való viszonyában*, Budapest 1877.

observed in the definition of the functions of a planned "*state council*", as well as in the partial public judiciary functions of counties' "*central panels*"[9]. But the methods of justice were actually defined once the principle of the separation of state powers was transposed into Hungary's public law[10]. (That is when judiciary functions were separated from public administration at all levels through section 1 of Act IV of 1869). The act on courts of law forbade courts and public administration entities to intervene in each other's work (section 1 of Act I of 1869), but certain subsequent laws did allow for challenging administrative decisions before a court[11].

Three **basic** and interconnected **questions** must be answered when organising administrative justice and a court serving that purpose. The first issue involves the organisational quality and legal standing of the court; the second is related to the notion and characteristics of administrative lawsuits; and the third involves the powers of the judges, i.e. what cases the judges should handle (subjective scope), and what decision-making authorisations the court should have (concerning the contents)[12]. These three questions are still valid today, with the additional need for comprehensive and effective legal protection.

Defining a court's **jurisdiction** has always been a much-discussed issue, both in jurisprudence and in legislation. This matter is not limited to the difference between two logical methods, i.e., whether the cases to be brought before a court should be exhaustively listed or defined more generally, based on certain principles. The latter solution means that the cases excluded from a court's jurisdiction must still be listed (negative listing). The second issue concerns the scope of the court's powers, i.e., the type of administrative acts (decisions and measures) that may be brought before the court, and whether those administrative acts can be reviewed in case of (objective and

[9] K. Némethy, *A közigazgatási bíróságokról szóló törvény magyarázata*, Budapest 1897, p. 4.

[10] J. Martonyi, *Az ötvenéves közigazgatási bíróság*, "Városi Szemle" 1947, vol. XXXIII, p. 188.

[11] For example, Legislative Article III of 1869 on the census.

[12] F. Toldi, *A közigazgatási határozatok bírói felülvizsgálata*, Budapest 1988, p. 17.

substantive) legal violations only, or also in case of a mere violation of a person's interests. This question could be rephrased by asking about the extent of protection provided by administrative courts. Also, it should be decided whether the court's powers cover decisions made via discretionary deliberation. The third question is what powers the court should have in terms of adjudicating the administrative act reviewed. Should the court merely establish any legal violation (*constatatio*)? Or should it also annul the unlawful decision (*cassatio*)? Or may the court also make a substantive decision instead of the administrative entity concerned (*reformatio*) in case of an unlawful decision?[13]

In legal literature and debates, there have been advocates of the English-type solution where cases are assigned to "ordinary" courts authorised to amend administrative decisions[14], French-style justice within the public administration system[15], and the Austro-German system of dedicated administrative courts[16]. Hungary's contemporary jurisprudence was rather divided concerning the types of administrative decisions to be assigned to an upcoming administrative court, and also regarding the court's decision-making leeway[17]. But it was not due to these divisions that the eventually

[13] See: J. Martonyi, *A közigazgatási bíráskodás és legújabbkori fejlődése*, Budapest 1932, pp. 31–32.

[14] Mainly G. Concha, *A közigazgatási bíróságokról szóló törvényjavaslat*, "Jogtudományi Közlöny", Budapest 1894.

[15] I. Kuncz, *Közigazgatási bíráskodás*, "Jogtudományi Közlöny" 1878, No. 21.

[16] See: K. Némethy, *A közigazgatási bíróságokról szóló törvényjavaslat. Válasz Concha Győző egyetemi tanár bírálatára*, Budapest 1894.

[17] In favour of positive taxation were Károly Némethy and Károly Kmety. Kmety, however, emphasised the importance of ensuring reformatory jurisdiction. Concha and Lánczy, who disagreed on the question of organisation, were on the same side in relation with the definition of jurisdiction by general definition. Zsigmond Reichard proposed a general definition of jurisdiction and annulment (cassatorius) jurisdiction. According to him, the courts are, moreover, not only because of their function within the administrative judiciary, but also because of their procedure, unsuitable for the substantive disposal of administrative cases. The procedural forms are more binding, responsibility to the superior authority is completely absent, as is the appropriate organisation.

adopted organisation and jurisdiction differed from all solutions listed in legal literature[18].

2.1.2. Main characteristics of Hungary's Royal Administrative Court

After thorough legal preparations and a lengthy legislation procedure, the Royal Administrative Court (hereinafter: the Court) was established via Act XXVI of 1896 as a single-instance, central administrative court at the *top of the judicial hierarchy*, *separated* from both public administration and the ordinary judiciary system. Its jurisdiction covered the administrative disputes exhaustively listed in the above-mentioned Act[19]. The Court's jurisdiction was extended by other laws, and possibly even by government decrees. It was authorised to assess the complaint underlying a procedure by evaluating both legal and factual issues i.e., it was not bound by an obligation to determine administrative facts only. The Court's ruling was *meritorius and reformatorius* (i.e., a substantive and final decision in the matter), and it was only in exceptional cases that the ruling was limited to annulling the unlawful administrative decision. The court was authorised to decide on the infringement of both *automatic rights* (entitlements) and *legal regulations*. The Court did not directly *review* the legislative activities of public administration, but its jurisdiction included the review of individual measures taken by the highest authorities (ministers). A *complaint* that launched a Court procedure usually *suspended* the implementation of the purportedly unlawful administrative decision or measure. The Court's procedure precluded any remedy of the same complaint by a higher administrative body, including *ex officio* (supervisory) measures by such bodies[20]. Each case was adjudicated by a **panel**, which had five members by default, or three members in case of exceptional powers.

---

[18] F. Toldi, *op. cit.*, p. 43.

[19] The above-mentioned difference of opinions on how to define jurisdiction (principle nature – taxonomy) seemed to disappear after the turn of the century.

[20] See: K. Kmety, *A magyar közigazgatási jog kézikönyve*, Budapest 1907, pp. 204–206.

The majority of a panel's members were always qualified judges, while the rest were arbitrators selected from public administration officials (3 to 2 or 2 to 1 member respectively).

The history of this **single-instance central court** was intertwined with reform attempts[21]. Despite continuous efforts, no lower-level administrative courts were established until the 1949 abolishment of the Court, and the central Administrative Court's jurisdiction was never defined in principle, based on a general authorisation. Nevertheless, the Court's constitutional significance increased steadily over the 52 years of its operation. Act LX of 1907 was one step in this process, when the Court was authorised to protect the rights of local self-governments by annulling decisions by the central government and certain ministries based on so-called "guarantee complaints" filed by self-governments, in case those decisions were found to violate a local self-government's rights. In the justification of that act, the Administrative Court (which has been in operation for 11 years at that time) was acknowledged as a **true constitutional court**[22]. The Court gained another constitutionally significant power in 1929, when it was authorised to review and annul a ministerial decree disbanding a council of local representatives. (In deviation from the current Constitutional Court's authorisation to issue an opinion on disbanding a council of local representatives, the Administrative Court substantively decided on the *lawfulness* and the *grounds* of the disbanding decision.) Act XXVI of 1925 marked another milestone in the steady extension of the Court's jurisdiction, when the Administrative Court was "exclusively and fully" entrusted with handling *election-related* complaints.

2.1.3. Protecting the Constitution

Several contemporary analysts emphasised the Administrative Court's role in the *protection of the Constitution*, and its *nature*

[21] See: A. Patyi, *Közigazgatási bíráskodásunk modelljei*, Budapest 2002, pp. 51–59.

[22] Legislative Articles of 1907 with notes made by Dezső Márkus.

as a public law entity beyond public administration[23]. Firstly, this protecting role was granted by the Administrative Court's jurisdiction, as judicial legal protection against the public administration system was (is and will be) constitutionally significant in itself. Even though that institutional legal protection was limited in scope, it played a crucial role in **subordinating public administration to the law,** and in establishing the rule of law. As to its nature and role, administrative justice was considered by contemporary analysts as "more than simple justice *because it also secures the Constitution*"[24].

However, the Administrative Court **did not operate as a Constitutional Court in the modern sense**. Its primary responsibility was not to maintain the lawfulness (legality) of the legal system itself, or to enforce the constitutional norms applicable to the legal system[25]. The Administrative Court could not *erga omnes* establish the invalidity of a legal norm in general. The Court was authorised to expressly assess the *validity of norms* concerning local municipal rights only, and solely concerning ministerial acts. It could only annul decrees that violated municipal rights stipulated by law. In view of its primary objective and result, this authorisation was not a review of legal norms but rather the protection of municipalities' rights from acts by the government and its entities, regardless of the form of those acts; the Administrative Court's review function was not limited to decrees but extended to decisions and measures

[23] Endre Puky also suggests a change of the name of the Court, in line with our Hungarian tradition, it should be called the "Public Law Court". See: E. Puky, *A negyven éves közigazgatási bíróság múltja és jövője*, Budapest 1937, p. 9.

[24] E. Puky, *A szent korona és a közigazgatási bíráskodás*, Budapest 1941, pp. 19–20.

[25] According to Bragyova, a court can be called a constitutional court that "decides on the validity of a legal norm on the basis of its permissibility in the legal system" and "the rules of the legal system give the power to invalidate the (illegal) norm that is not allowed". "This authorisation by the legal system gives the Constitutional Court a different role (function) from that of an "ordinary" court, since ordinary courts cannot decide on the validity of a norm, only on its applicability. See: A. Bragyova, *Az alkotmánybíráskodás elmélete*, Budapest 1994.

as well. But the Court could not constitutionally review laws, either concerning procedures (jurisdiction) or substance[26].

On the other hand, a kind of **limited, indirect normative review** was inherent in conventional administrative cases (not aimed at the protection of municipal autonomy) as well, because the Court could decide, as a *preliminary question,* about the validity of a legal norm applicable in the lawsuit. A decree found to be unlawful could be disregarded when ruling in the substance of a case. So, the lawfulness of decrees was not the expressly stated subject of the proceeding; no such petition was acceptable. And the Court could review the lawfulness of a norm in the specific cases within the Court's jurisdiction only, but not generally. It was a grave deficiency that the Administrative Court's decisions had a strict *inter partes* effect, i.e., a decision did not oblige the affected administrative body to refrain from the same legal violation in similar future cases[27]. Thus, a decree that the Court did not apply because of its unlawfulness remained in effect and resulted in further unlawful legal relations. The Court had no opportunity or tool to prevent such a decree from being used for making further unlawful decisions[28]; the Court had to watch idle as the government or a minister exceeded their authorisation to pass decrees, or violated the relevant authorising act[29]. But despite these limitations, the Court could exercise its constitutional function[30]. Gábor Schweitzer, on the other hand, makes a different assessment of the weight of the review of legal norms (and thus of the Court's constitutional significance) by emphasising that the Administrative Court was, despite its name, not an organic part of Hungary's judicial system. "Operating between relatively

[26] According to Article 19 of Act IV of 1869, the judge "may not question the validity of laws duly promulgated".

[27] J. Martonyi, *Az ötvenéves…*, p. 196.

[28] As István Egyed notes, "a significant proportion of complaints to the Court is due to the total indifference to judicial decisions even of the higher administrative authorities". See: I. Egyed, *Az alsó fokú közigazgatási bíráskodás,* Budapest 1916, p. 11.

[29] A. Márffy. *Tallózás a Közigazgatási Bíróság teljes ülési jegyzőkönyveiben*, [in:] J. Csorba (ed.), *A Magyar Közigazgatási Bíróság ötven éve* (*1897–1947*), Budapest 1947.

[30] *Ibidem*, p. 354.

narrow limits, it essentially dispensed public law, but notably not constitutional law, by reviewing the lawfulness of the operation of public administration upon request"[31].

2.1.4. "Interpreted" powers of a Constitutional Court

For the effective enforcement of constitutionality and the rule of law, the Court intended to operate as a true Constitutional Court by utilising its above-mentioned, very limited, incidental and indirect review powers. At the general assembly of all judges in 1947, the administrative judges claimed a *true Constitutional Court's powers*. According to a "assembly agreement" accepted at that meeting, the Court resolved not to apply any provision violating natural and inalienable human rights as listed in the introduction to Act I of 1946 on Hungary's form of government as a republic; the provisions in that Act would be applicable instead[32]. According to the general assembly of judges, any legal regulation or provision that was contradictory to the above-mentioned fundamental rights *lost effect* automatically, because the above rights were enacted with the concurrent definition of Hungary's form of government, and because legislators intended to enforce those rights as an objective of the overall setup of the state[33].

The judicial establishment or "discovery" of a **Constitutional Court's expressly stated powers** was not a new thing. As the Court's chairman had already noted, the principles of constitutionality could only be realised fully if the Court could adjudicate the constitutional compliance of ministerial or government decrees passed on the basis of statutory authorisation. Those decisions of the Court should be applicable to everybody and should be made through the prior review of legal norms. According to the chairman's proposal (which

[31] G. Schweitzer, *A "zsidótörvények" a Közigazgatási Bíróság ítélkezési gyakorlatában*, [in:] *A holokauszt Magyarországon európai perspektívában*, J. Molnár (ed.), Budapest 2005, p. 165.

[32] *A Közigazgatási Bíróság állásfoglalása az emberi jogok védelmében, Pénzügy és Közigazgatás*, 1947, pp. 96–97.

[33] *Ibidem*, p. 96.

was turned down), decrees passed instead of normal legislation could only be implemented once their constitutional compliance has been reviewed by the Administrative Court[34]. After 1945, the Court was first stripped of its authorisation to review the lawfulness of elections. Then, as a symbolic reaction to the intended role of a Constitutional Court (as projected by the "assembly agreement" of 1947), the Administrative Court was disbanded altogether via Act II of 1949, after 52 years of operation. Together with the Court, administrative justice disappeared from Hungary. Certain disputes about financial matters were resolved by a dispute panel appointed by the finance minister and operating in the ministry, but no independent judicial protection was provided. Apart from matters related to public taxes (which were within the same panel's jurisdiction), no justice was dispensed in conventional administrative areas; a final administrative decision was indeed final and enforceable[35].

2.2. THE LACK OF ADMINISTRATIVE JUSTICE AND THE COURT REVIEW OF ADMINISTRATIVE DECISIONS IN SOCIALIST LAW

As explained above, no other public organisation filled the void left by the disbanded Administrative Court; at the same time, **administrative justice as a function ceased to exist in Hungary**. "Administrative justice was a strong forum for legal protection until 1949. Section 1 of Act II of 1949 declared such courts closed as of the effective date of the Act. Thus, the anti-democratic regime of that time discarded, among many other elements required for the rule of law, any opportunity for reviewing administrative decisions by a court. The Act delegated the definition of the effective date to the government. According to section 1 of Government Decree 4080/1949 (VI. 10.) on the effective date and implementation of Act II of 1949, as well as on the operating rules of financial, allowance

[34] A. Márffy, *op. cit*., pp. 357–358.

[35] See: K. Zalán, *Búcsú a Közigazgatási Bíróságtól*, "Állam és Közigazgatás" 1949; F. Sik, *A Közigazgatási Bíróság alkonya 1945–1949*, "Jogtudományi Közlöny" 1984, No. 8, pp. 453–458.

and competence dispute panels, that date was 1 September 1949"[36]. This marked the beginning of an era characterised by an **almost total lack of judicial control over** (public) **administrative decisions**. This era ended in 1989 with the provision in section 50 (2) of the Constitution.

After the demise of administrative justice, a decision could only be contested in court based on a few laws, but even these regulations were rarely implemented. A procedural law passed soon after the anti-communist uprising in 1956 (Act IV of 1957) institutionalised the contesting of administrative decisions before a court, as an extraordinary form of legal remedy. But this was only available for a very limited range of decisions (much more limited than the jurisdiction of the old Administrative Court). Interestingly, the act on public administration also stipulated the rules of court procedures, but litigation rules were added to civil procedures as a separate chapter upon an amendment to those procedures (as of 1 January 1973). The rules for contesting administrative decisions before a court changed when the Act on Procedures was comprehensively amended in Act I of 1981; as of January 1, 1982, (pursuant to legislative decree 25 of 1981) the word "contesting" changed to "court review" in the title of the above-mentioned chapter of the Code of Civil Procedure as well. That is also when the scope of decisions that could be reviewed by a court was defined in decree 63/1981 (XII. 5.) by the Council of Ministers (on public administration), issued based on an authorisation defined in the State Administration Act.

Over the 32 years, between 1957 and 1989, the institution of contesting or reviewing an administrative decision before/by a court (in lieu of proper administrative justice) **was not mentioned in Hungary's socialist Constitution**. In the entire period, first-instance procedures were carried out by entities belonging to the ordinary court system (first district courts and then local courts at county seats; in certain case types, specifically assigned courts or the Budapest Capital Court). Judicial review of administrative actions in Hungary was aligned with a mostly uniform socialist model, built

[36] See: 3243/2018. (VII. 11.) Decision of the Constitutional Court of Hungary, Reasoning [29].

on the standard ideological foundations of two classic Marxist-Leninist works[37]. Consequently, "the justification of judicial reviews was and is not questioned in socialist state and legal sciences. What has been debated is when and to what extent the social conditions for introducing or extending a judicial way are available; what can also be debated is whether the reviews should be carried out by ordinary courts, or it is justified to set up dedicated administrative courts for that purpose"[38].

In the **socialist state**, guarantees for the lawful operation of public administration entities and for the protection of lawful interests were primarily and basically introduced and developed within **the system of public administration institutions**. It was claimed that the required effectiveness and lawfulness, and especially the protection of lawful interests, could not be satisfactorily achieved with the involvement of ordinary courts outside public administration, in view of the scale, multitude and specifics of administrative activities. Thus in the socialist state of Hungary, the judicial review of administrative decisions was only allowed **as a tool** for the maintenance of lawfulness[39]. By default, a judicial review was available *ex post,* once all legal remedies within the public administration system had been exhausted, in order to remedy any remaining legal injury. "A review by an ordinary court does not replace or substitute the obligation and responsibility of public administration bodies to

[37] The theoretical basis for judicial control of public administration in the socialist state was laid by Lenin in his work on "dual" subordination and legality, but until the 1950s the prevailing view of the real situation of judicial review was that the administrative judiciary was a purely bourgeois institution and therefore had no place in socialist conditions. See: A. Rácz, *A törvényesség és a közigazgatás*, Budapest 1990, pp. 172–173.

[38] G. Kilényi, *Az államigazgatási határozatok felülvizsgálata a szocialista jogfejlődés tükrében*, "Jogtudományi Közlöny" 1981, No. 8, p. 653.

[39] Rácz argues that the guarantees for the elimination of infringement of the law in the public administration should be created in the public administration in the first place, because the requirement of legality implies the obligation to correct the infringement of the law, but also because it is cheaper and faster. See: A. Rácz, *A törvényesség…*, p. 169.

ensure lawfulness"[40]. Courts decided on the lawfulness of administrative decisions both in contentious and out-of-court proceedings[41], occasionally overruling decisions instead of just reviewing them[42].

The proposal to regulate court reviews in the Constitution was made quite early, upon drafting the Act on Procedures, by Lajos Szamel[43], but his proposal was unfortunately not implemented. This deficiency was conspicuous not only compared to democratic constitutions (in Western Europe); in the 1970s, constitutional provisions about the principle of judicial reviews appeared in socialist countries. One of these was section 58 of the Soviet Union's Constitution of 1977, which gave citizens the right to judicial protection from unlawful, excessive or right-infringing administrative acts[44]. A separate Soviet act on judicial reviews was drafted in 1987[45].

According to the principles of socialist jurisprudence, judicial review was intended to guarantee **subjective legal protection**, i.e., the protection of the rights of the person affected by the decision. As the socialist Constitution and constitutional law (state law) discarded the idea of dividing the powers of the state (because it was based on the opposite, i.e., on the unity of state power), the institution of judicial reviews could be scientifically neither based on that

[40] *Az államigazgatási eljárási törvény magyarázata*, G. Fonyó (ed.), Budapest 1976, pp. 363–364; F. Toldi, *op. cit.*, p. 82.

[41] L. Névai, *A szocialista polgári eljárásjog elméleti alapkérdései*, Budapest 1987, pp. 105–106; G. Kilényi, *Az államigazgatási határozatok bírói felülvizsgálatának formái*, "Állam és Igazgatás" 1968, No. 3.

[42] I.S. Solymosi, *Az államigazgatási határozatok bírósági felülbírálata*, "Magyar Jog" 1983, No. 8, pp. 701–710; E. Nigriny, *Az államigazgatási határozatok bírósági felülvizsgálata továbbfejlesztésének néhány kérdése*, "Jogtudományi Közlöny" 1985, No. 2, pp. 49–57.

[43] L. Szamel, *Az államigazgatás törvényességének jogi biztosítékai*, Budapest 1957, pp. 185, 211.

[44] It is clear from the text of the Soviet constitution that it provided for the right to bring an action against public officials and not against organs. See: *A Szovjet Szocialista Köztársaságok Szövetségének Alkotmánya* (*Alaptörvénye*), Budapest 1977, pp. 22–23.

[45] L. Trócsányi, *Milyen közigazgatási bíráskodást*, Budapest 1992, p. 32; A. Rácz, *A törvényesség és a közigazgatás*, Budapest 1990, p. 176.

nor on the rule of law[46]. So, the theoretical and ideological bases of judicial reviews were found in the principle of legality, and in the enforcement thereof in public administration procedures[47]. Regardless of these ideological and scientific foundations, judicial reviews could not and did not really play a role in guaranteeing lawfulness, because no judicial way was available against the vast majority of administrative decisions. As a consequence, the number of such lawsuits remained very low[48]. What is quite instructive is the insistence on a unified, indivisible justice and court system, which lingered not only until the end of the socialist era but way beyond the transition to constitutional state (state under the rule of law), until the seventh amendment to the Fundamental Law[49]. And the eighth amendment to the Fundamental Law finally discarded the opportunity of setting up dedicated administrative courts separated from the system of ordinary courts.

2.3. A SHORT LINE IN THE OLD CONSTITUTION – SECTION 50 (2)

Administrative justice was poorly treated (barely mentioned) in the fundamental law of Hungary's transition to a constitutional state (state under the rule of law), i.e., the Constitution comprehensively amended in 1989–90. According to the rather short section

[46] L. Szamel, *Az államigazgatás törvényességének jogi biztosítékai*, Budapest 1957, pp. 191–193.

[47] F. Toldi, *op. cit.*, p. 81.

[48] According to Szamel, the post-1957 legislation allowed access to the courts in certain tax and housing cases only in cases where "by the very nature of the case, there is no administrative case or the authority's decision to infringe is rare". See: L. Szamel, *Az államigazgatási eljárás jogorvoslati rendszereinek továbbfejlesztése II. r.*, "*Állam és* Igazgatás" 1978, No. 4, pp. 299–306.

[49] At the same time, academic opinions on the development of public administration made it clear that "the removal of judicial review of administrative decisions from the competence of the ordinary courts does not violate the socialist principle of the unity of justice and thus […] does not constitute an ideological obstacle", *A közigazgatás fejlesztésének tudományos vizsgálata országos szintű kutatási főirány tudományos eredményei* (1981. január 1. – 1985. december 31.) "Kiadja: a Főirány Programirodája" Budapest 1986, p. 100.

50 (2), "The courts shall control the legality of the decisions of public administration." Amidst rapid and unfortunately frequent amendments to the Constitution, this section remained remarkably constant, withstanding all change from 23 October 1989 until the Constitution was overruled on 1 January 2012. The provision quoted above had been introduced by section 30 of Act XXXI of 1989 (hereinafter: Amendment of 1989). It is worth reviewing the purpose of inserting this rule into the Constitution, as well as its meaning and consequence.

As administrative justice was not referred to in the constitutional rules of the socialist era, the Constitution in effect before 1989 did not even contain a similar provision. This was an entirely new provision added to the Constitution upon its amendment, aimed at creating a constitutional state (state under the rule of law). The laconic and **minimalistic** sentence in the chapter about courts did not specify which courts should verify which aspects of which decisions, in what procedures. According to the Constitutional Court: "Indeed, the succinct wording provides no details. It does not specify the opportunity for the judicial review of administrative decisions violating the form, substance or procedures of the law"[50].

The justification in the proposal of the Amendment of 1989 was also succinct: "The new article (2) creates the **constitutional foundations for administrative justice."** But this constitutional objective was not expressed in any other provision[51]. So, neither the provisions about the organisation of courts nor other provisions referred to administrative justice or court procedures in administrative cases, either in 1989 or later, until the Fundamental Law took effect. This indicates that very little weight or significance was assigned to the topic; by contrast, a separate chapter was dedicated to the jurisdiction and institution of the Constitutional Court, and another chapter was devoted to the institution of parliamentary

[50] 994/B/1996 Decision of the Constitutional Court of Hungary.

[51] Trócsányi drew attention to the inadequacy of the constitutional legislation. See: L. Trócsányi, *Milyen közigazgatási bíráskodást*, Budapest 1992, p. 34; see also: A. Takács, *Az alkotmányosság és a törvényesség védelme bíróságok útján*, "Jogtudományi Közlöny" 1989, No. 9, pp. 443–455.

commissioners (ombudsman). This in spite of the availability of a specific and operable model for administrative justice, which had been discontinued in 1949 exactly due to the introduction of a socialist state organisation, whereas the Constitutional Court and the ombudsman for citizens' rights had no previous institutional history in Hungary's constitutional system.

It is worth examining how this short sentence was added to the amended Constitution without any context. Two comprehensive constitutional concepts (Regulatory Concept of the New Constitution of the People's Republic of Hungary, 30 November 1988, hereinafter: Concept I.; and Regulatory Principles of the Constitution of the People's Republic of Hungary, 30 January 1989, hereinafter: Concept II) were drafted before the amendment of 1989. These barely mention the judicial review of administrative decisions, treating this issue as if it was quite evident. The topic is referred to in connection with the procedures of the Constitutional Court, the activities of prosecutors[52], the protection of municipal rights, local elections[53], and the organisation of the judiciary[54]. It is expressly stated that "administrative justice must be set up within the system of ordinary courts"[55]. These concepts did not systematically address the most important question, namely the **jurisdiction of administrative courts**, i.e., what administrative decisions could be appealed before those courts, and what decision-making powers they would have. Still, the term "administrative court" is consistently used in both concepts. It should be noted that **administrative court procedures** were deemed to be separate from both civil proceedings and state administration procedures (see the next section) in Concept II. This confirms that the idea of dedicated administrative court proceedings had emerged at the highest levels, as early as 30 years before the relevant act took effect.

---

[52] New Constitution of the People's Republic of Hungary, November 30, 1988, p. 66.

[53] *Ibidem*, p. 82.

[54] New Constitution of the People's Republic of Hungary, January 30, 1989, p. 52.

[55] *Ibidem*, p. 53.

But the question of administrative justice was **omitted from the first draft** amendment to the Constitution (prepared by the Council of Ministers[56]) as well as from the subsequent proposals and draft documents prepared during the trilateral negotiations, including the constitutional amendment bill tabled by the Justice Minister[57]. In this bill, the new section 50 (2) stipulated the independence of judges; the numbering later changed to 50 (3). In conclusion, this **neglect of administrative justice at the level of draft Constitutions** is conspicuous because several specific proposals aimed at extending the judicial review of state administration decisions were drafted back in the 1980s.

The following conclusions can be drawn from the above information:

- When the new Constitution was drafted at the turn of the 1980s and 90s, adjudicating administrative decisions was given **little weight** compared to the proceedings of the Constitutional Court.
- The concepts defined for the new Constitution regarded this matter primarily as a **legal remedy** guaranteeing the correct application of the law in (state) administration.
- The (re)establishment of a **dedicated** administrative court was **not planned** when the Constitution was drafted.
- The potential jurisdiction of administrative justice was deemed to include areas of public law beyond the "conventional" application of law in this field, such as court decisions about local **elections**.
- The judicial protection of local municipalities' rights was clearly considered as one of the responsibilities of administrative justice.

The neglect of this topic in the Concepts is not only obvious in hindsight. According to a **contemporary** analysis, the court levels to which the new Constitution assigned administrative cases should

[56] First draft amendment to the Constitution (prepared by the Council of Ministers) May 10, 1989.

[57] Constitutional amendment bill tabled by the Justice Minister, September 22, 1989.

have been identified, and general definitions for the administrative case types to be reviewed by courts would have to be introduced. And this definition could not be provided in "a normal law without constitutional foundations"[58]. It should also be stated in the constitutional regulations how (when and under what conditions) a judge is authorised to change an unlawful administrative decision[59].

No major significance was assigned to this subject after the change of public law regimes, during the constitution drafting in the **1994–98 parliamentary cycle.** Naturally, decision 32/1990 (XII. 22.) of the Constitutional Court was already known and effective; it **annulled** those provisions in laws and Council of Ministers' decrees which limited the court review of public authorities' decisions to a narrow scope of cases, exactly because those provisions went against section 50 (2) of the Constitution. And Act XXVI of 1991 on the extension of administrative justice was also effective at that time. It can be safely stated that in 1994, the judicial review of administrative decisions was **legislatively regulated.** Still, the new constitutional concept[60] accepted by Parliament in a decision did not refer to jurisdiction. The **draft texts** prepared by Parliament's Constitution-Drafting Committee along the relevant regulatory principles adopted the same wording about the review of administrative decisions, with only minimal deviations from section 50 (2) of the Constitution that was in effect at the time.

It is questionable whether the issue of administrative justice and the relevant detailed court regulations emerged when Hungary's current Fundamental Law was formulated. The ad-hoc parliamentary committee drafting **the new Constitution in 2010** had the opportunity to negotiate and formulate satisfactory constitutional regulations. The chairman of the ad-hoc committee charged a so-called **"wording panel" of three experts** with managing the numerous proposed texts and formulating a unified concept. But the regulatory

[58] A. Takács, *Az alkotmányosság és a törvényesség védelme bíróságok útján*, "Jogtudományi Közlöny" 1989, No. 9, p. 454.

[59] For example, if the administrative body's decision is challenged again in court.

[60] 119/1996. (XII. 21.) Resolution of the Hungarian Parliament.

principles[61] proposed by the ad-hoc committee were not used as the basis for the wording of the new Constitution.

Instead of the then existing, succinct sentence about judicial review, the new regulatory principles strove for more detailed constitutional regulation, stating that "administrative courts shall review the lawfulness and practicability of the operation and actions of administrative entities, in order to ensure that the public administration function remains subordinated to the law. Administrative courts shall protect the rights of local municipalities and evaluate legal disputes about administrative decisions, providing effective legal protection as stipulated by law. Administrative courts shall also supervise the lawfulness of local municipal decrees and other normative decisions in the manner defined in the relevant cardinal law".

The original text compiled by the committee's experts provided even more detailed, almost comprehensive regulations[62]. Besides unequivocally proposing the reinstatement of the old Administrative Court, the experts formulated further details and also used phrases from section 106 of Spain's Constitution ("shall review the lawfulness of the operation and actions of public administration, as well as the compliance thereof with the objectives of such operation and actions")[63].

But these draft regulations were also discarded. The comprehensive and unified regulation of administrative justice (including all material aspects of the constitutional regulation of the issue) approached public administration from its activities (operation); subordination to the Public Administration Act (as a basic attribute of the rule of law) was deemed to be the primary objective of judicial control. The proposed regulations noted that courts adjudicated legal disputes and raised the possibility of courts also reviewing whether an administrative action actually served the underlying

[61] 9/2011. (III. 7.) Resolution of the Hungarian Parliament, http://www.parlament.hu/irom39/02057/02057.pdf [accessed on: 15 October 2021].

[62] A. Patyi, P. Szalay, Zs.A. Varga, *Magyarország alkotmányának szabályozási elvei. Szakértői változat*, "Pázmány Law Working Papers" 2011, No. 31, http://www.plwp.jak.ppke.hu/ [accessed on: 15 October 2021].

[63] *Ibidem*, p. 20.

statutory objective. But these comprehensive regulations were not adopted after all.

An administrative court as a dedicated entity was not referred to in the new Constitution, but the following regulation remained in effect: "Dedicated courts may be established for certain groups of cases." This rule was abolished by the ninth amendment in 2020, but administrative courts had almost been established before that, via the unrealised seventh amendment explained in the following chapter.

2.4. AN ATTEMPT IN 2018: THE SEVENTH AMENDMENT TO THE FUNDAMENTAL LAW

The unrealised (and subsequently withdrawn) seventh amendment to the Fundamental Law in 2018 was aimed at laying the foundations of a new, separate administrative court system. In the same year, an act was passed on administrative courts and the related transitional rules. A two-level administrative court system was designed, with eight regional administrative courts and a Higher Administrative Court.

The **breakthrough in terms of constitutional regulations** awaited since 1989 could have been achieved via the seventh amendment to the Fundamental Law. the Chapter emphasises that administrative justice, whether approached from its subordination to administrative law (a requirement for the rule of law), from the extent of the judges' powers, or from the function of protecting legal entities, definitely belongs in the Constitution, and should be regulated there[64]. The planned seventh amendment to the Fundamental Law stipulated that Hungary should have two kinds of courts: ordinary and administrative. Both types were to dispense justice. In this dual judicial system, ordinary courts were to adjudicate criminal cases,

[64] See: A. Patyi, *Közigazgatási bíráskodás de constitutione ferenda*, [in:] *Közérdekvédelem. A közigazgatási bíráskodás múltja* és *jövője*, Zs.A. Varga, J. Fröhlich (eds.), Budapest 2011, pp. 21–32; A. Patyi, *A közigazgatási bíráskodás – a* (2) *bekezdés magyarázata*, [in:] A. Jakab, *Az Alkotmány kommentárja*, Budapest 2009, p. 50; § 32–111.

civil law disputes, and other cases defined by law. The highest-ranking body in this ordinary judicial system was to be the Curia, which was intended to pass uniformity decisions in order to ensure uniform legal application by ordinary courts. Meanwhile, administrative courts were to decide in administrative disputes and other cases assigned to them by law. A Higher Administrative Court was planned as the highest-ranking body within the administrative court system; similarly to the Curia, it would have been responsible for ensuring the uniformity of legal application by administrative courts by passing legal uniformity decisions that were to be binding on those courts. But the amendment also stipulated a condition to the application of the new constitutional rules (which were promulgated and essentially took effect): until the cardinal law on the establishment of the administrative justice organisation entered into force, ordinary courts would continue to decide in criminal cases and civil law disputes, in other legally stipulated matters, and also about the lawfulness of administrative decisions, about any conflicts of municipal decrees with other legal regulations (and about the annulment of such decrees), as well as about any failure by a local municipality to legislate as required by the Act on local municipalities.

Similarly, the amendment to the Fundamental Law ruled that the administration of courts would continue unchanged until the cardinal law on setting up the organisation of administrative justice entered into force.

The constitutional rules stipulated in the seventh amendment are no longer effective or valid; they belong to Hungary's legal history, as they were cancelled by the eighth amendment. Besides the definition of the activities of administrative courts, they also ruled that those activities were parts of overall justice. Thus, the Fundamental Law could have created **closed and consistent** administrative justice regulations. The Chapter considers the final conclusion of the writing titled "Underway"[65] valid in this regard. Firstly, because the seventh amendment projected organisationally independent

[65] A. Patyi, *Alapkérdések a szervezetileg* önálló *közigazgatási bíráskodás megszervezése kapcsán*, "Acta Humana – Emberi Jogi Közlemények" 2019, No. 7(1).

administrative courts (including a Higher Court) and referred to them at the Constitution's level; and secondly because a road could have been opened towards the administrative justice of the future, and the work commenced in the past could have been finished. Hungary's old Administrative Court may be regarded as an achievement of the historical Constitution, but it could not and cannot serve as a clear historical example due to its maimed and incomplete organisation, the lack of first-instance courts, and its fragmented jurisdiction. Still, the fact remains that a dedicated, professional and organisationally independent administrative justice system with courts at two levels could not be introduced.

Consequently, until 2020, Hungary's administrative justice continued to operate within the much-questioned organisational framework defined in 2013 (a so-called "fake mixed" system)[66]. Then, after seven years of operation, administrative and labour courts were closed. As a result, administrative justice is now dispensed by ordinary courts, as it almost always has been since 1989, albeit based on dedicated administrative procedural rules that were drafted in 2017 (Act I of 2017 on the Code of Administrative Litigation) and took effect in the following year.

3. Impact of the constitutional provisions on administrative justice

After the introduction of the historical aspects of the topic, it is important to draw attention to the constitutional background of the administrative justice. In order to point out the main constitutional features, this subchapter returns to Section 50 (1) and Section 57 (1) of the previous Constitution mentioned in Subchapter I/4 aiming to highlight the importance of the co-interpretation of these provisions. Then, it continues with the analysis of the Fundamental Law.

[66] See: H. Küpper, *Magyarország átalakuló közigazgatási bíráskodása*, "MTA Law Working Papers" 2014, No. 59, pp. 11–15, https://jog.tk.mta.hu/uploads/files/mtalwp/2014_59_Kupper.pdf.

3.1. THE SUBSTANCE OF THE PREVIOUS CONSTITUTION'S BASIC PROVISIONS

An amendment to Hungary's previous Constitution via Act XXXI of 1989 (23 October 1989) introduced constitutional rules that served as the basis for the review of administrative decisions by courts[67]. The Constitutional Court's decision No. 39/1997 (VII. 1.) defined an important **constitutional requirement**, which has been confirmed several times by the Constitutional Court under the Fundamental Law[68] and thus remains effective today. This requirement concerns the judicial review of the lawfulness of administrative decisions, and primarily the laws that define the procedures and decisions which may be reviewed: "It is a constitutional requirement that the court should be able to substantively evaluate the contested rights and obligations pursuant to the conditions defined in Section 57 (1) of the Constitution. The rule defining the administrative decision-making powers must specify a proper aspect or measure based on which the court can review the lawfulness of the decision". This requirement is about section 57 (1) of the Constitution, but the

[67] For an analysis of the relationship of certain constitutional provisions to judicial review, see: A. Patyi, *A közigazgatási bíráskodás – a (2) bekezdés magyarázata*, [in:] *Az Alkotmány kommentárja*, A. Jakab (ed.), Budapest 2009, pp. 1756–1764.

[68] The Constitutional Court has maintained its findings in this case even after the Fourth Amendment of the Fundamental Law (13/2013 (VI.17.) Decision of the Constitutional Court of Hungary, Reasoning [27]–[33]), and has also defined its meaning in the light of the provisions of the Fundamental Law. Considering administrative judiciary as one of the acquis of the historic Constitution, the Constitutional Court held that the interpretation included in 39/1997 (VII. 1.) Decision of the Constitutional Court of Hungary can be invoked even after the Fourth Amendment of the Fundamental Law. 17/2015 (VI.5.), Reasoning [87]. The decision also reiterates the formula used in 39/1997 (VII. 1.) Decision of the Constitutional Court of Hungary as follows: "judicial review of the legality of administrative decisions cannot be constitutionally limited to an examination of legality based on purely formal criteria, limited to compliance with procedural rules. The court hearing an administrative case is not bound by the facts established in the administrative decision and may – indeed must – review the discretion of the administrative body as regards legality" (Reasoning [88]). Reaffirmed in 17/2018 (X. 10.) Decision of the Constitutional Court of Hungary, Reasoning [42].

justification of the decision makes it clear that the decision also interprets Section 50 (2) of the Constitution as follows: "a proceeding aimed at reviewing an administrative decision must lead to the court actually assessing the contested rights and obligations in the manner specified there"[69]. In other words, the term "*the court assessing*" actually means that the court "*substantively evaluating*" the rights and obligations affected by the administrative decision, i.e., the legal effects of the decision. According to the Constitutional Court, the courts handling administrative cases needed and still need the jurisdiction required for making "final and substantive decisions that determine the relevant rights". Logically, this means that:

1) the judicial verification of the lawfulness of administrative decisions could not be limited to examining formal legality;
2) a court acting in an administrative lawsuit is (was) not bound by the facts defined in the administrative decision;
3) and the court can (could) overrule the assessment by the administrative entity regarding the lawfulness of the decision.

It is worth pointing out that since the previous Constitution, two types of legal protection, the subjective protection and the objective protection, have been considered as the function of the administrative judiciary[70]. In this regard, courts provide subjective protection (protection of individual rights and legitimate interests) and objective protection (safeguarding the written law) as well. Thus, they investigate on violations of substantive law but also on the infringement of a procedural legal provision. According to the traditional concept, regarding on the object and on the infringement of the law reviewed by courts in administrative cases, the following order can be determined, from the most serious to the less serious: (1) subjective protection – on the basis of substantive law; (2) objective protection – on the basis of substantive law, (3) subjective protection – on the basis of the procedural law, (4) objective protection – on the basis of the procedural law.

---

[69] 39/1997 (VII. 1.) Decision of the Constitutional Court of Hungary.

[70] K. Rozsnyai, *A hatékony jogvédelem biztosítása a közigazgatási bíráskodásban*, "Acta Humana" 2013, No. 1, pp. 117–130.

3.2. THE ERA OF FUNDAMENTAL LAW

By overruling the previous Constitution, the Fundamental Law and its amendments opened a new chapter in administrative judiciary and brought a paradigm shift in interpretation of the administrative law. The analysis highlights the main provisions of the Fundamental Law, which have an influence on the interpretation of the applicable law in the administrative disputes.

3.2.1. Main constitutional principles

The state is an indispensable player in the organisation of a modern society. Following the common constitutional traditions of European democracies, the state is built up and operated according to the predictable regulation system of the law. The principle of the **rule of law** defined in **paragraph (1) of article B) of the Fundamental Law** makes all participants within the authority of the state subject to the rule of law. These participants include the executive power, from its central governance to the "working hands" (at the endpoints of public administration).

The administrative and other entities exercising the power of the state must make their decisions within the framework and according to the procedures defined by law, pursuant to the rules of substantive law[71]. If their acts are directed at entities outside the organisation, but also if they affect the fundamental rights of persons inside the organisation, legal compliance must be verified by entities independent of the governing power, i.e., by courts. Thus, administrative justice is an institutional guarantee to the establishment of a constitutional state (state under the rule of law)[72].

According to **article C) of the Fundamental Law**: "The functioning of the Hungarian State shall be based on the principle of the division of powers". This principle **precludes unlimited power**,

[71] 5/2013. (II. 21.) Decision of the Constitutional Court of Hungary, Reasoning [37], earlier 56/1991. (XI. 8.) Decision of the Constitutional Court of Hungary.
[72] H. Küpper, *Magyarország…*, p. 9.

and means that the branches of power are separated, balanced and cooperative with each other[73]. There is no unlimited power (all power can be limited) in a rule of law; certain branches of power necessarily limit the authorisations of other branches[74].

Paragraph **(2) of Article 25** of the Fundamental Law defines one of the tools for creating the above-mentioned balance, as it refers to deciding about the lawfulness of administrative resolutions as one of the responsibilities of independent and impartial courts. This constitutional provision makes it clear that a special activity of the state is delegated to courts, as they are endowed with a power that is separate from criminal or civil law dispute settlement. Civil and criminal justice may overlap with administrative justice (for example in misdemeanour cases[75]) if an administrative body first decides about rights and obligations subject to civil law, or about a charge under criminal law, without covering all aspects of the matter. Judiciary activities under public law also include decision-making about the lawfulness of administrative decisions, about conflicts of municipal decrees with other legal regulations (and about the annulment of such decrees), as well as about any failure by a local municipality to legislate as required by the Act on local municipalities (i.e., a positive or negative review of municipal norms) [Paragraph (2) of article 25 of the Fundamental Law].

3.2.2. Constitutional Rights

Administrative justice has also an important **subjective** side besides guaranteeing legal protection in the matter at hand: providing effective legal protection to individuals from any unjustified intervention and legal violation by the state.

---

[73] 9/2014. (III. 21.) Decision of the Constitutional Court of Hungary, Reasoning [52].

[74] 24/2013. (X. 4.) Decision of the Constitutional Court of Hungary, Reasoning [54]; earlier 28/1995. (V. 19.) Decision of the Constitutional Court of Hungary.

[75] See: 63/1997. (XII. 11.) Decision of the Constitutional Court of Hungary, 38/2012. (XI. 14.) Decision of the Constitutional Court of Hungary.

In conformity with the **National Avowal** ("we hold that democracy is only possible where the State serves its citizens and handles their affairs in an equitable manner, without abuse and impartially"), **paragraph (1) of Article XXIV of the Fundamental Law** declares that **the right to good public administration** is a fundamental right. This means that authorities must handle citizens' affairs impartially and fairly, within a reasonable deadline, and that the justification of administrative decisions must be provided as required by law. Specifying the detailed contents of that right is the ultimate responsibility of the courts proceeding in administrative lawsuits, and of the Constitutional Court. And the court procedures themselves must comply with the requirements stemming from citizens' right to fair proceedings.

In the division of power, connecting paragraph (2) of article 25 (which defines the tasks of judges) with the right to fair proceedings as stipulated in **paragraph (1) of article XXVIII** means that court review proceedings must lead to the court actually assessing the disputed rights and obligations, pursuant to the constitutionality requirements referred to above. The procedure must meet the constitutional requirements for fair proceedings, namely that it must be independent and impartial, and that the legal dispute must be settled within a reasonable time in a fair and public hearing. Effective legal protection can only be provided by courts where the judicial verification of the lawfulness of administrative decisions is not limited to examining formal legality.

In an administrative lawsuit, the court must not be bound by the facts established in the administrative decision, i.e., the court may overrule the assessment by the administrative entity regarding the lawfulness of the decision[76]. Thus, paragraph (1) of article XXVIII of the Fundamental Law has **dual (procedural and substantive) relevance** in administrative matters. The procedural aspect involves making a complaint before a court, which is a fundamental right

[76] 5/2013. (II. 21.) Decision of the Constitutional Court of Hungary, Reasoning [48]–[49], 7/2013. (III. 1.) Decision of the Constitutional Court of Hungary, Reasoning [24], earlier 39/1997. (VII. 1.) Decision of the Constitutional Court of Hungary.

that may be limited subject to the relevant constitutional conditions (necessity and proportionality – paragraph (3) of article I). The substantive aspect means that the regulations under substantive law must not preclude a substantive review, without allowing an opportunity to review the contents of the contested decision[77]. Thus, the enforcement of the right to fair proceedings in administrative lawsuits also affects the regulations under substantive law: the rule defining the administrative decision-making powers must specify a proper aspect or measure based on which the court can review the lawfulness of the decision.

An administrative lawsuit is a **legal remedy**. As such, it is related to **paragraph (7) of article XXVIII of the Fundamental Law on the fundamental right to legal remedy**. The right to legal remedy is basically granted through the opportunity of ordinary appeals within the administrative organisation system; but if that form of legal remedy is not available (especially if no legal remedy can be provided within the organisation), an administrative lawsuit can satisfy the requirement for that fundamental right. One condition to that is a notional and substantive opportunity to remedy the legal violation, i.e. that the legal remedy should be effective: if possible, the legal remedy should be provided before the implementation of the unlawful decision[78]. In case the administrative lawsuit satisfies the requirement for legal remedy as a fundamental right (or a legal remedy has been provided within the administrative organisational system), the state does not need to, but may, provide further legal remedy against the judicial decision.

According to these regulations, it is **theoretically** possible that legal protection can be modelled based on the constitutional regulations: the authority concerned does not make a justified decision as required by paragraph (1) of article XXIV of the Fundamental Law, thus violating the constitutional right to the fair handing of affairs. In order to remedy that violation, the aggrieved person may bring the matter to court pursuant to paragraph (2) of article 25

[77] 5/2013. (II. 21.) Decision of the Constitutional Court of Hungary, Reasoning [52].
[78] 39/2007. (VI. 20.) Decision of the Constitutional Court of Hungary.

of the Fundamental Law. If that person suffers damage due to the authority's unlawful behaviour, he/she is entitled to compensation as stipulated in paragraph (2) of article XXIV of the Fundamental Law. This constitutes a degree of "constitutional concentration" which requires independently defined further procedural rules.

3.2.3. Constitutional background of the judicial interpretation of the applicable law

Article 28 of the Fundamental Law defines general and primary guidelines (a framework) for the interpretation of legal regulations by courts. These guidelines must inevitably be followed when evaluating which of several judicial interpretations should be accepted as the correct (and mandatory) one. Consequently: (1) Courts applying the law must interpret the text of legal regulations primarily based on the objectives of those regulations. Thus, examining and evaluating the legislator's objectives are crucial. In this process, the following must be considered: (1a) the preamble to the legal regulation; and (1b) the justification of the proposal to create or amend the legal regulation. [By including the word "primarily", the Fundamental Law does not make the listed interpretations exclusive, but only stipulates their application before everything else]. (2) Courts must interpret the text of legal regulations (once again, "primarily") in conformity with the Fundamental Law. Thus, it is indispensable for judges to interpret or at least consider the relevant provisions of the Fundamental Law following their interpretation by the Constitutional Court. As another premise, the Fundamental Law and other legal regulations must be interpreted based on the assumption that they (3) are reasonable and serve the common good; (4) serve a moral purpose; and (5) serve an economical purpose.

Interpretation in accordance with the Fundamental law, so-called constitutionally conforming interpretation, means that if the law in question allows for different interpretations, the interpretation in accordance with the constitution must be adopted over the others. The requirement of constitutionally conforming interpretation is complementary to traditional methods of interpretation, for

this reason, the result obtained by applying methods of interpretation must also be examined to see whether the resulting normative content is in accordance with the constitution. The Constitutional Court underlined that the courts should enforce the relevant constitutional requirements within the limits of interpretation allowed by the special legal regulations[79].

Furthermore, the Fundamental Law has resulted in a significant shift of emphasis in the powers of the Constitutional Court, who is the authentic interpreter of the constitution[80]. It is important to see that until the entry into force of the Fundamental Law, the most important task of the Constitutional Court was to ensure constitutional legislation, which could be achieved through norm control. In this regard the Constitutional Court was considered a so-called negative law-making body in the Kelsen sense[81], which in the system of separation of powers it was more closely linked to law-making. In the legislative framework under the previous Constitution, it was not possible to challenge a decision on the grounds of a breach of fundamental right, since a constitutional complaint could only be lodged if an unconstitutional legal regulation was also applied in the proceedings. The Fundamental Law changed that and introduced a new competency of the Constitutional Court, the "real" constitutional complaint, which gives individuals the right to contest a court decision.

---

[79] Decision 3/2015. (II. 2.) Decision of the Constitutional Court of Hungary, Reasoning [17]–[18].

[80] See scholarship available in English on the Constitutional Court of Hungary: Z. Toth, *Changes Which Occurred in the Role of the Hungarian Constitutional Court in Protecting the Constitutional System*, "Acta Universitatis Sapientiae Legal Studies" 2018, No. 7, p. 95; G. Spuller, *Transformation of the Hungarian Constitutional Court: Tradition, Revolution, and* (*European*) *Prospects*, "German Law Journal" 2014, No.15, p. 637; see the following selected scholarship on the constitutional complaint procedure: F. Gardos-Orosz, *The Hungarian Constitutional Court in Transition – From Actio Popularis to Constitutional Complaint*, "Acta Juridica Hungarica" 2012, No. 53, p. 302; B. Somody, B. Vissy, *Citizen's Role in Constitutional Adjudication in Hungary: From the Actio Popularis to the Constitutional Complaint*, "Annales Universitatis Scientiarum Budapestinensis De Rolando Eötvös Nominatae – Sectio Iuridica" 2012, No. 53, p. 95.

[81] L. Csink, B. Schanda, *The Constitutional Court*, [in:] *The Basic Law of Hungary. A First Commentary*, L. Csink, B. Schanda, Zs.A. Varga (eds.), Budapest 2012, p. 165.

The rules of **the "real" constitutional complaint** are in the Act CLI of 2011 on the Constitutional Court, according to which the affected person or organization in a given case can turn to the Constitutional Court against a court decision that is contrary to the Fundamental Law, if the substantive case decision or other decision concluding the court proceeding violates the rights of the complainants in the Fundamental Law and the petitioners had already exhausted their legal remedies or no legal remedies had been made available[82]. In the constitutional complaint procedure, the violation of the rights guaranteed by the Fundamental Law, such as the right to a fair trial expressed under Article XXVIII (1) of the Fundamental Law, must be invoked. The constitutional problem raised in the constitutional complaint may be resolved by the Constitutional Court with the annulment of the court decision in the case of a question of interpretation, or with the establishment of an omission contrary to the Fundamental Law when there is no law and no question of interpretation[83].

Regarding the above, the Chapter points out that the "real" constitutional complaint makes explicit that the legality of judicial decisions is subject to compliance with the Fundamental Law. Consequently, **the "real" constitutional complaint is a legal institution serving the purpose of enforcing Article 28 of the Fundamental Law.** Furthermore, the extension of the competencies of the Constitutional Court involves that the protection of fundamental rights is becoming more important in individual judicial cases.

[82] Section 27 of the Act CLI of 2011 on the Constitutional Court.

[83] 6/2018 (VI.27.) Decision of the Constitutional Court of Hungary, Reasoning [35].

4. Thoughts about the characteristics of uniformity complaints[84]

Through an amendment to Act CLXI of 2011 on the organisation and administration of courts (hereinafter: Court Organisation Act) in December 2019[85], Parliament adopted a new legal remedy method by allowing the submission of uniformity complaints about the Curia's decisions.

Uniformity complaints[86] must be submitted to the Curia itself[87]. **This rule is unusual**, not only because petitions for a new legal remedy, together with the procedural rules for the assessment of such petitions, are institutionalised in a law of organisational and administrative character[88]. In addition, these special rules of review

[84] See scholarship available in English on precedent in different legal system: J.L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, "Louisiana Law Review" 1993, No. 54, p. 1; A. Shoenberger, *Changes in the European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Precedent into the Civil Law System*, "Loyola Law Review" 2009, No. 55, p. 5; M. Garvey Algero, *Considering Precedent in Louisiana: Balancing the Value of Predictable and Certain Interpretation with the Tradition of Flexibility and Adaptability*, "Loyola Law Review" 2012, No. 58, p. 113; M. Jacob, *Precedents and Case-based Reasoning in the European Court of Justice*, Cambridge 2014, p. 66; Z. Khün, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation*, Leiden, Boston 2011, p. 216, SILTALA (27. j.) p. 141, AARNIO in MACCORMICK–SUMMERS (7. j.) p. 93; P.M. Tiersma, *The Textualization of Precedent,* "Notre Dame Law Review" 2006–2007, No. 82, p. 1187.

[85] Section 72 of the Act CXXVII of 2019 on the Amendment of Certain Acts in Connection with the Establishment of Single-Level District Office Procedures.

[86] In connection with the uniformity complaint procedure, see: A. Patyi, *A jogegységi panasz bevezetésnek és továbbfejlesztésének néhány kérdése*, [in:] *Ünnepi tanulmányok a 65 éves Cs. Kiss Lajos tiszteletére. Ut vocatio scientia*, A. Pongrácz (ed.), Budapest 2021, pp. 303–322.

[87] A. Osztovics's and Zs. A. Varga's recent articles published in "Magyar Jog", at the beginning of the year already contain a kind of analysis of the new procedural system, partly analysing the issues of precedent. See: A. Osztovits, *Törvénymódosítás a bírósági joggyakorlat egységesítése* érdekében – *jó irányba tett rossz lépés?*, "Magyar Jog" 2020, No. 67; Zs.A. Varga, *Tíz gondolat a jogegységről* és *a precedenshatásról*, "Magyar Jog" 2020, No. 67.

[88] For a long time, the procedural rules for the review of the lawfulness of municipal decrees were stipulated in the Court Organisation Act. Sections 46–61 of the Act CLXI of 2011 on the organization and administration of the courts

procedures are not laid down in the usual codes of procedure[89]. It is all but self-explanatory to consider uniformity complaints as a form of legal remedy; the very name ("complaint") indicates that, but even more importantly, the potential outcomes of the complaint procedure justify that categorisation. As a result of a successful complaint, the Curia's uniformity panel will repeal the Curia's contested decision because of its legal contradiction with a previously published decision by the Curia. But even if such a contradiction is established, it is possible that the contested decision is not repealed as a result of the uniformity complaint proceeding, because the Curia rules that the contradiction is justified[90]. In other words, a successful uniformity complaint (as a result of which a legal contradiction is confirmed) can also lead to an adverse result from the complainant's personal perspective. That is why this legal institution could be called a Janus-faced legal remedy tool.

Hungary's jurisprudence has not yet agreed whether this complaint proceeding constitutes a legal remedy or is primarily intended to ensure uniformity. The latter function makes this tool stand out from the legal remedies available to individuals. It is necessary to see that legal remedies are not intended to always favour the applicants; rather, they are intended to correct erroneous or not fully lawful decisions by state entities. In case of the uniformity complaint procedure, **the primary objective is to ensure legal uniformity rather than remedy the infringement of an individual's rights**. This second function may also be served, but not necessarily. According to the law, if the uniformity panel establishes a legal conflict with a previously published decision by the Curia, then an interpretation binding on courts must be made, along with a ruling on the contested decision.

A complaint may only be submitted if the Curia's decision in the complainant's case is in (purported) legal conflict with a previously published decision by the Curia. However, the procedure may result

were "transferred" to Chapter XXV of Act I of 2017 on the Code of Administrative Litigation (Sections 139–150).

[89] The codes of procedures mention but do not regulate the procedure itself.

[90] Paragraph (1) *a*) of Section 41/C. § of Act CLXI of 2011 on the organization and administration of the courts.

in establishing that the new decision (which the complainant finds injurious because of the legal conflict) contains the correct legal interpretation, which will be binding on courts. In other words, a uniformity complaint is not deemed successful if the proceeding confirms a conflict between the two decisions; it is successful if, according to the Curia's uniformity panel, it is the new decision that deviated from the correct assessment of the legal issue, i.e., from the right legal interpretation. In case the Curia's panel agrees with the legal interpretation in the contested ("conflicting") new decision, then the complaint is subjectively unsuccessful.

A uniformity complaint and the resulting proceedings have **a very strong legal and constitutional character.** The procedure itself essentially involves the enforcement of equality before the law (a requirement stipulated in the Fundamental Law) in the matter at hand, and the provision of a guideline for unified judicial interpretation. This means a sort of constitutional adjudication. This characteristic is confirmed by article 28 of Hungary's Fundamental Law, which defines for courts the constitutional framework and limits of legal interpretation. This means that a uniformity complaint procedure must lead to the definition of the correct legal interpretation by judges pursuant to the constitutional framework regarding the obligatory interpretation of legal regulations, as the provisions in article 28 are also relevant to the Curia's decisions in a complaint procedure. In other words, in a uniformity complaint procedure, the Curia must identify and maintain an interpretation that is in conformity with the Fundamental Law. In doing so, the Curia is governed by the practices of the Constitutional Court over more than 30 years. As the decision about the complaint may be reviewed by the Constitutional Court, the panel of the Curia must keep an eye on the Constitutional Court's decisions.

Consequently, the method and procedure of adjudicating uniformity complaints are not entirely new, as they have a history in Hungary's public law. The Chapter is of the opinion, the logical process of the fundamental legality test by the Constitutional Court could serve as an example for decision-making about the legal conflicts; firstly, because both processes consist of review (decision-making) steps where the conclusion drawn at one step can serve as a premise for

the next step. The second reason is that a range of important notions which are also relevant to the Fundamental Law usually emerges (or to be more specific, is defined) at the beginning of a uniformity complaint proceeding. These notions recur during the procedure and serve as the basis for it. In other words, enforcing article 28 of the Fundamental Law becomes crucial to the interpretation of the examined legal provision (to the definition of an obligatory interpretation).

Therefore, uniformity complaint proceedings not only need to involve the comparison of two or more legal interpretations (and the selection of the most suitable one). The Chapter is of the opinion that the Curia's new jurisdiction also provides a tool for the enforcement of fundamental legal interpretation paradigms.

Finally, the following questions arise regarding substantive examination of the legal contradiction: How to define the test of a legal contradiction, i.e., what are the starting premises and the conclusions? And do those conclusions lead to new premises? Is it necessary to have identical, or at least partly identical, facts defined? Concerning the inherent decision-making options, a uniformity complaint is a petition for legal remedy; the proceeding is partly a legal remedy proceeding, and it can only start upon a request by the affected and entitled person.

The substance of a uniformity complaint can only be assessed if **the complaint is first accepted by the Curia.** In the first phase of the substantive examination, it is indispensable to determine the decision content (***ratio decidendi***) of the contested ruling. In essence, this means the assessment of the nature (and the facts) of the cases decided, as well as the court's position in the previous decision which is claimed to be contradictory. As the Curia states: "The requirement of legal uniformity is stipulated in paragraph (3) of article 25 of the Fundamental Law, which states that the Curia shall ensure uniform legal application by courts. This responsibility of the Curia is discharged if the in-principle content (*ratio decidendi*) of the legal interpretation accepted in the Curia's published decisions is followed in identical cases"[91].

[91] JPE.I.60.002/2021/7. Decision of the uniformity complaint panel, Reasoning [18], https://kuria-birosag.hu/hu/jogegysegi-panasz/jpei6000220217-szamu-hatarozat [accessed on: 15 October 2021].

The determination of the exact contents of the court's position taken in the previous, contradictory decision also needs to be interpreted. This involves the presentation of the exact text of the interpreted legal regulation, and of the context (the legal situation in which the regulation is interpreted). The same interpretation must be applied when determining the position taken by the court in the contested decision or ruling. By default, a legal contradiction means that the Curia has interpreted the same legal provision (notion) differently in a similar case, i.e. assigned a different content to it (used it with a different content). This includes applying the same legal notion (provision) with a different result, i.e., arriving at an opposite legal consequence or establishing no legal consequence, in deviation from the previous decision.

Only then can the court start to examine whether any contradiction exists. It is worthwhile to note the simple cases in which there is *almost* certainly no contradiction, i.e., the situations when a legal contradiction can be almost automatically excluded. Such a contradiction can be excluded if the Curia has interpreted different legal regulations (i.e., provisions of different nature or meaning). Naturally, this comparison can rarely be fully automatic, because the same or similar legal notions can be used in different legal regulations. A legal contradiction is also unlikely if the two decisions involve the interpretation of different provisions of the same legal regulation.

A legal contradiction can probably not be excluded automatically (i.e., a full and substantive examination is justified) in the following cases, each of which have their own weight and difficulty. In the first such case, the same legal notion (provision) is applied by the Curia to facts that partly or entirely differ. The examination of the different facts is crucial because legal notions are always used in court decisions in connection with certain facts (of the case at hand). According to the Curia: "Thus the requirement of uniformity is never abstract but connected to specific cases and legal interpretations, and can only arise concerning certain and identified judicial decisions"[92]. It is this situation that the Curia grasped with the notion of **"case identity"**.

[92] *Ibidem*, [19].

According to the Curia, it is an expectation within the requirement of uniformity that the law should be interpreted uniformly in cases that raise the same legal issue (case identity). In principle, a difference between the facts of two cases does not always affect the establishment of a legal conflict, because some facts may not be required for the application of a certain legal provision. I.e., the method of applying that provision does not depend on those facts. For example, the age of a person affected by a proceeding can be crucial in the case of one provision but irrelevant in the case of another. If the two cases only differ in terms of factual elements that are not required for the application of the legal notion disputed in the complaint (as well as applied and interpreted in both legal cases), these different but not required factual elements cannot lead to the establishment of no legal conflict. I.e., the difference between the facts of the cases does not prevent the establishment of a legal conflict.

Also, there may be a difference between factual elements that are relevant (and quoted in the hypothesis of the given legal norm) to the application of one and the same legal notion (institution) which is used in both the previous and the contested new decision. In this case, a legal conflict cannot be established, or can only be established in very justified cases, as the difference between the Curia's decisions lies in facts and not legal matters. The differing legal interpretations result from that difference in relevant facts. In a special variation of the cases described above, it is claimed in the complaint that similar notions (provisions of the same nature) in different legal regulations are interpreted differently (e.g., the forfeiture of legal rights, or the meaning of a procedural or substantive deadline etc.). In this case, the facts will be different because different legal regulations are applied. But even in this case, a substantive comparison is required in order to exclude or confirm a conflict. Naturally, the uniformity panel can still establish that the complaint must be rejected because it is two different legal issues that are interpreted differently (despite the similar nature of the legal notions involved).

Consequently, the assessments of the two legal issues are likely to differ (i.e., the Curia has deviated from its previously published decision) if the same legal notion is applied differently to the same

facts, with the two decisions interpreting the relevant legal regulation differently. In the second case, the same legal notion is applied differently to the same facts, with the two decisions interpreting the relevant legal regulation in the same way, but with different conclusions drawn (different legal consequences ordered by the court). In the third option, the same legal notion or institution is applied to partly identical facts, with the two decisions assigning different meanings to the legal regulation, without a relevant difference between the facts.

The doctrine of case identity renders the above theoretical approach much more specific. When assessing case identity, "the following factors must be taken seriously: the identical nature (effect, norm content) of the substantive legal regulation applied in the compared judicial decisions; the substantive similarity of the facts that are relevant to legal interpretation; and, in an administrative lawsuit, the elements that influence the factual and legal identity of the claim submitted to the authority, the original claim, and the review petition (as the case is tied to the petition, and the examination is determined by the subject of the administrative matter)"[93].

According to the Curia, "there is no case identity between the following: administrative cases with different backgrounds in substantive law, administrative cases with the same background in substantive law but different petitions, or administrative cases with the same background in substantive law but different facts, and between the subsequent legal disputes of administrative nature. Furthermore, it is justified to question case identity if the background in substantive law is the same, but the petition or review arguments differ"[94].

Based on the statistics of the uniformity complaint procedures, mainly in administrative cases, motion for uniformity complaint procedure has been lodged, more precisely from July 2020 to August 2021, 25 uniformity complaints were submitted, of which 15 complaints occurred in the administrative case. The Chapter emphasizes

[93] Jpe.I.60.002/2021/7. Decision of the uniformity complaint panel. Reasoning [20], https://kuria-birosag.hu/hu/jogegysegi-panasz/jpei6000220217-szamu-hatarozat [accessed on: 15 October 2021].

[94] *Ibidem*, [21].

that there is no wide-ranging prior practice yet, but it can be stated that this new judicial power may gradually approximate Hungary's law (which is basically a continental or civil law system) to precedent-based systems. This new procedure and "annulling power" projects gradual changes in the notion, sources and obligatory nature of administrative law (and law in general).

5. Challenges regarding the judicial interpretation of the administrative law

The previous subchapters introduced the constitutional background of the administrative judiciary and the new procedures: the constitutional complaint procedure of the Constitutional Court and the uniformity complaint procedure of the Curia. Regarding and the interpretation in accordance with the Fundamental Law and the constitutional complaint procedure, the judicial interpretation of the administrative law is affected by the case law of the Constitutional Court, as a result of which, changes are taking place in the application of the administrative law. The Chapter aims to highlight these changes and analyse them from the point of the rule of law.

In this regard, it is necessary to point out the concept of the rule of law, the so-called "the inner morality of law" formulated by Lon Fuller. According to Fuller, there are eight principles of legality[95] requiring that laws should be general, public, prospective, clear, coherent, possible to obey, stable, and practicable (congruent). Moreover, from the point of view of Fuller, the predictability of the law, its predictable (clear, coherent, stable) content, can be considered as the most important constituent element of the rule of law[96]. By examining the requirement of legal certainty based on Fuller in the case law of the Constitutional Court, the Chapter underlines the following.

[95] F. Lon, *Morality of Law*, New Haven 1969, p. 39. Fuller has an extended discussion of each criterion.

[96] C. Murphy, *Lon Fuller and the moral value of the rule of law*, "Law and Philosophy" 2005, No. 24, pp. 239–262.

On one hand, the Constitutional Court has been constantly following the Fuller's principles since 1990 placing the legal certainty in the centre of the concept of the rule of law[97]. In line with the above, the Constitutional Court emphasised that the legal certainty is an indispensable element of the rule of law, which requires "that the state, and in particular the legislator, must ensure that the law as a whole, its individual parts and its rules are clear, unambiguous, predictable in their effects and foreseeable for the recipients of the norm, and that they must have a normative character that is recognisable in the application of the law"[98]. In line with the Fuller's principles, the Constitutional Court also expressed that the basic requirement of the legal certainty is the predictability of law and the clarity of the legal norms[99].

On the other hand, when the Constitutional Court establishes a constitutional requirement regarding the interpretation of an enacted law, the requirement of the legal certainty is tested by the Constitutional Court itself. It is necessary to highlight that, first, the constitutional requirement[100] is not a new legal rule, but rather the correct interpretation of law, originated from the

[97] The Constitutional Court has been following the Fuller's principles in its case law: 9/1992. (I. 30.) Decision of the Constitutional Court of Hungary, 1263/B/1993. Decision of the Constitutional Court of Hungary, 24/2013. (X. 4.) Decision of the Constitutional Court of Hungary, Reasoning [49], 3047/2013. (II. 28.) Decision of the Constitutional Court of Hungary, Reasoning [18], 3/2016. (II. 22.) Decision of the Constitutional Court of Hungary, Reasoning [11], 3098/2016. (V. 24.) Decision of the Constitutional Court of Hungary, Reasoning [30]–[33], 3296/2018. (X. 1.) Decision of the Constitutional Court of Hungary, Reasoning [32], 3/2021. (I. 7.) Decision of the Constitutional Court of Hungary, Reasoning [52]–[54].

[98] 9/1992. (I. 30.) Decision of the Constitutional Court of Hungary.

[99] 33/2014. (XI. 7.) Decision of the Constitutional Court of Hungary, Reasoning [32]; 3001/2019. (I. 7.) Decision of the Constitutional Court of Hungary, Reasoning [87].

[100] Section 46 (3) of Act CLI of 2011 on the Constitutional Court says that the Constitutional Court, in its proceedings conducted in the exercise of its competences, may establish in its decision those constitutional requirements which originate from the regulation of the Fundamental Law and which enforce the constitutional requirements of the Fundamental Law with which the application of the examined legal regulation or the legal regulation applicable in court proceedings must comply.

regulation of the Fundamental Law, and it is established by the Constitutional Court in order to avoid annulling the law or let the legislator redefine it[101]. Second, the Constitutional Court stands at the top of the "hierarchy" of interpretation of law, moreover, the constitutional requirement laid down in the decision of Constitutional Court has the most biding force for the legal practitioners. Therefore, from the moment of the establishment of a constitutional requirement, the legal practitioners must enforce the constitutional requirement set out by the Constitutional Court and not the enacted law which entered into force earlier. It means that the Constitutional Court, by establishing constitutional requirements, limits the judicial interpretation of law and challenges the requirement of the legal certainty.

In addition to the above, it is important to note that the interpretation set out in the decisions of the Constitutional Court (*ratio decidendi*) is biding the judicial interpretation. Thus, the decisions of the Constitutional Court are getting a stronger effect on the judicial interpretation of administrative law. In this regard, the Chapter draws attention to 3311/2018. (X. 16.) Decision of the Constitutional Court of Hungary.

According to the Code of Administrative Litigation, the written law, there are **two types of infringement of the procedural law: infringement of an important procedural rule and infringement of a non-important procedural rule in administrative law.** In this regard, the courts can annul the administrative decision only in case of a violation of an important procedural rule[102]. In the case of Kvf.

[101] According to a research, the most of the constitutional requirements established between 2012 and 2019 are related to Article XXVIII (right to fair trial), Article B) (1) (the rule of law) and Article XV (the obligation of equal treatment). See: Z. Szakály, *Alkotmányos követelmények a magyar alkotmánybíróság gyakorlatában 2012 után*, "Iustum Aequum Salutare" 2020, vol. XVI, No. 4, pp. 166–169.

[102] Section 88 (1) c) of the Act I. of 2017 on the Code of Administrative Litigation says that the court shall reject the claim if violation of procedural rules occurred that did not have any material impact on the adjudging the case on the merits.

II.37.070/2016/7, Curia stated that when the infringements of the procedural laws, such as the violation of the right of access to the file, are committed in the first instance procedure, and the client exercises the right to appeal, the infringements of the procedural laws do not affect the merits of the case, since it could be remedied in the second instance procedure.

The Constitutional Court reviewed the Curia's decision and held that the right to good public administration expressed under Article XXIV (1) of the Fundamental Law had been infringed. Based on the right to a fair proceeding, the Constitutional Court stated that each procedural guarantees are of value, the breach or non-observance of which may affect the merits of the case, regardless of its outcome. By taking the totality and circumstances of the proceeding into account, a violation of the right to a fair proceeding may also occur when there is no causal link between the substantive procedural violation and the specific outcome of the case, but the enforceability of the rights of the client is infringed in a way, which rises to the level of unconstitutionality[103]. Therefore, if the constitutional rights are violated, even if it is by an infringement of a non-important procedural rule, the administrative decision should be annulled. This decision of the Constitutional Court makes the infringement of a non-important procedural rule, which violates a constitutional right, more serious, challenging the traditional concept regarding the function of the administrative judiciary mentioned in Subchapter II/1.

Finally, it is important to underline that the **Curia shall ensure uniformity of the application of the law by courts**. The final decisions of Curia, the legal interpretation contained therein, are binding. It means that the lower courts cannot deviate from the Curia's legal interpretation, but it also binds the Curia itself. In case of deviation from the previous decision of the Curia, the Curia's own decision can be reviewed in the uniformity complaint procedure. In this regard, the Curia becomes the new forum to interpret the administrative law, which is bound by the case-law of the Constitutional Court of

[103] 3311/2018 (X. 16.) Decision of the Constitutional Court of Hungary, Reasoning [34].

Hungary and binds the lower courts. Moreover, the interpretation laid down in the decision of the uniformity or the uniformity complaint procedure of Curia is above the interpretation with **binding force** laid down in the decision of the review procedure of Curia in the hierarchy of interpretation.

6. Conclusions

The chapter first examined the theoretical and historical aspects of the Hungarian administrative justice and the new legislative framework related to administrative judiciary. It explored the impacts of the Fundamental Law: the role of the Constitutional Court and the Curia in the interpretation of law.

Regarding the provisions of the Fundamental Law and the new procedures – the constitutional complaint procedure and the uniformity complaint procedure – it is confirmed that the Constitutional Court influences administrative justice in the aspect of the application and the interpretation of the administrative law by providing constitutional requirements. Although, due to the lack of case law, there is the dilemma regarding the relationship between the case-law of the Constitutional Court and the Curia: how the Constitutional Court and the Curia will handle the situation in case there is the discrepancy of their case law.

The Chapter recognizes that there is a greater importance of the question of interpretation of the administrative law. While until 2020 the scholarship mainly dealt with the organizational issues, such as the possibility of the administrative court separated from the ordinary courts, currently, the Chapter considers that other important question arises: who does truly interpret administrative law, who says the final word what administrative law is.

REFERENCES

Az államigazgatási eljárási törvény magyarázata, G. Fonyó (ed.), Budapest 1976.

Bragyova A., *Az alkotmánybíráskodás elmélete*, Budapest 1994.

Csink L., Schanda B., *The Constitutional Court*, [in:] *The Basic Law of Hungary. A First Commentary*, L. Csink, B. Schanda, Zs.A. Varga (eds.), Budapest 2012.

Concha G., *A közigazgatási bíráskodás az alkotmányosság és az egyéni joghoz való viszonyában*, Budapest 1877.

Concha G., *A közigazgatási bíróságokról szóló törvényjavaslat*, "Jogtudományi Közlöny", Budapest.

Dennis J.L., *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, "Louisiana Law Review" 1993, No. 54.

Egyed I., *Az alsó fokú közigazgatási bíráskodás*, Budapest 1916.

Gardos-Orosz F., *The Hungarian Constitutional Court in Transition – From Actio Popularis to Constitutional Complaint*, "Acta Juridica Hungarica" 2012, No. 53.

Garvey Algero I.M., *Considering Precedent in Louisiana: Balancing the Value of Predictable and Certain Interpretation with the Tradition of Flexibility and Adaptability*, "Loyola Law Review" 2012, No. 58.

Jacob M., *Precedents and Case-based Reasoning in the European Court of Justice*, Cambridge 2014.

Khün Z., *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation*, Leiden, Boston 2011.

Kilényi G., *Az államigazgatási határozatok bírói felülvizsgálatának formái*, "Állam és Igazgatás" 1968, No. 3.

Kilényi G., *Az államigazgatási határozatok felülvizsgálata a szocialista jogfejlődés tükrében*, "Jogtudományi Közlöny"1981, No. 8, p. 653.

Kmety K., *A magyar közigazgatási jog kézikönyve*, Budapest 1907.

Közigazgatási A., *Bíróság állásfoglalása az emberi jogok védelmében*, "Pénzügy és Közigazgatás" 1947.

Küpper H., *Magyarország átalakuló közigazgatási bíráskodása*, "MTA Law Working Papers" 2014, No. 59, https://jog.tk.mta.hu/

uploads/files/mtalwp/2014_59_Kupper.pdf [accessed on: 15 October 2021].

Lon F., *Morality of Law*, New Haven 1969.

Márffy A., *Tallózás a Közigazgatási Bíróság teljes ülési jegyzőkönyveiben*, [in:] *A Magyar Közigazgatási Bíróság ötven éve* (*1897–1947*), J. Csorba (ed.), Budapest 1947.

Martonyi J., *A közigazgatási bíráskodás és legújabbkori fejlődése*, Budapest 1932.

Martonyi J., *Az ötvenéves közigazgatási bíróság*, "Városi Szemle" 1947, vol. XXXIII.

Murphy C., *Lon Fuller and the moral value of the rule of law*, "Law and Philosophy" 2005, No. 24.

Némethy K., *A közigazgatási bíróságokról szóló törvény magyarázata*, Budapest 1897.

Némethy K., *A közigazgatási bíróságokról szóló törvényjavaslat. Válasz Concha Győző egyetemi tanár bírálatára*, Budapest 1894.

Névai L., *A szocialista polgári eljárásjog elméleti alapkérdései*, Budapest 1987.

Nigriny E., *Az államigazgatási határozatok bírósági felülvizsgálata továbbfejlesztésének néhány kérdése*, "Jogtudományi Közlöny" 1985, No. 2.

Osztovits A., *Törvénymódosítás a bírósági joggyakorlat egységesítése* érdekében – *jó irányba tett rossz lépés?*, "Magyar Jog" 2020, No. 67.

Patyi A., *A jogegységi panasz bevezetésnek és továbbfejlesztésének néhány kérdése*, [in:] *Ünnepi tanulmányok a 65 éves Cs. Kiss Lajos tiszteletére. Ut vocatio scientia*, A. Pongrácz (ed.), Budapest 2021.

Patyi A., *A közigazgatási bíráskodás – a* (2) *bekezdés magyarázata*, [in:] *Az Alkotmány kommentárja*, A. Jakab (ed.), Budapest 2009.

Patyi A., *Alapkérdések a szervezetileg* önálló *közigazgatási bíráskodás megszervezése kapcsán*, "Acta Humana – Emberi Jogi Közlemények" 2019, No. 7(1).

Patyi A., *Közigazgatási bíráskodás de constitutione ferenda*, [in:] *Közérdekvédelem. A közigazgatási bíráskodás múltja* és *jövője*, Zs.A. Varga, J. Fröhlich (eds.), Budapest 2011.

Patyi A., *Közigazgatási bíráskodásunk modelljei. Tanulmány a magyar közigazgatási bíráskodásról*, Budapest 2002.

Patyi A., Szalay P., Varga Zs.A., *Magyarország alkotmányának szabályozási elvei. Szakértői változat*, Pázmány "Law Working Papers" 2011, No. 31, http://www.plwp.jak.ppke.hu/ [accessed on: 15 October 2021].

Puky E., *A negyven éves közigazgatási bíróság múltja és jövője*, Budapest 1937.

Puky E., *A szent korona és a közigazgatási bíráskodás*, Budapest 1941.

Rácz A., *A törvényesség és a közigazgatás*, Budapest 1990.

Rozsnyai K., *A hatékony jogvédelem biztosítása a közigazgatási bíráskodásban*, "Acta Humana" 2013, No. 1.

Schweitzer G., *A "zsidótörvények" a Közigazgatási Bíróság ítélkezési gyakorlatában*, [in:] *A holokauszt Magyarországon európai perspektívában*, J. Molnár (ed.), Budapest 2005.

Schweitzer G., *Közigazgatás – igazságszolgáltatás – jogállamiság, avagy a közigazgatási bíráskodás kezdetei Magyarországon*, "Állam – és Jogtudomány" 1996–1997, No. 1–2[98].

Shoenberger A., *Changes in the European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Precedent into the Civil Law System*, "Loyola Law Review" 2009, No. 55.

Sik F., *A Közigazgatási Bíróság alkonya 1945–1949*, "Jogtudományi Közlöny" 1984, No. 8.

Solymosi S., *Az államigazgatási határozatok bírósági felülbírálata*, "Magyar Jog" 1983, No. 8.

Somody A., Vissy B., *Citizen's Role in Constitutional Adjudication in Hungary: From the Actio Popularis to the Constitutional Complaint*, "Annales Universitatis Scientiarum Budapestinensis De Rolando Eötvös Nominatae – Sectio Iuridica" 2012, No. 53.

Spuller G., *Transformation of the Hungarian Constitutional Court: Tradition, Revolution, and* (*European*) *Prospects*, "German Law Journal" 2014, No. 15.

Stipta I., *A közigazgatási bíráskodás előzményei Magyarországon*, "Jogtudományi Közlöny" 1997, No. 3.

Stipta I., *A pénzügyi közigazgatási bíróság archontológiája*, "FORVM Acta Juridica et Politica" 2017, vol. VII, No. 1.

Szamel L., *Az államigazgatási eljárás jogorvoslati rendszereinek továbbfejlesztése II. r.*, "Állam és Igazgatás" 1978, No. 4.

Szamel L., *Az államigazgatás törvényességének jogi biztosítékai*, Budapest 1957.

Szakály Z., *Alkotmányos követelmények a magyar alkotmánybíróság gyakorlatában 2012 után*, "Iustum Aequum Salutare" 2020, vol. XVI, No. 4.

Takács A., *Az alkotmányosság és a törvényesség védelme bíróságok útján*, "Jogtudományi Közlöny" 1989, No. 9.

Tiersma P.M., *The Textualization of Precedent*, "Notre Dame Law Review" 2006–2007, No. 82.

Toldi F., *A közigazgatási határozatok bírói felülvizsgálata*, Budapest 1988.

Trócsányi L., *Milyen közigazgatási bíráskodást*, Budapest 1992.

Varga Zs.A., *Constitutional Identity as Interpreted by the Council of Europe and the European Union – Conflict of Laws – Conflict of Courts*, [in:] *2016 Hungarian Yearbook International Law & European Law*, 2016.

Varga Zs.A., *Role of Constitutional Courts in the Protection of National/Constitutional Identity*, [in:] *2018 Hungarian Yearbook International Law & European Law*, 2018.

Varga Zs.A., *Tíz gondolat a jogegységről* és *a precedenshatásról*, "Magyar Jog" 2020, No. 67.

Zalán K., *Búcsú a Közigazgatási Bíróságtól*, "Állam és Közigazgatás" 1949.

DR. NOÉMI SURI, PH.D., LL.M.
Ferenc Mádl Institute for Comparative Law

The system of legal remedies in the Hungarian Code of Administrative Court Procedure

1. Introduction – the objective of the research assignment

The objective of the research assignment is to provide a detailed description and critical analysis of the system of legal remedies in the Hungarian Code of Administrative Court Procedure[1]. The paper takes a broad perspective in the review of the legal remedy options available in the case of administrative court decisions.

First, it examines the remedy options applicable for court decisions made in administrative procedures. This section focuses on exploring the connection points of Act CL of 2016 on the Code of General Administrative Procedure and Act I of 2017 on the Code of Administrative Court Procedure. In the research assignment among special administrative court actions, the rules on remedies over administrative decisions in simplified lawsuits and assembly cases are examined.

The analysis and assessment of the system of legal remedies in the Code of Administrative Court Procedure constitute the substantive part of the paper written based on the research results. The author provides a comprehensive analysis of the legal regulations

[1] Act I of 2017 on the Code of Administrative Court Procedure.

pertaining to ordinary and extraordinary remedies. In this way, he examines the legal institutions of appeal, cross-appeal, retrial, and review in detail. Further, the author examines the anomalies and potential legal loopholes in the three-year application of the Code of Administrative Court Procedure in the form of an empirical research, and, this way, looks for initiating points for the determination of the direction of a potential future law amendment.

2. Remedy options against administrative authorities' decisions – in particular appeal

The primary goal of reforming the Hungarian public administrative procedures was to create the Code of Administrative Court Procedure. This was given special attention during the codification of the administrative authority procedures. From the point of view of the time factor, the two procedures appear to the client as a single unit, which together are capable of providing an effective, quick, and timely remedy. The legislator, therefore, saw them fit to design these laws in harmony[2].

The codification was carried out with the main objective of facilitating decisions made by the authorities in administrative procedures that can be effectively adjudicated in an administrative court action. The restructuring of the legal remedy system against the authority's decisions was essential for this[3].

With the creation of the Code of Administrative Court Procedure, the renewal of the rules of authority procedures also became inevitable. This requirement was fulfilled by the Code of General Administrative Procedure[4]. "The new code maintains the predecessors's

[2] P. Demjén, *Az új közigazgatási perrend, mint a modern állam eszköze*, "Miskolci Jogi Szemle" 2020, No. 2, 15. Évf., (különszám), p. 24.

[3] A. Patyi, *Néhány gondolat a közigazgatási perrendtartás előzményei, előkészítése és megalkotása köréből*, [in:] *Tanulmánykötet a Kúria Közigazgatási Szakágában 2019-ben ítélkező bírák tollából*, F. Bartók, G. Madarász, I. Marton, O. Dévényi, E. Varga (eds.), Kúria 2019, pp. 151–165.

[4] B. Hajas, *Általános közigazgatási rendtartás – Ket. kontra Ákr*, "Új Magyar Közigazgatás" 2016, No. 4, p. 18; F.K. Rozsnyai, *A közigazgatási perrendtartás*

approach, and it deals with proceedings in which the administrative authorities act in cases of legal entities (parties) outside the administration. These proceedings take place in such a way that concrete rights and obligations are established for the parties. The proceedings presuppose that the administrative body acts as an authority and assumes the active cooperation of the other subjects of the proceedings"[5].

The Code of General Administrative Procedure regulates administrative contracts between administrative authorities and parties. If the administrative authority fails to fulfill the administrative contract as agreed and fails to comply with the client's notice requiring performance, the client may seek remedy at the court of jurisdiction for administrative court actions[6].

The Code of General Administrative Procedure is indeed general[7]. However, it is not a complete procedural law, it does not cover certain procedures with unique requirements. The Code of General Administrative Procedure itself acknowledges that it does not cover a few administrative procedures – for example, infraction procedures, election procedures, initiation of referendums and referendum procedures, and tax and customs administration procedures[8].

---

kodifikációja kapcsán várható lényegesebb közigazgatási perjogi változások, "Versenytükör" 2016, No. 4, 12 évf., p. 33.

[5] A. Patyi, *Hungary*, [in:] *Administrative Proceedings in the Habsburg Succession Countries*, K. Zbigniew (ed.), Łódź, Warszawa 2021, p. 139.

[6] P. Darák, *Administrative Justice In Europe – Report for Hungary*, p. 4, https://www.aca-europe.eu//en/eurtour/i/countries/hungary/hungary_en.pdf [accessed on: 6 November 2022].

[7] In András Patyi's view, "generality" includes three requirements: i) the rules must be of general application (rules of general application must be respected by all administrative bodies in all proceedings), ii) the consequences of their violation must be general (the decision must be reversed, reviewed, and corrected), and iii) they must be general in nature (they must be formulated at a linguistically abstract level). See: A. Patyi, *A közigazgatási eljárásjog és perjog változásai és összefüggései*, [in:] I. Benisné Győrffy, "Tizennegyedik Magyar Jogászgyűlé Balatonalmádi" október 4–6 2018, pp. 153–154.

[8] According to Section 8 of the Code of General Administrative Procedure, "(1) The following shall be not covered by this Act: a) infraction procedures, b) election procedures, initiation of referendums and referendum procedures, c) tax and customs administration procedures, d) asylum and immigration

The purpose of this chapter is to form an overall picture of the legal remedy options available in administrative authority procedures as set forth in this Act.

A legal remedy is a means of legal control over public administration, which constitutes the review of the official procedure and the decision taken in its course according to a specific procedure, with the right to revise, that is, to change or annul the decision to remedy the error found[9].

Section 112 of the Code of General Administrative Procedure declares the right to legal remedy on a general level. However, upon taking a closer look at the Act, it can be established that all public administration decisions are not subject to legal remedy.

Decisions reached in public administration authority proceedings may be appealed individually. Individual legal remedy may be lodged against an authority's decision if the law expressly allows it. The legal remedy options set forth in the Code of General Administrative Procedure may be classified into two groups: redress procedures available upon request and own motion redress procedures. Redress procedures available upon request presuppose client activity as the procedure is initiated by an application, and the client has substantive rights to initiate the procedure. Redress procedures available upon request basically protect clients (and, in certain cases, other participants in the procedure) against decisions by public authorities that undermine their rights and legitimate interests. This means that legal protection is subjective in nature and is also known as subjective legal protection[10]. The Act defines adminis-

---

procedures and, excep for the issue of citizenship certificates, citizenship procedures e) competition supervision proceedings, and f) authority procedures related to the functions of the Hungarian National Bank specified in section 4 (2) and (5) to (9) of Act CXXXIX of 2013 on the Hungarian National Bank and in Act XV of 2014 on trustees and the rules of their activities".

[9] Zs.A. Varga, *Az alkotmányosság követelménye és az eljárás alapelvei*, [in:] *Közigazgatási hatósági eljárásjog*, A. Patyi (ed.), Budapest–Pécs 2012, p. 135.

[10] N. Balogh-Békési, *A közigazgatási eljárásjog* (*államigazgatási eljárásjog*) *jogorvoslati rendszere szabályozásának jellegzetességei az Ákr-ben*, [in:] *A hazai közigazgatási hatósági eljárási jog karakterisztikája*, A. Boros, G. Patyi (eds.), Budapest 2019, p. 330.

trative court actions and appeal procedures as redress procedures available upon request.

Legal remedy procedures initiated ex officio serve to enforce the constitutional requirement of the rule of law and the resulting legal certainty by replacing the decision that is in breach of the law with a decision that complies with the law. Ex officio remedy procedures may be launched in the absence of the client or even against the client's will, and the procedure is executed at the discretion of the authority. Ex officio remedy procedures are conducted at the discretion of the deciding authority, the supervisory authority, and the public prosecutor. This legal protection is objective and, therefore, is called objective legal protection[11].

It provides for the amendment or withdrawal of decisions by virtue of the authority's office, supervisory proceedings, and prosecutor's intervention and action as own motion redress procedures.

In my research assignment, I will examine the rules of appeal in detail. The Code has fundamentally changed the previous system of redress procedures available upon request by making administrative court actions the primary remedy[12]. An important rule in the relationship between appeals and administrative court actions is that if a decision of a public authority can be challenged on appeal, the administrative proceedings must be preceded, if possible, by a legal remedy (appeal) within the administrative organizational system[13].

In other words, in addition to the primacy of administrative court actions, the Act on the Code of General Administrative Procedure and the Act on the Code of Administrative Court Procedure continue to uphold the principle of the preliminary mandatory administrative appeal established for decades in the Hungarian administrative procedural law.

Therefore, if the administrative procedure comprises two instances, an appeal must be exhausted before the action can be

[11] N. Balogh-Békési, *op. cit*., p. 331.

[12] G. Barabás, *Közigazgatási per*, [in:] *Kommentár az általános közigazgatási rendtartásról szóló törvényhez*, G. Barabás, B. Baranyi, M. Fazekas (eds.), Budapest 2018, p. 682.

[13] G. Barabás, *op. cit*., p. 682.

launched. Exhaustion of the appeal means that one of the entities entitled to appeal lodges an appeal that is then decided on[14].

On the one hand, an appeal is an internal legal remedy, adjudicated by the authority of second instance, that is, it is decided on within the administrative organizational system[15]. On the other hand, according to the reasoning of the Act on the Code of General Administrative Procedure, an appeal is an exceptional, secondary remedy compared to an administrative court action, which can be lodged against a first instance decision if it is expressly permitted by law. The client or the person subject to any of the provisions of the decision may lodge an appeal against the first instance decision of a public administration authority under the law.

"(1) A resolution may be appealed if it was brought: a) by a body of a municipal government, other than the council of representatives; or b) by the local branch of a law enforcement agency.

(3) In cases where an appeal lies against the decision under Subsections (1) and (2), the ruling that can be challenged independently may be appealed"[16].

The appeal may have a suspensory effect on the execution of the decision if the authority does not declare an immediately enforceable decision. The appeal may be filed within 15 days. An appeal may be based on an infringement or harm with respect to the decision contested, which is factually and directly related to the decision. Moreover, the appeal shall, in all cases, be reasoned.

The appeal shall be lodged with the authority that has reached the decision and who will first examine the submission in effect. In the case of an appeal, the authority of second instance not only examines the decision from the point of view of its legality, but also reviews the preceding procedure. In the appeal procedure, the authority of second instance is not bound by the grounds of the appeal.

If the authority of first instance finds on appeal that its decision is unlawful, it shall amend or withdraw the decision in question.

---

[14] N. Balogh-Békési, *Fellebbezés*, [in:] *A hazai közigazgatási hatósági eljárási jog karakterisztikája*, A. Boros, G. Patyi (eds.), Budapest 2019, p. 337.

[15] N. Balogh-Békési, *op. cit.*

[16] Section 116. § (2) The General Code of Administrative Procedures.

The appeal shall be determined by the authority of second instance, upon reviewing the contested decision and the process leading to it. The authority of second instance shall either sustain the decision on account of the alleged harm shown in the appeal or shall reverse or annul the decision in case of an infringement[17].

3. The connection points of Act CL of 2016 on the Code of General Administrative Procedure and the Code of Administrative Court Procedure

My goal in this chapter is to explore the connections between Act CL of 2016 on the Code of General Administrative Procedure and the Code of Administrative Court Procedure in the context of the legal remedy systems in the two legislations.

In the previous chapter, I examined the legal remedy system in the Code of General Administrative Procedure. Here, I shall explain in what cases a decision made by an administrative authority can lay the grounds for an administrative court action. In other words, how can an administrative authority procedure turn into an administrative court action?

Article 25 of the Fundamental Law of Hungary clearly defines and distinguishes between three branches of judicial activity: criminal, civil disputes, and administrative adjudication[18]. As a result of Act CXXX of 2016 on the Code of Civil Procedures (hereinafter: "Code of Civil Procedures") and Act I of 2017 on the Code of Administrative Court Procedure (hereinafter: "Code of Administrative Court Procedure") both taking effect on January 1, 2018, jurisdiction in civil matters and public administration court actions became separate in effect, and different systems of rules were established for each.

The Act on the Code of Administrative Court Procedure as a separate code contains the main rules applicable to administrative court actions, but the extraordinary number of rules detailed

[17] Section 116. § (1), (4), (5) The General Code of Administrative Procedures.
[18] E.I. Horváth, A. Lapsánszky, Zs. Wopera, *Közigazgatási perjog*, Budapest 2019, p. 18.

in the new Code of Civil Procedure must continue to govern and apply in administrative court actions. As *Patyi* points out, "The so-called procedure-neutral legal instruments of the Code of Civil Procedure must be applied in administrative court actions." The Act on the Code of Administrative Court Procedure brought changes to the system of related sectoral laws: procedural provisions are now concentrated in the Code of Administrative Court Procedure, making the relevant body of law more transparent[19].

With the Code of Administrative Court Procedure taking effect, administrative legal disputes as defined in Section 4 of the Code of Administrative Court Procedure are now decided on in the context of administrative adjudication:

The subject of the administrative dispute shall be the lawfulness of an act regulated under administrative law and taken by an administrative organ with the aim to alter the legal situation of an entity affected by administrative law or resulting in such an alteration, or the lawfulness of the administrative organ's failure to carry out such an act (hereinafter: "administrative activity").

Civil service disputes are considered administrative disputes, and due to the employment relationship involved, they also entail labour law elements. Besides the statement of claim, the Code of Administrative Court Procedure established another very important tool for legal protection: interim relief.

The main aim of administrative court actions is to provide an efficient remedy for legal violations, that is, to provide legal protection through judicial means against administrative activities where the right or legitimate interest of the plaintiff is violated. Pursuant to Section 39 (6) of the Code of Administrative Court Procedure, the filing of a statement of claim does not generally have a suspensory effect on the administrative activity taking effect (enforcement), but there may be cases where the administrative activity challenged in an administrative court action or the situation caused by it infringes

[19] A. Patyi, *Néhány gondolat a közigazgatási perrendtartás előzményei, előkészítése és megalkotása köréből*, [in:] *Tanulmánykötet a Kúria Közigazgatási Szakágában 2019-ben ítélkező bírák tollából*, F. Bartók, G. Madarász, I. Marton, O. Dévényi, E. Varga (eds.), Kúria 2019, p. 161.

the rights or legitimate interests of a person to such an extent that it is advisable to seek legal protection before the final closing of the case to avert the imminent threat of harm, to temporarily settle the legal relationship in dispute, or to maintain the unchanged situation giving rise to the dispute. This is known as interim relief in administrative proceedings. Therefore, the aim of interim relief is to ensure effective legal protection, both in time and content, if the administrative court action or the situation created by it infringes someone's rights or legitimate interests to such an extent that it would be impossible or disproportionately difficult to restore the original situation after the final ruling in the court procedure. In the absence of interim relief, administrative court actions would not be able to fulfil their purpose in certain cases, and judicial legal protection would essentially be obsolete[20].

There is also the possibility of settling disputes in administrative court actions, but in a much narrower scope than in civil procedures. Accordingly, in administrative court actions, a settlement can only be reached if the material law allows the administrative body some discretion and, thus, some leeway. Thus, in administrative court actions, the parties cannot agree on whether or not the administrative activity challenged before the court was unlawful, but they can agree on how the infringements alleged by the plaintiff can be remedied within the discretionary powers granted by the law, without the need for further administrative proceedings. This can be a beneficial and prioritized objective for both the plaintiff and the defendant public authority.

However, unlike civil procedures, administrative court actions are aimed at providing not only subjective legal protection, but also objective legal protection, that is, the protection of rights that represent public interest. The role of objective legal protection can also be

[20] The purpose of the application for an immediate relief may be to prevent imminent harm (e.g., to avoid the subsequent destruction of evidence) or to temporarily settle a disputed legal relationship (e.g., to ensure that the conditions for the grant of a provisional measure are fulfilled) or to uphold the state giving rise to the legal dispute (e.g., to suspend the obligation to demolish in a construction case) See: I. Winklerné Nóvé, *Azonnali jogvédelem a közigazgatási perben*, "Magyar Jog" 2020, No. 4, p. 227.

derived from the constitutional principles of the rule of law and the separation of powers. The new Code introduces the principle of *ex officio* procedures, which, in exceptional cases, breaks through the disposition principle. Thus, in addition to the principle of equality of arms and the disposition principle, *ex officio* procedures are also used, where appropriate, to ensure the objective legal protection function in addition to the disposition principle[21].

Among the forms of the principle of ex officio procedures, *Demjén* also mentions Section 81 (4) of the Act on the Code of Administrative Court Procedure as an example: if a procedure should be terminated, under certain conjunctive conditions, the law provides the court with the possibility to call upon the prosecution to intervene[22].

4. The system of legal remedies in the Hungarian Administrative Court Procedure

As of March 31, 2020, public administration and labour courts were dissolved in Hungary as a result of a change in legislation. From 1 April 2020, eight regional courts (Metropolitan Court of Budapest, Regional Court of Budapest, Regional Court of Debrecen, Regional Court of Győr, Regional Court of Miskolc, Regional Court of Pécs, Regional Court of Szeged, and Regional Court of Veszprém) have regional jurisdiction to act in administrative court actions in the first instance. The Metropolitan Court of Budapest has exclusive competence in cases in which the Budapest Administrative and Labour Court used to have jurisdiction, such as visa and statelessness cases.

Further, the second instance adjudication in administrative legal disputes will be partially restructured by 1 March 2022. In line with the new regulation, an Administrative Law Department has been set up at the Budapest Regional Court of Appeal.

---

[21] P. Demjén, *op. cit*., p. 25.
[22] *Ibidem*.

Adjudication at second instance is the responsibility of

a) the Court of Appeal having an Administrative Law Department (hereinafter: Court of Appeal) in cases heard before regional courts, and
b) the Curia in cases falling in the competence of the Court of Appeal.

In addition, the Metropolitan Court of Budapest has exclusive jurisdiction in the cases of independent regulatory bodies, autonomous state administrative bodies and the governmental head office under the Act on Central State Administrative Bodies, the railway administrative body and the aviation authority, the supervisory and internal affairs of certain public bodies (chambers), and lawsuits related to the disclosure of classified data and the administrative activities of the Hungarian National Bank. In administrative court cases, the Curia acts as the second instance forum in appeal and review procedures. In special cases, the Curia can act as a first instance and exclusive forum; such cases are assembly cases.

An important difference in the review procedure over civil and administrative court actions is that the Curia approves a request for review under the Code of Administrative Court Procedure in cases where a deviation from the published practice or uniformity decision of the Curia or the need for a preliminary ruling justifies it.

Another difference in the regulatory system of the Code of Civil Procedure and the Code of Administrative Court Procedure is that the new Code of Civil Procedure still contains extrajudicial procedures within the jurisdiction of the courts, while the Code of Administrative Court Procedure institutionalizes simplified procedures instead of extrajudicial procedures, which provide a procedural framework for the quick and efficient adjudication of minor cases by the court[23].

The system of legal remedies in the Hungarian Administrative Court Procedure is based on ordinary and extraordinary remedies.

[23] A. Patyi, *Néhány gondolat a közigazgatási perrendtartás előzményei, előkészítése és megalkotása köréből*, [in:] *Tanulmánykötet a Kúria Közigazgatási Szakágában 2019-ben ítélkező bírák tollából*, F. Bartók, G. Madarász, I. Marton, O. Dévényi, E. Varga (eds.), Kúria 2019, pp. 163–164.

4.1. THE ORDINARY REMEDIES IN THE HUNGARIAN CODE OF ADMINISTRATIVE COURT PROCEDURE

In this section, I provide an overview of the ordinary remedies in the system of remedies set out in the Hungarian Code of Administrative Court Procedure. The new Code includes provisions pertaining to the instruments of appeal and cross-appeal, among other remedies. There is further differentiation between the rules of appeal against judgments and orders. First, I would like to briefly summarize the rules governing appeals, with special attention to the differences between civil and administrative court actions.

In administrative court actions, appeal is an ordinary remedy against non-binding court judgments and orders based on legal infringement as set out in law on which the court of second instance is competent to decide.

An appellant is a person entitled by the Code of Administrative Court Procedure to submit an appeal. In administrative proceedings, a party, that is, an interested party, is eligible to file an appeal or appeal against a part of a decision that concerns them if the contested decision is directed at them[24].

An appeal may be lodged on the grounds of violation of the law. The category of violation has not been more precisely defined by the legislator; therefore, it should be understood to include both material and procedural law violations.

According to Section 99: "(1) If it is allowed by law, the party and the interested person may lodge an appeal against a judgment of first instance or a decision of the Curia published in the Collection of Judicial Decisions of the Curia (CJD) (hereinafter: published decisions of the Curia) on the grounds of violation of the law or deviation on a point of law, respectively, and so can those affected by a judgment against the part of the judgment concerning such parties. (2) An appeal is possible a) if the administrative activity was carried out without a preliminary procedure, b) in a legal dispute defined by law".

[24] M. Kárpáti, *Fellebbezés*, [in:] *A közigazgatási eljárás szabályai II. A közigazgatási perrendtartás magyarázata*, F. Petrik (ed.), Budapest 2017, p. 339.

In administrative proceedings, appeals may not be lodged against all judgments, but only against those for which the law allows it. At the same time, the scope of the right to appeal is not limited in relation to judgments. Therefore, an appeal may be lodged against the whole judgment or only a part thereof and there is no obstacle to the appellant challenging only the operative part of the judgment or only its reasoning before the court of second instance[25].

Similar to civil actions, in administrative court actions, there is a division of jurisdiction between the court of first instance and the court of second instance with regard to appeals. The court of first instance is responsible for examining the appeal, rejecting it, if necessary, and, if the application is compliant, referring it and the case file to the court of second instance within eight days.

In administrative proceedings, unlike in the first instance, the second instance procedure is not divided into a preparatory phase and the hearing, but as in the first instance procedure, the court must be requested to hold a hearing also in the second instance procedure. The court may itself order a hearing if it considers it necessary and if, except for documentary evidence, evidence is to be taken in the proceedings at second instance.

If the judgment appealed against complies with the material law on which it is based, or if a procedural violation occurred that did not affect the adjudication of the case in effect, the court of second instance upholds the judgment appealed against. In the event of a violation of the law, the court of second instance may modify the judgment of the court of first instance in whole or part.

The judgment under appeal may be set aside only if it is seriously defective. According to Section 110 [Setting aside the first instance judgment],

1) The court of second instance, regardless of the limits of the appeal, cross-appeal, and counter-appeal, shall set aside the first instance judgment in its order and shall order the court of first instance to conduct a new procedure and adopt a new decision if
   a) the first instance court was not duly constituted,

[25] E.Í. Horváth, A. Lapsánszky, Zs. Wopera, *op. cit.*, p. 18.

b) a judge meeting a ground for disqualification participated in adopting the judgment, or
c) the judgment contains deficiencies as to form that cannot be remedied and that render the judgment unsuitable for substantive review.

After completing the second instance proceedings, the court shall send the documents to the first instance court within thirty days, which, within eight days of receiving the documents, shall communicate to the parties the decision closing the second instance proceedings.

Among the ordinary remedies, the institutions of cross-appeal and counter-appeal should also be mentioned: the opposing party of the party submits the appeal and the interested party may file a counter-appeal or a cross-appeal within eight days of the communication of the appeal.

A counter-appeal is the response or statement of the appellant's opponent to the appeal requesting that the appeal be dismissed on the grounds that it is wholly or partly unfounded. In a cross-appeal, the appellant's opponent asks the court to alter or set aside the decision appealed against.

As a general rule, cross-appeals and counter-appeals are ancillary remedies, that is, they share the legal fate of an appeal. Thus, if the appeal is dismissed or withdrawn, the counter-appeal or cross-appeal also becomes ineffective. An exception to this is if the cross-appeal is filed within the deadline of submitting an appeal, in which case it is considered a separate appeal if the appeal is withdrawn, and the appeal is then taken to the second instance.

The Code of Administrative Court Procedure contains special provisions on appeals against orders.

The court of second instance shall adjudicate the appeal without a hearing but shall hear the parties if necessary. Unless otherwise provided by this Act, the court of second instance shall decide within thirty days after the appeal was referred to it[26]. The second instance court shall amend the order violating the law or shall set

[26] Section 114 (1) of the Code of Administrative Court Procedure.

aside the order violating the law if the procedural act contained in the order is not allowed.

4.2. THE EXTRAORDINARY REMEDIES IN THE HUNGARIAN CODE OF ADMINISTRATIVE COURT PROCEDURE

In the previous chapter, I discussed the ordinary remedies in the Hungarian Code of Administrative Court Procedure. The subject of this chapter is the extraordinary remedies in the Hungarian Code of Administrative Court Procedure. The Code of Administrative Court Procedure defines two legal institutions among extraordinary procedural remedies: review and retrial.

4.2.1. About the review

As the Code explains, the purpose of a review is to establish and ensure a unified jurisprudence by offering a remedy for legal violations that arose due to deviations from the case law of the Curia or incorrect interpretation of EU law[27].

A review procedure may reasonably be lodged against a final judgment with reference to a violation of the law or a departure in a point of law from a published decision of the Curia.

In other words, an application for review may be brought against a final judgment, a final order rejecting a statement of claim, or a final order terminating the proceedings on the grounds of an infringement of the law.

A review of administrative court actions may be requested with reference to a violation of the law. However, the Code of Administrative Court Procedure does not specify the violated law therefore, a review request may also be submitted with reference to the violation of material law or procedural rules[28].

[27] Detailed explanation for Section 115 of the Code of Administrative Court Procedure.

[28] E.Í. Horváth, A. Lapsánszky, Zs. Wopera, *op. cit*., p. 384.

A review application may be submitted by the party, the interested party, and against a part of a decision that concerns the submitting party. The application for review shall state the full name, residence, or registered office, known electronic mailing address, status of the parties and their representatives, and the subject of the action.

The rules of appeal are also applicable to the review if Chapter XIX on extraordinary procedural remedies does not specify any related provisions.

The application for review shall state the full name, residence, or registered office, known electronic mailing address, status of the parties and their representatives and the subject matter of the action.

Furthermore, the application for review must contain:

- the number of the judgment against which the review application is launched,
- the legal infringement providing the grounds for the review application with the exact legal provision cited, and
- a definitive request for a ruling from the Curia.

The application for review may not refer to a new legal basis or to new facts and circumstances that were not the subject of the proceedings at first or second instance.

Section 117 [Review application] states as follows:

1) The review application shall be submitted through a legal representative to the court of first instance that adopted the decision, within thirty days after the communication of the final and binding decision. An application for excuse for failing to meet the time limit may be submitted within 15 days after the expiry of the time limit.
2) No new legal basis or no new fact that was not subject in the first and second instance proceedings may be raised in the review application.

The Curia, sitting in a three-member panel, shall decide upon the admissibility or rejection of the review application without a hearing within thirty days after the application was referred to it. The order rejecting the review application shall be reasoned.

Regarding the review applications submitted to it, the Curia first rules on rejection or acceptance. A rejection is not identical

to a decision made about acceptability, since the Curia examines the existence of potential procedural obstacles in the former case, whereas in the latter, it searches for problems with the content that could hinder the effective achievement of the purpose of the review[29].

The examination of the content of a review application before admission must only follow if the application is first found compliant from a procedural point of view, it is not rejected.

"The Curia shall find the review application admissible if

a) reviewing the violation of the law that affects the merits of the case is justified
   aa) by the need to ensure the uniformity of jurisprudence or its further development,
   ab) due to the specific gravity or social relevance of the legal issue raised,
   ac) due to the need for the preliminary ruling procedure at the Court of Justice of the European Union,
   ad) a likely infringement of the applicant's fundamental procedural rights or any other procedural irregularity affecting the merits of the case, or
b) because the decision contains a provision that deviates from the published case law of the Curia"[30].

Ensuring unity of jurisprudence and the further development of jurisprudence as defined in Section 118 (1) a) aa) of the Code of Administrative Court Procedure are not identical but are two separate reasons, in accordance with the practice of the Curia thus far.

To ensure the unity of jurisprudence, the Curia accepts a review application, particularly if the final judgment raises a point of law of principle about which the Curia has not yet expressed an opinion in a uniformity decision, an opinion by the Civil Department, former instruments of principle-based governance still in force (directive, decision on principle, a department opinion), and the ad hoc decision published by the Curia, provided that the case law on the legal point of principle requiring legal interpretation is not uniform, or that there is a risk of repetition of a decision deviating from case

[29] *Ibidem*, p. 386.
[30] Section 118 (1) of the Code of Administrative Court Procedure.

law and thus of a disruption of the unity of the law. Regarding the necessity of developing jurisprudence further, the Curia accepts a review application if the case law regarding the point of law of principle raised by the final judgment is already established and unified, and the follow-up of which is not to be supported due to the change of circumstances[31].

Based on the social significance of the raised point of law, the Curia accepts a review application if the given point of law affects a wide range of legal entities. A question of law or a case has a social significance if a wide spectrum of the society is directly or indirectly affected by it. The special weight of a raised question of law only facilitates the review of a final judgment if the reviewed point of law exceeds the individual case in terms of its special significance. Furthermore, the reason for admission must be relatable to legal unity in general and indirectly to legal certainty[32]. This can be attributed to the large number of new types of cases[33].

Commentary: Pursuant to Article 267 of the TFEU, a preliminary ruling procedure may be initiated if the interpretation or validity of an EU law governing a case pending before a national court is doubtful. Given the fact that the Curia is the final judicial forum in the Hungarian judicial system, the legislator must facilitate the initiation of a preliminary ruling procedure even if such a procedure was not carried out in the main procedure, despite it being necessary. The Curia can adopt a decision on admissibility pursuant to Section 118 (1) a) ac) of the Code of Administrative Court Procedure based on the facts of the case and knowledge of the national and community law governing the case. However, in the event that the applicability of EU law cannot be raised in the

[31] Point 7 of the precedent-setting Curia Decision No. Kfv.37993/2020/2 on the settlement of administrative disputes, furthermore Decision No. Kfv.II.38.109/2019/2., Decision No. Kfv.V.35.525/2019/2., Decision No. Kfv.I.35.484/2019/2.

[32] Point 8 of the precedent-setting Curia Decision No. Kfv.38045/2021/2. on the court review of administrative decisions (court review of administrative decisions adopted in CONSTRUCTION cases).

[33] Point 10 of the precedent-setting Curia Decision No. Kfv. 45199/2022/2.; Point 13 of the precedent-setting Curia Decision No. Kfv.45159/2022/2.

specific case, it will implicitly decide not to accept the application. It will probably reach the same decision if the Court of Justice of the European Union (CJEU) has already expressed its legal opinion on the review request concerning the disputed question of law in a preliminary ruling procedure initiated in a separate case earlier.

Regarding Section 118 (1) a) ad) of the Code of Administrative Court Procedure, only the reasoning of Act CXXVII of 2019 (on the Amendment of Certain Acts in Connection with the Establishment of Single-Level District Office Procedures) provides guidance according to which the amendment of the admission procedure was carried out "to reinforce both the legally unifying and the remedy function of the review". Therefore, the scope of cases subject to the acceptance of a review application has been extended to include "procedural irregularities affecting the applicant's fundamental procedural rights or the merit of the case".

If a case is based on grounds set out in Section 118 (1) (b), the published Curia decision and the part thereof from which the decision sought to be reviewed differs on a point of law shall be indicated. The court is not bound by the ground for admissibility indicated by the party.

The Curia will accept a request for review if it is justified by a difference on a point of law from a decision published in the CJD[34].

The Curia's published decisions include decisions published in the CJD after January 1, 2012 [Sections 34 (3), 41/B (1), 197/B (5) of the Act on the Organisation and Administration of Courts]. Furthermore, the Curia shall also digitally publish in the CJD any uniformity decision, decisions adopted in uniformity complaint procedures, decisions in remedy procedures opened to ensure legality, decisions adopted by it on the merits of the case and annulling a decision, and decisions adjudicating review applications in effect. [Section 163 (1) (1a) of the Act on the Organisation and Administration of Courts]. Decisions taken after 1 January 2021 must be accompanied by the content of the decision in principle or, failing

[34] Points 9–10 of the precedent-setting Curia Decision No. Kfv.37985/2021/2 on the administrative court action against a decision adopted in a real estate registration case.

that, a brief summary of its content and the laws applied. For decisions adopted between 1 January 2012 and 31 December 2020 and published in the CJD, the content of the decision in principle or, failing that, a brief summary of the content and the laws applied must be indicated until December 31, 2023. [Section 197/C (1)–(2) of the Act on the Organisation and Administration of Courts][35].

Submitting the review application shall not have a suspensory effect on the court decision requested to be reviewed and the underlying administrative act. An application for interim relief may also be submitted simultaneously with the review application. If the review application contains a request for interim relief, the court of first instance shall promptly arrange for the referral of the documents to the Curia. The Curia shall decide upon the application for interim relief at the latest in its order on accepting the application[36].

Section 120 (5) states as follows: "Taking evidence shall not be allowed in the review procedure; the Curia, when deciding upon the review application, shall adopt a decision on the basis of the documents and evidence that were available at the time when the final and binding decision was adopted".

If the Curia accepts the review application, the case can be examined on the merits, which the Curia can decide on. The application for review may be decided on the merits out of court and by holding a hearing. The party may request a hearing in the application or counter-application for review.

The Curia has the power to act as a court of cassation in the review procedure and, therefore, cannot change the decision challenged in the review application.

Regarding the review decision, if the decision requested to be reviewed violates the law in a way that affects the merits of the case, the Curia shall set aside the final and binding decision in full or in part and, if necessary, shall order the first or second instance court that proceeded in the case to conduct a new procedure and adopt a new decision. If necessary, in its judgment, the Curia shall

[35] F. Petrik, *A közigazgatási eljárás szabályai II. – Kp. – A közigazgatási perrendtartás magyarázata* [accessed on: 10 March 2021].

[36] Section 119 (1) (2) of the Code of Administrative Court Procedure.

set aside the final and binding decision with effect, also covering the administrative act, and shall order the administrative organ to conduct a new procedure.

If the decision requested to be reviewed complies with the laws or its breach of procedural rules did not affect the merits of the case, the Curia shall uphold the decision subject to the dispute[37].

The decision is not subject to review. The application for review may be accompanied by an application for interim relief. If the application for review contains an application for interim relief, the court of first instance will immediately arrange for the case to be referred to the Curia. The Curia decides on the application for interim relief together with the decision on admission at the latest[38].

4.2.2. About the retrial

On the subject of retrial, the Code of Administrative Court Procedure calls for the application of the procedural rules of the Civil Procedure Code. In administrative proceedings, a retrial is an extraordinary, non-appealable remedy against a final judgment and the decision on the merits that terminated the proceedings.

In the new Code of Civil Procedure, the legal institution of retrial serves a dual purpose: it continues to provide a means for the adjudication of facts and evidence not adjudicated in the main proceedings, and its function to serve as a means of remedying certain infringements and irregularities was strengthened[39]. Retrial may be initiated only if the grounds are set out in the Civil Procedure Code. Retrial may be sought against a final and binding judgment or against other decisions with the same effect as a judgment, if a) a party invokes a fact, a piece of evidence, or a final and binding decision of a court or other authority that was not assessed by

[37] Section 121 of the Code of Administrative Court Procedure.

[38] See General information on the procedures falling within the jurisdiction of the Curia: https://kuria-birosag.hu/hu/rendkivuli-jogorvoslati-eljarasok-kozigazgatasi-ugyekben [accessed on: 6 November 2022].

[39] K. Gombos, *A polgári perorvoslati rendszer és átalakulás*, "Jogtudományi Közlöny" 2018, No. 2, pp. 62–63.

the court during the proceedings, provided that a judgment more favourable for the party would have been delivered if it had been assessed, b) the party lost the action unlawfully due to a crime committed by a judge participating in the delivery of the judgment, by the opposing party, or another person, c) a party invokes a judgment delivered by the European Court of Human Rights in their case and establishing the violation of a right set forth in the Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950 and promulgated by Act XXXI of 1993, or any protocol thereto, provided that the final and binding judgment is based on the same violation of law, and compensation was not awarded to them by the European Court of Human Rights, and the violation of law may not be remedied by recompense[40], d) a final and binding judgment was already adopted regarding the same right before the judgment in the action was delivered, and e) the statement of claim or another document was served on the party by public notice in violation of the rules pertaining to service[41].

The party, that is, the interested party, is eligible to submit an application for retrial or appeal against a part of a decision that concerns them if the contested decision is directed at them. The same right applies to the prosecutor.

The request for retrial shall be submitted in writing to the court of first instance. The judgment challenged by the request for retrial and the content of the decision sought by the party shall be specified in the request. The facts serving as grounds for the retrial and the supporting evidence shall be specified, and the relevant documents

[40] An issue that had been a subject of legal literature for some time was providing legal remedy in situations where a litigant suffered a violation of their fundamental rights through proceedings before the courts and/or final decisions, in particular where the applicant was denied the right to go to court in a manner inconsistent with the requirement of a fair trial as laid down in the ECHR (European Convention on Human Rights). Therefore, it was suggested that even with the fair compensation awarded by the ECtHR (European Court of Human Rights), some kind of "re-examination" or "reopening" procedure might be necessary. See: K. Gombos, *A perújítás újraszabályozásának kérdései európai jogi, alapjogi összefüggésben*, [in:] *Lege et Fide: Ünnepi tanulmányok Szabó Imre 65 születésnapjára*, K. Gellén, M. Görög (eds.), Szeged 2016, pp. 156–166.

[41] Section 393 of Act CXXX of 2016 on the Code of Civil Procedure.

shall be attached to the request. If the request is submitted over six months after the challenged judgment becomes final and binding, the reasons for doing so shall be presented.

If a retrial is granted, the action shall be heard again at the main retrial hearing, within the limits of the request for retrial. The provisions pertaining to the amendment of the action in the second instance proceedings shall apply to the amendment of the action. Considering the outcome of the retrial, the court shall uphold the judgment challenged by way of retrial, or it shall set aside the judgment in whole or in part and adopt a new decision in accordance with the laws[42].

In administrative court actions, the court shall reject the application for a retrial even if retrial is excluded by law. If a retrial is granted, the case must be retried on the merits within the limits of the request for retrial. Unlike in civil proceedings, there is no possibility of amending the action in the context of a retrial of an administrative court action.

5. The procedure for constitutional complaints

The need to introduce the so-called "real" constitutional complaint arose in Hungary as early as 1991[43], but Act XXXII of 1989 on the Constitutional Court of Hungary (the former Act on the Constitutional Court) only provided for the possibility of filing a constitutional complaint against the norm applied in individual cases. Pursuant to this Act, the constitutional complaint in the Hungarian legal system was a sort of ex-post constitutional review, which differed from the latter only in that it assumed the violation of the petitioner's right granted by the Constitution and was linked to a case that had been concluded by a final judicial decision. The adoption

[42] Section 404 of Act CXXX of 2016 on the Code of Civil Procedure.

[43] T. Lábady, *A populáris akció és az egyéni jogvédelem biztosítása az alkotmánybírósági eljárásban*, "Magyar Jog" 1991, No. 7, pp. 386–390.

of the new Fundamental Law opened the way for the introduction of the so-called "real" constitutional complaint[44].

The Fundamental Law redefined the powers of the Constitutional Court by following the German model: it introduced the constitutional complaint that covered the review of the application of law [Article 24 (2) (d)] and provided for the annulment of the judicial decision as a legal consequence of the violation of the Fundamental Law [Article 24 (3)]. With this, the subjective protection of fundamental rights was prioritized over the objective protection of the constitutional legal order, which also meant a significant change in the relationship between the Constitutional Court and the ordinary courts[45].

Pursuant to Article 24 (2) c) of the Fundamental Law, based on a constitutional complaint, the Constitutional Court first reviews whether the law applied in the individual case is in harmony with the Fundamental Law, and second, if the court decision is in harmony with the Fundamental Law. The detailed rules pertaining to constitutional complaints are set out in Sections 26–31 of the Act of 2011 on the Constitutional Court of Hungary.

In constitutional complaints, the rules set out in the Code of Civil Procedures and the Code of Administrative Court Procedure must be jointly applied. Pursuant to Section 123 (1) of the Code of Administrative Court Procedure, the rules of the Code of Civil Procedures must be properly applied to constitutional complaint cases, whereas the Code of Administrative Court Procedure only defines a few special rules. In other words, the Code of Administrative Court Procedure introduced additional and different rules for

[44] The adjective "real" referred to the German type of constitutional complaint against a judicial decision, which – unlike the constitutional complaint aimed at constitutional review under Section 48 of the former Act on the Constitutional Court – provided for the review of the application of law. See: P. Paczolay, *Megváltozott hangsúlyok az Alkotmánybíróság hatásköreiben*, "Alkotmánybírósági Szemle" 2012, No. 1, pp. 68–69.

[45] K. Zakariás, *A bírói döntések alkotmánybírósági felülvizsgálata terjedelmének dogmatikai keretei – A jogalkalmazás közvetlen és közvetett alapjogsértésének kontrollja a német és a magyar gyakorlat tükrében*, "Állam-és Jogtudomány" 2021, No. 4, p. 103.

administrative actions compared to the rules applicable to constitutional complaints and generally to civil lawsuits.

If, based on a constitutional complaint, the Constitutional Court of Hungary annulled the court's decision, the Curia shall order the court having proceeded in the first or second instance to conduct a new procedure or shall order that a new decision be adopted in the matter of the review request. The Curia shall dispense with ordering that a new procedure be conducted if the infringement cannot be remedied subsequently[46].

The Curia procedure to be conducted in case of a constitutional complaint differentiates between two cases: one is the Constitutional Court annulling a law or a legal provision, and the other is the annulling of a court decision by the Constitutional Court. To exercise a remedy to a constitutional complaint, the Curia can decide as follows: if the Constitutional Court sets aside a material law or provision and there is only a judicial or extrajudicial procedure underway in the case, it notifies the party filing the complaint that it is entitled to file an application for retrial at the court of first instance of the action.

The Constitutional Court may also determine, in derogation from the foregoing, the repeal of a legislation infringing upon the Fundamental Law or the inapplicability of an annulled legislation in general or in specific cases, if this is justified by the protection of the Fundamental Law, legal certainty, or the particularly important interest of the initiator of the proceedings[47].

If the Constitutional Court annuls a procedural law or provision, it shall determine the exercisability of the procedural right deriving from its decision by applying the relevant procedural rules and, if necessary, order the reopening of the stage of the proceeding, the outcome of which may have been affected by the application of the unconstitutional law with the simultaneous annulment of the decision that ended the proceeding. If the Constitutional Court annuls

[46] K. Pollák, *Perorvoslatok és az alkotmányjogi panasz esetén követendő eljárás*, [in:] *A közigazgatási jogvédelem és jogérvényesítés alapintézményei*, Budapest 2019, p. 109.

[47] Petrik's electronic commentary, *op. cit*.

a court decision, the Curia orders the court acting as the court of first or second instance to open new proceedings or to take a new decision or orders a new decision on the review application in line with the Constitutional Court decision. An exception to this latest rule is when the Constitutional Court annuls a court decision and, also the decision of another authority that was reviewed by the court decision, in which case the Curia notifies the authority making the annulled decision to ensure that necessary action is taken while simultaneously sending the authority the decision of the Constitutional Court, and notifies the party filing the complaint. Consequently, if the Constitutional Court sets aside a law or legal provision based on a constitutional complaint, the Curia procedure is launched upon an application; however, if the Constitutional Court annuls a court decision, the Curia shall act ex officio[48].

The Curia shall act immediately in procedures deriving from constitutional complaints. The Code of Administrative Court Procedure defines two special rules for procedures opened based on constitutional complaints. On the one hand, it states that if the Constitutional Court annuls the court's decision, the Curia shall order the court having proceeded in the first or second instance to conduct a new procedure or shall order that a new decision be adopted in the matter of the review request. The Curia shall dispense with ordering that a new procedure be conducted if the infringement cannot be remedied subsequently. On the other hand, regarding the notification obligation of the Curia, if the Constitutional Court annuls a court decision together with the administrative act subject to that decision, the Curia, simultaneously with the communication of the Constitutional Court decision, shall inform the administrative organ having taken the annulled decision so that necessary arrangements can be made, and shall also inform the complainant.

Practical experiences in recent years show that very few proceedings have been initiated on grounds of infringement of the Fundamental Law (one retrial and two procedural infringement proceedings). The majority of cases related to the annulment of judicial decisions (more than 30).

[48] K. Pollák, *op. cit*., pp. 109–110.

From among the court decisions ordering retrial and adopting a new decision, or ordering a new decision on a review application, I consider the following worth highlighting:

In case No. Kpkf. IV.37.219/2015/2., the Constitutional Court annulled the order of the Curia, since it did not rule on an element of the request that led to the violation of the freedom of expression. For this reason, as there was still an unresolved application, the adoption of a new procedure and a new decision was ordered.

In case No. Kpkf. IV.37.391/2015/2., an order of the Curia was again annulled, because it assessed a statement of opinion as a statement of facts. A new procedure and a new decision were ordered because the application was not adjudicated.

In case No. Kpkf. IV.37.157/2015/2. on market surveillance, the issue of constitutionality arose in connection with the freedom of expression and freedom of the press, which was not examined by the court of first instance; it did not take this into account in its interpretation of the law, and the application remained unadjudicated resultantly. The solution was to set aside the judgment of both instances and order the court of first instance to open a new procedure.

Case No. Kpkf. IV.37.145/2016 was special because the Curia not only determined who should act in which procedure, but also provided guidance on the direction of the decision.

In case No. Kpkf.IV.38.297/2019/2., the Curia issued a decision ordering a new procedure and a new decision following the Constitutional Court's annulment of an order of the Court of Appeal in an election case, as the annulment left the decision pending. According to the guidance, the new procedure must take into account the requirements and aspects of the Constitutional Court decision, such as the freedom of expression and the restriction of fundamental rights.

Where the Constitutional Court annulled a procedural or material law, the following legal consequences were applied:

In case No. Kpkf. IV.37.263/2016, after annulling the procedural law, the Curia ordered the reopening of the part of the proceedings that could be affected by the annulled law and established the exercisability of the procedural right.

In case No. Kpkf.IV.37.059/2016/5., following the Constitutional Court decision to annul the material law, the Curia notified the petitioner of the complaint that a request for retrial could be filed with the court of first instance within thirty days.

In case No. Kpkf.38.390/2019/3, the Curia annulled the court decision of both instances and the decision of the tax authority of both instances and ordered the first instance authority to conduct a new procedure (in a case concerning the limitation period for the refund of duties) with the instruction that the authority should assess the applicant's application on the basis of the legal text (without the annulled text) in accordance with the Constitutional Court decision.

6. Uniformity complaint procedures against Curia decisions

In the time since the regime change, and almost a quarter of a century since the institutionalization of the uniformity procedure, and even in the eight years since the entry into force of the Fundamental Law, the unification of law entrusted to the Curia has not been achieved. Organizational power is not enough for legal unity, organizational and management tools are not sufficient, and the judicial activity of the Curia as an independent Supreme Court is required. However, there is no legal certainty without unity of law, and the concept of justice is meaningless[49].

With the introduction of the institution of unity complaints, the legislator's purpose was to provide a remedy in cases where the parties no longer have any remedy options – because they have either exhausted them or the use of such means is excluded (including in cases where the Council of the Curia deviated from jurisprudence) – and, thus, to promote legal unity[50].

[49] Zs.A. Varga, *Tíz gondolat a jogegységről és a precedenshatásról*, "Magyar Jog" 2020, No. 2, p. 86.

[50] Petrik's electronic commentary, *op. cit*.

Act CLXI of 2011 on the Organisation and Administration of Courts introduced uniformity complaint procedures as a new form of proceedings at the Curia, which can be lodged against Curia decisions made on 1 July 2020 or thereafter.

The uniformity complaint is a special sui generis legal institution. Its special nature is mainly supported by the fact, among others, that it can only be brought against decisions taken in ordinary or extraordinary remedy cases by the highest judicial forum, that is, the Curia, and that Section 41/C (5) of the Act on the Organisation and Administration of Courts states that certain decisions adopted in such cases have the force of a uniformity decision[51].

A uniformity complaint may be initiated against the following decisions of the Curia provided that an application or motion for review refers to a point of law deviating from a Curia decision already published in the CJD:

a) a decision upholding a challenged decision if the application for review or appeal based on the Code of Administrative Court Procedure is unfounded,
b) a decision rejecting a review pursuant to the Code of Civil Procedures, and
c) a decision denying acceptance of a review application pursuant to the Code of Civil Procedures.

A uniformity complaint may be instituted if the adjudicating council of the Curia deviates from a decision published in the CJD in a point of law – without initiating a uniformity procedure – in a way that the given deviation is not present in the decision of the lower instance court.

The uniformity complaint must, in addition to the general rules for submission, indicate the decision against which the party lodged the complaint and the published decision of the Curia from which the party claims the deviation on a point of law occurred. In a uniformity complaint procedure, an application for a stay on enforcement or interim relief may be submitted pursuant to the rules of the procedure on which it is grounded. An application for a stay on

[51] Petrik's electronic commentary, *op. cit*.

enforcement or interim relief and must be filed in the uniformity complaint.

The uniformity complaint must be submitted to the Curia within thirty days from the publication of the contested decision. The procedural fee, which is the same as the fee for the review procedure, must be paid when filing the complaint, unless a fee or cost reduction is granted under the applicable legislation.

A uniformity complaint may be instituted by anyone who, pursuant to the procedural laws, is entitled to file a review application or an appeal in accordance with the Code of Administrative Court Procedure. In compliance with the Code of Civil Procedures, legal representation is mandatory in uniformity complaint procedures.

The Curia must decide whether to accept or reject the complaint within thirty days. The Curia established a Uniformity Complaint Council to hear and decide on uniformity applications.

The accepted complaints are adjudicated by a council of nine members chaired by the President of the Curia or the Vice President appointed by the President. Each department is represented in the council, and there is no legal time limit for a decision on the merits.

András Patyi defines the aim and essence of uniformity complaint procedures in three points. First, the procedure is a remedy aimed at redressing individual rights. He points out the Janus-faced nature of the institution. A successful complaint may also lead to the Curia's Council of Uniformity Complaints overturning the decision of the Curia challenged in the complaint because it deviated on a point of law from an earlier published Curia decision. Another possible outcome of the uniformity complaint procedure could be that the decision challenged in the complaint is not annulled even though it deviated on a point of law from the earlier published decision, because it finds that the difference was justified. In other words, a successful uniformity complaint (which proves that a point of law was deviated from in the complainant's case) will then fail from an individual perspective[52].

[52] A. Patyi, *A jogegységi panasz bevezetésének és továbbfejlesztésének néhány kérdése*, [in:] A. Pongrácz, *Ünnepi tanulmányok a 65 éves Cs. Kiss Lajos tiszteletére Ut vocatio scientia*, Budapest 2021, p. 304.

Second, in Patyi's view, this is the primary aim of the procedure, namely, to ensure unity of law. Pursuant to Section 41/C (1) of the Act on the Organisation and Administration of Courts, if the Council of Uniformity Complaints finds a deviation on a point of law from the published decision of the Curia, it must decide on the interpretation binding on the courts in any event and rule accordingly on the fate of the new decision under appeal. Third, the core of the procedure is essentially to enforce in a specific case the requirement of equality before the law set forth in the Fundamental Law, while simultaneously creating a framework for uniform judicial interpretation[53].

Since 2020, the Council has reached a decision in 19 cases. In all cases, the application of the plaintiff/applicant was rejected/denied.

7. Results of the empirical research

In the research assignment among special administrative court actions, the rules on remedies over administrative decisions in simplified lawsuits and assembly cases are examined.

7.1. DECISIONS IN SIMPLIFIED LAWSUITS

The new Code replaced most of the former administrative extrajudicial procedures with simplified actions. Simplified procedures are intended to facilitate quick and efficient adjudication of minor cases. Unlike in previous extrajudicial procedures, the proceedings must be initiated by a statement of claim instead of an application, and the court will rule on the simplified action by way of a judgment.

Unless otherwise provided by law, the court shall act by a simplified lawsuit a) in actions related to certificates of registered data and official certificates and the keeping of official registers, except for the registers of public bodies or other organizations required for exercising an activity and the land register, b) in actions initiated

[53] A. Patyi, *op. cit.*, pp. 304–305.

solely based on an application filed by another party of the official procedure, c) in actions relating to an ancillary administrative act and to a decision by an administrative body to refuse or terminate a proceeding, d) in right of assembly actions, except dispersing an assembly, e) in actions concerning an application for a visa for an intended stay not exceeding ninety days for third-country nationals and their family members, and f) in actions concerning conscript soldiers' application for unarmed military service[54].

If it enables the procedure to be completed in a concentrated and cost-effective manner, the court a) shall dispense with holding a preparatory panel session, b) shall draw up a memorandum instead of recording procedural acts and may also dispense with calling upon the persons concerned to make statements concerning the requests to supplement the record or memorandum, c) may set for procedural acts, except for the appeal, time limits deviating from those specified in an Act, and d) may accept that a statement be made electronically through channels ensuring audio connection instead of being made orally[55]. In a simplified procedure, the court shall proceed according to the rules on adjudication without a hearing. A court clerk acts instead of a judge. Patyi welcomes this rule from the perspective of the right to legal remedy and the right to a fair trial[56].

In the course of a simplified procedure, the court gives a simplified judgment. The judgment delivered in a simplified procedure may not be appealed. Orders shall be subject to appeal within eight days of notification.

It is up to the discretion of the court to apply the guaranteed rule that it may, at any time during the proceedings, order the continuation of the proceedings as per the general rules if this is necessary to ensure a fair trial[57].

---

[54] Section 124 of the Code of Administrative Court Procedure.

[55] Section 125 of the Code of Administrative Court Procedure.

[56] A. Patyi, *Néhány gondolat a közigazgatási perrendtartás előzményei, előkészítése és megalkotása köréből*, [in:] *Tanulmánykötet a Kúria Közigazgatási Szakágában 2019-ben ítélkező bírák tollából*, F. Bartók, G. Madarász, I. Marton, O. Dévényi, E. Varga. (eds.), Kúria 2019, p. 164.

[57] Petrik's electronic commentary, *op. cit*.

After reviewing the case law on simplified lawsuits, I would like to highlight the following points of judicial interpretation:

Section 126 (3) of the Code of Administrative Court Procedure excludes appeals against a simplified judgment. Although in simplified lawsuits, the court is entitled to order the continuation of the proceedings as per the general rules, if the conditions set out in Section 124 (4) of the Code of Administrative Court Procedure are provided, this does not create a right of appeal against the judgment. Section 99(1) of the Code of Administrative Court Procedure provides for the possibility of appeal against a judgment only if the law allows it[58].

In several cases, the Curia had to interpret the concept of ancillary administrative activity as one of the cases in which the rules of simplified lawsuits can be applied. In this context, the Curia stated that the concept of ancillary administrative activity must always be applied to the specific case and activity[59].

In the research project, I looked at the cases in which the rules of simplified lawsuits are applied based on the Curia's accessible/public case law. In all the decisions available on the Curia's website, the rules on simplified lawsuits were applied in relation to right of assembly cases[60].

7.2. REMEDY IN RIGHT OF ASSEMBLY CASES

As of April 1, 2020, pursuant to Section 12 (2) d) of the Code of Administrative Court Procedure as amended by Act CXXVII of 2019 on the amendment of certain acts in connection with the creation of

[58] Precedent-setting Curia Decision No. Kfv.35242/2019/9. On state-granted aid.

[59] Decision No. Kfv.37800/2020/8.

[60] Decision No. K. IV.39.999/2021/5; Decision No. K. IV.39.725/2021/2; Decision No. K. IV.40.500/2021/4.; Decision No. K. IV.40.428/2021/5.; Decision No. K.I.39.441/2020/4.; Decision No. K. IV.40.001/2021/6.; Decision No. K. IV.40.000/2021/5.; Decision No. K. II.40.446/2020/2; Decision No. K. III.39.536/2020/2.; Decision No. K. III.39.533/2020/2.; Decision No. K. III.39.535/2020/2.

single-tier district office procedures, the Curia acts in the first and final instance in proceedings relating to the right of assembly, except dispersing an assembly. In accordance with Section 15 (4) of Act LV of 2018 on the right of assembly, the Curia decides on remedy within three days of receiving the application. In accordance with Section 15 (2) of Act LV of 2018, the application for remedy must be submitted to the assembly authority. Legal remedy procedures are governed by the rules of the Code of Administrative Court Procedure.

From 2020 until the time of writing this manuscript, the Curia has reached a decision in 12 right of assembly cases. In the decisions, the following cases were interpreted:

- *deployment for signature collection,*
- *expressing an opinion on a public matter,*
- *restrictions on the exercise of the right of assembly in a state of emergency,* and
- *the rules for notification about an event or meeting* (*including the interpretation of the principle of priority in the case of competing events*).

This study aims to explore the content in principle and the relevance of these decisions.

Regarding the subject of the deployment for signature collection, the Curia declared that a deployment for signature collection is not considered an "assembly" as per the Assembly Act, if it is not organized with the aim of expressing an opinion on a public matter. The aim of the event is for the organizers to learn the opinions of the people attending and conducting individual conversations and discussions with them[61].

When expressing an opinion on a public matter is the content of the decision in principle, if at least one element of the event involves the objective of expressing an opinion on a public matter – provided some other conditions also exist – pursuant to Section 2 (1) of the Assembly Act, it is considered an assembly, and the notification about such assembly must be adjudicated by the assembly authority[62].

[61] Decision No. K.I.39.441/2020/4. (31).

[62] Decision No. K. III.39.533/2020/2.; Decision No. K. III.39.536/2020/2.; Decision No. K. III.39.535/2020/2.

In the case of an assembly, an injunction based on a legal provision prohibiting assembly during a state of emergency is lawful. The general prohibition precludes the assembly authority from considering the specific circumstances of the individual case[63].

Regarding the rules for notification about an event or meeting, the Curia declared that the starting date of the obligation to make a notification pursuant to Section 10 (1) of Act LV of 2018 on the Right of Assembly shall be the day three months prior to the assembly, which is the same day as the date of the planned meeting. The deadline is deemed to have been met in the case of doubt[64].

From among more events announced for the same venue and time, the one announced to the assembly authority earlier shall have priority. At the time of the notification, what means of contact the person making the notification chooses must be clearly identifiable but bears no significance. The principle of priority sets the requirement for the assembly authority to protect the event announced earlier with appropriate means to allow the people participating in it to exercise their right to peaceful assembly. In this context, the assembly authority must meet its obligation to protect against the influence of third parties. The authority must record the facts and circumstances relevant to the merits of the case in the reasons for its decision, and failure to do so cannot be remedied in an administrative court action. However, this obligation does not require a detailed statement of the facts recorded. In an administrative court action, the authority must be able to substantiate the veracity of the facts – if the plaintiff contests such facts – and of all the details of the circumstances, which support the connection of the fact outlined in the decision and the decision based on it[65].

From among more events announced for the same venue and time, the one announced to the assembly authority earlier shall have priority. At the time of the notification, it must be clearly identifiable, but bears no significance, what means of contact the person making the notification chooses. The principle of priority

[63] Decision No. K. II.40.446/2020/2.(30); K. IV.39.725/2021/2.t (29).
[64] Decision No. K. IV.39.999/2021/5. (30) (31).
[65] Decision No. K. IV.40.001/2021/6. (29).

sets the requirement for the assembly authority to protect the event announced earlier with appropriate means to allow the people participating in it to exercise their right to peaceful assembly, and in this context the assembly authority must meet its obligation of protecting against the influence of third parties. The authority must record the facts and circumstances relevant to the merits of the case in the reasons for its decision, and failure to do so cannot be remedied in an administrative court action, but this obligation does not require a detailed statement of the facts recorded. In an administrative court action, the authority must be able to substantiate the veracity of the facts – if the plaintiff contests such facts – and of all the details of the circumstances, which support the connection of the fact outlined in the decision and the decision based on it[66].

Notification of a marching event, which, by its demonstrative nature, is likely to arouse fear in minorities because of their membership in the community in question, constitutes a restriction on the exercise of the right of assembly. If a personal hearing is required by the assembly authority during the negotiation of the assembly, the parties may be expected to cooperate mutually and effectively in arranging the time as necessary[67]. A court decision to prohibit a march on the same day, for the same purpose, from the same place is deemed to be a judgment[68].

In the research project, one of my aims was to search for cases in which the rules of simplified lawsuits are applied based on the Curia's accessible/public case law. Second, I looked at the type of cases in which the Curia acted in appeals against decisions adopted in right of assembly cases. Based on the case law examined, a link can be found between the two sub-topics. In all the decisions available on the Curia's website, the rules on simplified lawsuits were applied in relation to right of assembly cases.

[66] Decision No. K. IV.40.000/2021/5. (31)–(32)–(33)–(34).
[67] Decision No. K. IV.40.428/2021/5. (29)–(30).
[68] Decision No. K. IV.40.500/2021/4. (28).

8. Summary – *de lege ferenda* postulates

The separation of administrative disputes from civil matters and the existence of separate procedural codes/rules of procedure are unquestionable. In my view, Act CL of 2016 on the Code of General Administrative Procedure the types of redress procedures available, its rules are adapted to today's conditions, ensuring its compliance with the rules of administrative procedure. The regulatory concept of the Code of Administrative Court Procedure rests on the regulation of the Code of Civil Procedure, at the same time, provides an effective redress system for citizens in administrative disputes.

Among the concluding thoughts of the study, I also consider it important to highlight that there is an active legislative and law development trend concerning the legislation on the settlement (adjudication) of administrative disputes in Hungary today, the primary driving force of which is the jurisprudence developed over the years since the application of the Code of General Administrative Procedure and the Code of Administrative Court Procedure. As a result of these processes, the organization of the administrative court system is being built/has been built up in several stages, and the rules governing certain procedures (e.g., unity complaint procedures) are being amended.

By analysing the means of remedy provided by the two Codes, it can be concluded that there is a multistage and effective system of legal remedies available to clients for alleged or actual adverse decisions in administrative court actions.

As *de lege ferenda* postulate, I find it worth considering transposing the content of principle set out in decisions taken in assembly matters into the act.

Furthermore, I would consider extending the rules on retrial procedures in the Code of Administrative Court Procedure. Similar to appeal and review cases, the law lays down the fundamental rules pertaining to legal institutions, which in my view would also be necessary for the case of retrial procedures.

REFERENCES

A közigazgatási jogvédelem és jogérvényesítés alapintézményei, A. Boros (ed.), Nemzeti Közszolgálati Egyetem, Budapest 2019.

Barabás G., *Közigazgatási per*, [in:] *Kommentár az általános közigazgatási rendtartásról szóló törvényhez*, G. Barabás, B. Baranyi, M. Fazekas (eds.), Wolters Kluwer Hungary, Budapest 2018.

Darák P., *Administrative Justice In Europe – Report for Hungary*, https://www.aca-europe.eu//en/eurtour/i/countries/hungary/hungary_en.pdf.

Gombos K., *A perújítás újraszabályozásának kérdései európai jogi, alapjogi összefüggésben*, [in:] *Lege et Fide: Ünnepi tanulmányok Szabó Imre 65. születésnapjára*, K. Gellén, M. Görög (eds.), Iurisperitus Bt., Szeged 2016.

Gombos K., *A polgári perorvoslati rendszer és átalakulása*, "Jogtudományi Közlöny" 2018, No. 2.

Gyurita E.R., Hulkó G., Józsa F., Lapsánszky A., Varga Zs.A., *A közigazgatási hatósági eljárásjog jogintézményei*, Dialóg Campus, Budapest 2019.

Hajas B., *Általános közigazgatási rendtartás – Ket. kontra Ákr*, "Új Magyar Közigazgatás" 2016, No. 4.

Horváth E.Í., Lapsánszky A., Wopera Z., *Közigazgatási perjog*, Dialóg Campus, Budapest 2019.

Kárpáti M., *Fellebbezés*, [in:] *A közigazgatási eljárás szabályai II. A közigazgatási perrendtartás magyarázata*, P. Ferenc (ed.), HVG-ORAC Lap- és Könyvkiadó Kf, Budapest 2017.

Kárpáti M., *Rendkívüli perorvoslatok*, [in:] *A közigazgatási eljárás szabályai II. A közigazgatási perrendtartás magyarázata*, P. Ferenc (ed.), HVG-ORAC Lap- és Könyvkiadó Kft, Budapest 2017.

Kengyel M., *Magyar polgári eljárásjog*, Osiris Kiadó, Budapest 2014.

Kiss D., *Fellebbezé*, [in:] *A polgári perrendtartás magyarázata 2. Harmadik (átdolgozott) kiadás*, J. Németh, D. Kiss (eds.), CompLex Kiadó, Budapest.

Lábady T., *A populáris akció és az egyéni jogvédelem biztosítása az alkotmánybírósági eljárásban*, "Magyar Jog" 1991, No. 7.

Nóra B.B., *A közigazgatási eljárásjog (államigazgatási eljárásjog) jogorvoslati rendszere szabályozásának jellegzetességei az Ákr.-ben*,

[in:] *A hazai közigazgatási hatósági eljárási jog karakterisztikája*, A. Boros, G. Patyi (eds.), Dialóg Campus, Budapest 2019.

Paczolay P., *Megváltozott hangsúlyok az Alkotmánybíróság hatásköreiben*, "Alkotmánybírósági Szemle" 2021, No. 1.

Patyi A., *A jogegységi panasz bevezetésének és továbbfejlesztésének néhány kérdése*, [in:] A. Pongrácz, *Ünnepi tanulmányok a 65 éves Cs. Kiss Lajos tiszteletére. Ut vocatio scientia*, Ludovika Egyetemi Kiadó, Budapest 2021.

Patyi A., *A közigazgatási eljárásjog és perjog változásai és összefüggései*, [in:] I.B. Győrffy, *Tizennegyedik Magyar Jogászgyűlés*, Magyar Jogász Egylet, Budapest 2018.

Patyi A., *Hungary*, [in:] *Administrative Proceedings in the Habsburg Succession Countries,* K. Zbigniew (ed.), Wydawnictwo Uniwersytetu Łódzkiego, Wolters Kluwer Polska, Łódź, Warszawa 2021.

Patyi A., *Néhány gondolat a közigazgatási perrendtartás előzményei, előkészítése és megalkotása köréből*, [in:] *Tanulmánykötet a Kúria Közigazgatási Szakágában 2019-ben ítélkező bírák tollából*, F. Bartók, G. Madarász, I. Marton, O. Dévényi, E. Varga (eds.), Kúria 2019.

Petrik F., *A közigazgatási eljárás szabályai II. – Kp. – A közigazgatási perrendtartás magyarázata*, updated: 10 March 2021 (electronic version).

Rozsnyai K.F., *A közigazgatási perjog emancipációja: a közigazgatási perrendtartás*, "Jogtudományi Közlöny" 2017, No. 5, 72 évf.

Rozsnyai K.F., *A közigazgatási perrendtartás kodifikációja kapcsán várható lényegesebb közigazgatási perjogi változáso*, "Versenytükör" 2016, No. 4, 12. évf.

Rozsnyai K.F., *Hatékony jogvédelem a közigazgatási perben. A magyar közigazgatási perrendtartás európai fejlődési tendenciákhoz illeszkedő kodifikációjának egyes előkérdései*, ELTE Eötvös Kiadó, Budapest 2018.

Sperka K., *Quo vadis közigazgatási bíráskodás? A közigazgatási bírósági szervezetrendszer átalakításával kapcsolatos kihívások*, "Acta Humana" 2019, No. 1.

Szalai É., *A közigazgatási per*, [in:] *Közigazgatási jog. Általános rész III. Második, átdolgozott kiadás*, M. Fazekas (ed.), ELTE Eötvös Kiadó, Budapest 2017.

Szilbereky J., *Perorvoslatok*, [in:] J. Szilbereky, L. Névai, *A polgári perrendtartás magyarázata*, Közgazdasági és Jogi Kiadó, Budapest 1967.

Varga Zs.A., *Az alkotmányosság követelménye és az eljárás alapelvei*, [in:] *Közigazgatási hatósági eljárásjog*, A. Patyi (ed.), Dialóg Campus, Budapest–Pécs 2012.

Varga Zs.A., *Mit ér a panasz, ha alkotmányjogi?*, "Acta Universitas Szegediensis – Acta Iuvenum" 2015, No. 2, 58. évf.

Varga Zs.A., *Tíz gondolat a jogegységről és a precedenshatásról*, "Magyar Jog" 2020, No. 2.

Winklerné Nóvé I., *Azonnali jogvédelem a közigazgatási perben*, "Magyar Jog" 2020, No. 4.

Zakariás K., *A bírói döntések alkotmánybírósági felülvizsgálata terjedelmének dogmatikai keretei – A jogalkalmazás közvetlen és közvetett alapjogsértésének kontrollja a német és a magyar gyakorlat tükrében*, "Állam-és Jogtudomány" 2021, No. 4.

PRZEMYSŁAW OSTOJSKI

Professor at the Academy of Justice in Warsaw, prosecutor at the Polish National Public Prosecutor's Office

Towards the unified model of adjudicatory powers of administrative courts in Europe

1. Introductory remarks

The existing European literature analyses the issue of adjudicatory powers (remedies)[1] from the point of view of the efficiency of court operations, evaluated according to the criteria of pragmatics and speed of handling cases[2]. In the course of the evolution of individual legal orders, legislators subjected legal remedies to the process of positivization. As a result, parallel to the legal systems of continental Europe, the adjudicatory powers of courts are delineated by the provisions of the applicable laws, although in recent years, as a consequence of the case law of the Court of Justice of

[1] The concept of "adjudicatory powers of courts" is more appropriate for the terminology used by lawyers in continental Europe, and "remedies" for lawyers in the common law area.

[2] See: K.-P. Sommermann, *Das Recht auf effektiven Rechtsschutz als Kristallisationspunkt eines gemeineuropäischen Rechtsstaatsverständnisses*, [in:] *Rechtsstaat und Grundrechte. Festschrift für Detlef Merten*, F. Kirchhof, H.-J. Papier, H. Schäffer (eds.), Heidelberg 2007, pp. 443–461; W. Piątek, *Die Effektivität der verwaltungsgerichtlichen Kontrolle in Europa*, "Zeitschrift der Verwaltungsgerichtsbarkeit" 2018, Issue 2, pp. 100–107; P. Ostojski, A. Dalkowska, *Die "Macht" des Verwaltungsgerichts im Bereich der öffentlichen Verwaltung – eine rechtsvergleichende Analyse*, "Zeitschrift der Verwaltungsgerichtsbarkeit" 2020, Issue 3, pp. 183–190.

the European Union, in certain circumstances of the particular cases, administrative courts can make discretionary use of legal bases established directly in the Charter of Fundamental Rights of the European Union[3]. Therefore, the issue of adjudicatory powers (remedies)[4] is not self-evident.

The problem of the permissibility of direct or indirect settlement of an administrative case by the court (instead of the agency), and thus effectively guaranteeing the rights of individuals, emerges as a key issue. This raises not only the question of the model of judicial review of final agency decisions, but also a constitutional problem – concerning the undermining of the principle of separation of powers, related, among others, to the question whether, in the case of the settlement of an administrative case instead of the agency – the court performs the tasks of the executive branch. The issue of (tripartite) separation of powers is still alive today, particularly in the countries of Central and Eastern Europe (though not only), mainly due to the historical experience of the expansion of European totalitarian regimes in the 20th century. On the other hand, limiting the powers of the judiciary exclusively to the function of bodies restoring the rule of law, but lacking legal instruments to effectively secure the individual rights, calls into question their fundamental function in a democratic state of law. For this reason, the eminent Polish jurist Jerzy Stefan Langrod emphasized, inspired by French models, that: "[…] to give administrative courts only cassatory powers [only to set aside agency decisions – author's note] is the main brake on their initiative and resilience, it is an impediment to any rational and consistent judicial review of the administration, since the administrative judge is bound by the facts established in the administrative acts, and can only either abolish the challenged act or uphold it"[5]. This is particularly evident in those spaces of law enforcement by agencies that are closest to individuals, such as immigration law.

[3] See more fully later in this paper.

[4] The concept of "adjudicatory powers of courts" is more appropriate for the terminology used by lawyers in continental Europe, and "remedies" for lawyers in the common law area.

[5] See: J. Langrod, *Kontrola administracji. Studja*, Warszawa–Kraków 1929, p. 160.

In this article I would like to verify the thesis that due to the jurisprudence of the Court of Justice of the EU, reaching with its indications the solutions of the French Council of State, it is justified to state that in the area of the EU Member States there is harmonization in the field of judicial powers of administrative courts. This applies, inter alia, to the reformatory judgments of courts. By a reformatory judgment, I mean a judicial decision made on the merits of an administrative case – deciding the rights and obligations of individuals – that amends a final administrative decision that was made in violation of laws[6].

2. The constitutionality of adjudicatory powers of administrative courts

Limiting the role of a court exercising judicial review solely to reverse an unlawful final agency decision – may appear *prima facie* to be fully consistent with the principle of separation of powers. In countries belonging to the civil law tradition, opponents of "deeper" ("tougher") overreaching by courts into the sphere of the executive conclude that if an administrative court makes a binding determination of the rights or duties of individuals, it is performing a function inherent to an agency ("administering")[7].

In France, this issue is linked to the problematic placement of the *Conseil d'Etat* in the executive branch, which raises questions about

[6] A model different from judicial review applies in Poland in administrative cases in the field of social insurance, of an appeal from agency decisions. These cases are generally heard by courts of general jurisdiction, which conduct the proceedings from the outset, including taking of evidence *de novo*. A similar solution was adopted during the systemic transformation in Ukrainian law. Until the 2005 Administrative Judiciary Code of Ukraine entered into force, courts of general jurisdiction, as well as commercial courts, adjudicated complaints against administrative acts according to the standards of civil procedure See: H.N. Fenton, *Where too little judicial deference can impair the administrative process: the case of Ukraine*, [in:] *Comparative Administrative Law*, S. Rose-Ackerman, P.L. Lindseth (eds.), Cheltenham–Northampton, 2010, p. 461.

[7] J. Zimmermann, *Aksjomaty sądownictwa administracyjnego*, Warszawa 2020, p. 39.

the autonomy and independence of the judges of this Court[8]. In Poland, ironically, despite fears of a return of executive domination that was seen over decades[9] – there is stronger resistance to equipping administrative courts with broader powers to issue judgments on the merits or altering decisions. When interpreting Article 184 of the Constitution of April 2, 1997[10] some scholars advocate a traditional (originating in the times of the Austro-Hungarian Monarchy), strict – or even narrowing – interpretation of this concept. In their opinion, the notion of review referred to in the above provision has a well-established understanding in the domestic science of law. It stands in the way of further extension of the cassatory adjudication model of administrative courts with powers that would enable the replacement of decisions of public administration bodies with court judgments[11]. At the same time, according to this strand of views on the subject at hand, it is not permissible for an administrative court *in genere* to take evidence. Therefore, this system can be described as closed record[12].

The first element of the problem with separation of powers is related to the position of courts in modern states in the context of division of powers. There is no doubt in the contemporary legal doctrine and in practice of the so-called Western World states that judiciary shall be separated and independent of legislative and executive. It is not, however, possible to purely separate all three branches of state power. The doctrine of checks and balances assumes that

[8] See: J. Massot, *The powers and duties of the French administrative law judge*, [in:] *Comparative Administrative Law*, S.R. Ackerman, P.L. Lindseth, B. Emerson (eds.), Cheltenham–Northampton 2019, pp. 435 ff.

[9] I am referring to modern times, from the outbreak of World War II until 1989, the fall of the so-called people's power, or the era of socialism in Poland.

[10] Constitution of the Republic of Poland of April 2, 1997, Journal of Laws No. 78, item 483 as amended; hereinafter: "Constitution of the Republic of Poland".

[11] See: W. Piątek, A. Skoczylas, *Kasacyjny czy merytoryczny model orzekania – kwestia zmiany modelu sądowej kontroli decyzji administracyjnych*, "Państwo i Prawo" 2019, No. 1, p. 36; J. Zimmermann, *op. cit*., p. 39.

[12] M. Asimow, Y. Dotan, *Open and Closed Judicial Review of Agency Action: The Conflicting U.S. and Israeli Approaches*, "The American Journal of Comparative Law" 2016, vol. 64, pp. 524–525.

each branch of government is assigned some role in the exercise of the other branch's functions. The three departments must be: "[…] connected and blended as to give to each a constitutional control over the others"[13]. Secondly, under the principle of *ultra vires,* the role of courts is to ensure that Parliament's will is enforced. Contemporaneously, there is no doubt in the legal doctrine that the separation of powers dictates that questions of law should be conclusively resolved by the judicial branch and the executive must respect the court's determination of the question of law[14].

Simultaneously, the courts must respect the proper field within which the executive and Parliament function: the formulation of policy. It is not for judges to weigh calculations of social, economic or political preference[15]. Nevertheless, the doctrine emphasizes that the constitutional status of the judiciary should not excuse the courts from any scrutiny of policy decisions. "[…] Courts are able, and indeed obliged, to require that decisions, even in the realm of "high policy" are within the scope of the relevant legal power or duty and arrived at by the legal standards of procedural fairness; […] they may legitimately intervene if the decision is devoid of reason and not properly justified. Judges always possess the capacity to probe the evidence and assess whether the reasons and motives for decisions are rationally related to their aims. […] Public law has rapidly advanced recently from a «culture of authority» to a «culture of justification»[16]".

Under the European Convention of Human Rights and generally under the international human rights law, no public authority may interfere with human rights and even Parliament is expected to abide by the international principles of protection of fundamental rights[17]. From this perspective, courts appear to be the guardians of

---

[13] J. Madison, *Federalist No. 48*, [in:] *The Federalist Papers*, https://guides.loc.gov/federalist-papers [accessed on: 6 December 2021].

[14] *The Nature of Judicial Review*, [in:] *De Smith's Principles of Judicial Review*, H. Woolf, J. Jowell, C. Donnelly (eds.), London 2020, pp. 15–25.

[15] *Ibidem*, p. 26.

[16] *Ibidem*, p. 27, and the case law and the literature cited therein.

[17] *Ibidem*, p. 28.

these rights since questions of law should be conclusively resolved by the judicial branch.

According to my opinion, the three branches of state power must be "connected and blended as to give to each a constitutional control over the others"[18]. Simultaneously, courts are obliged to require that every decision is within the scope of the relevant legal power or duty and arrived at by the legal standards of procedural fairness. Under the international human rights law, no public authority may interfere with human rights and even Parliament is expected to abide by the international principles of protection of fundamental rights[19]. From this perspective, courts appear to be the guardians of these rights, since questions of law should be conclusively resolved by the judicial branch.

3. Effective judicial protection of individual rights according to the CJEU

The adjudicatory models of courts exercising judicial review in the countries of continental Europe raise also the following question: which of the models examined ensures full and effective judicial protection for individuals? A seemingly theoretical question turns out to have profound implications in the adjudicatory practice of courts. This is clearly shown in the recent case law of the Court of Justice of the European Union, which resonates (harmonizes) the legal systems of EU Member States.

The process of progressive Europeanization of the law of the Member States of the Union (aiming in fact at federalization of the Union itself) envisages an increasing adjustment of the systems of judicial protection of individual rights to European standards[20]. This is due to the uniform application of the principle of primacy of

[18] J. Madison, *op. cit.*

[19] *Ibidem*, p. 28.

[20] See: M. Brenner, *Allgemeine Prinzipien des verwaltungsgerichtlichen Rechtsschutzes in Europa*, "Die Verwaltung" 1998, No. 31, pp. 1 ff.; F. Schoch, *Die Europäisierung des verwaltungsgerichtlichen Rechtsschutzes*, Berlin, New York 2000, pp. 17 ff.

EU law within the European Union[21]. Contemporary legal science usually subjects the phenomenon of approximation of European legal systems to comparative law research[22]. The law of EU Member States is analysed from the perspective of satisfying the guarantees stemming from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms[23] and Article 47 of the Charter of Fundamental Rights of the European Union[24], in particular as regards compliance with the principles of effective judicial protection, the independence of administrative judges and the right to be heard[25]. Although the principles of law stemming from these convention (treaty) provisions do not determine the adjudicatory model according to which the administrative judiciary should be shaped in European countries, the case law of the European Court of Human Rights has recognized the shortcomings of cassatory judgments in administrative adjudication proceedings[26].

The efficiency of judicial review of administrative actions concerns both the scope of jurisdiction of administrative courts[27], the

[21] See: CJEU judgments of July 15, 1964, Case 6/64, Flaminio Costa v ENEL, EU:C:1964:66; of October 15, 1987, Case 222/86, Unectef v George Heylens and Others, EU:C:1987:442.

[22] See: C.D. Classen, Die Europäisierung der Verwaltungsgerichtsbarkeit, Eine vergleichende Untersuchung zum deutschen, französischen und europäischen Verwaltungsprozeßrecht, Jus Publicum 13, Tubingen 1996, *passim*; K.-P. Sommermann, *Die Europäisierung der nationalen Verwaltungsgerichtsbarkeit in rechtsvergleichender Perspektive*, [in:] *Verwaltungsgerichtsbarkeit in der Europäischen Union*, R.P. Schenke, J. Suerbaum (eds.), Baden-Baden 2016, pp. 189 ff.

[23] Of November 4, 1950, Journal of Laws of 1993, Section 284 as amended.

[24] OJ EU C 2007.303.1; hereinafter referred to as the "Chart".

[25] M. Brenner, *op. cit*., pp. 12 ff.

[26] See: the ECtHR judgment of October 23, 1990 in the *Obermaier v. Austria* case, Application No. 11761/85, the ECtHR judgment of October 4, 2001 in the *Potocka v. Poland* case, Application No. 33776/96, https://hudoc.echr.coe.int [accessed on: 6 December 2021]; W. Piątek, *Sposób rozumienia pojęcia sądu administracyjnego*, [in:] *Wykonanie wyroku sądu administracyjnego*, W. Piątek (ed.), Warszawa 2017, p. 30.

[27] See: M. Deibl, Zum *Prüfungsumfang im verwaltungsgerichtlichen Verfahren*, "Zeitschrift der Verwaltungsgerichtsbarkeit" 2005, No. 5, pp. 403 ff.

"depth" of this review[28], procedural economy[29], and above all, the effectiveness of protection of individual rights. The effectiveness of judicial review of public administration has been, and continues to be, the subject of discussion in the legal solutions of EU member states. This concept is known primarily to the German legal science[30]. In individual states, these discussions have led to either partial or comprehensive legal changes. Some of these were presented in the previous section of this paper. These changes have by no means closed the controversial topic of the admissibility of administrative courts issuing judgments on the merits, and especially those that alter decisions. Austrian scholars point out that the introduction of new adjudicatory powers for administrative courts in Austria has sparked controversy over this issue[31].

Also in Poland, there is a discussion on modifying the adjudicatory competence of administrative courts towards equipping courts with limited powers to decide on the merits of recognized cases[32]. One of the results of this discussion was the amendment of the Law of the Administrative Courts Procedure Act, implemented by the Act of April 9, 2015 amending the Law of the Administrative Courts Procedure[33], by virtue of which administrative courts in Poland were equipped with the above-mentioned powers to issue judgments on the merits ending proceedings before the agency. However, such powers may be used in exceptional cases, which seems to be an insufficient solution for the proponents of ruling on the merits by

[28] See: Z. Kmieciak, *Głębokość orzekania w sprawach objętych kognicją sądów administracyjnych*, "Państwo i Prawo" 2007, Issue 4, pp. 31 ff.

[29] See: D. Leeb, Verfahrensökonomie und VwGVG, "Zeitschrift der Verwaltungsgerichtsbarkeit" 2005, No. 3, p. 211 ff.

[30] See: D. Lorenz, *Der grundrechtliche Anspruch auf effektiven Rechtsschutz*, "Archiv des öffentlichen Rechts" 1980, vol. 105, No. 4, pp. 623–649.

[31] See: L. Pavlidis, *Zur Sache; Die Entscheidung in der Sache* (*selbst*) *und ihre Implikationen*, "Zeitschrift der Verwaltungsgerichtsbarkeit" 2015, No. 1, pp. 26 ff.

[32] See: P. Ostojski, W. Piątek, *Vollstreckung verwaltungsgerichtlicher Urteile* (*Erkenntnisse*) *in Polen und in Österreich*, "Zeitschrift der Verwaltungsgerichtsbarkeit" 2016, No. 5, pp. 206–207.

[33] Journal of Laws of 2015, item 658.

administrative courts[34]. The basic weakness of the strict cassation model is the repeated examination of the same case alternately by administrative authorities and administrative courts of different instances without its final, substantive conclusion[35].

As a transparent example illustrating the above problem, serve the circumstances of a case decided by the Court of Justice of the European Union on July 29, 2019, C-556/17[36]. The proceedings in this case were initiated by a reference for a preliminary ruling from the Administrative and Labour Court in Pécs (*Pécsi Közigazgatási és Munkaügyi Bíróság*) in the administrative adjudication proceedings brought by Alekszij Torubarov versus the Hungarian Immigration and Asylum Office[37]. In the cited judgment, the Court of Justice of the EU stated that, in order to guarantee an applicant for international protection effective judicial protection within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union[38] and in accordance with the principle of sincere cooperation, the national court before which the proceedings are pending is required to set aside the decision of an administrative or *quasi-judicial authority that is inconsistent with its previous judgment and to replace that decision with its own decision on the application for international protection of the person concerned, if necessary by misapplying a provision of national law that prohibits it from doing so*. The above ruling of the Court was made in an area directly related to the protection of human rights, where the European Union has the power to legislate, i.e., in asylum and migration policy[39].

The Hungarian administrative court considered the third consecutive complaint of Alekszij Torubarov in the same case. In this

---

[34] Z. Kmieciak, *Zarys teorii postępowania administracyjnego*, Warszawa 2014, pp. 393–398.

[35] W. Jakimowicz, *O tzw. merytorycznych kompetencjach orzeczniczych sądów administracyjnych określonych w art. 145a § 1 Prawa o postępowaniu przed sądami administracyjnymi*, "Casus" 2017, No. 2, pp. 6 ff.

[36] ECLI:EU:C:2019:626.

[37] In Hungarian: *Bevándorlási és Menekültügyi Hivatal*; hereinafter referred to as the "immigration authority".

[38] OJ EU C 2007.303.1; hereinafter referred to as the "Charter".

[39] In the case in question, it is *sensu stricte* the EU return policy; see: K. Strąk, *Polityka Unii Europejskiej w zakresie powrotów*, Warszawa 2019, *passim*.

regard, the referring court pointed out that as a result of the entry into force – bon September 15, 2015 – of the Act on the Management of Mass Immigration, the administrative courts have lost the competence to amend administrative decisions on the granting of international protection. According to the referring court, those provisions had the effect of depriving applicants for international protection of an effective remedy before the courts. As a result, from the moment of filing his application for international protection in December 2013, Mr Torubarov's legal situation, in the absence of a final decision on that application, remained uncertain, and he had no status whatsoever in the territory of Hungary.

The CJEU held, first, that irrespective of that margin of appreciation, the Member States are obliged to comply with Article 47 of the Charter, which guarantees every person whose rights and freedoms guaranteed by European Union law are violated the right to an effective remedy before a court or tribunal[40]. The characteristics of the remedy referred to in Article 46 of Directive 2013/32[41] must therefore be determined in accordance with Article 47 of the Charter, which reaffirms the principle of effective judicial protection[42]. The Court pointed out, secondly, that Article 47 of the Charter confers on individuals a right which they may rely on directly, in an autonomous manner and thus without the need for specific rules to be laid down in European Union or national law[43]. Thirdly, according to the Court, the right to an effective remedy would be illusory if the legal order of a Member State were to allow the possibility that

[40] See similarly the judgment of the Court of July 26, 2017, Sacko, C-348/16, EU:C:2017:591, paragraph 30 and the case law cited therein.

[41] Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection of June 26, 2013, OJ. EU L 180, p. 60.

[42] See similarly the judgments of the Court: of July 26, 2017, Sacko, C-348/16, EU:C:2017:591, paragraph 31; of July 25, 2018, Alheto, C-585/16, EU:C:2018:584, paragraph 114.

[43] CJEU judgment of April 17, 2018, Egenberger, C-414/16, EU:C:2018:257, paragraph 78.

a final and binding judicial decision might remain ineffective (*effet utile*) to the detriment of the party concerned[44].

According to the CJEU, any provision of the national legal order and any legislative, administrative or judicial practice having the effect of limiting the effectiveness of that law by refusing to confer on the court having jurisdiction to apply it the power to do, at the time of application of that law, whatever is necessary to disapply national statutory provisions which may stand in the way of ensuring the full effectiveness of directly applicable rules of Union law, is incompatible with the requirements arising from the very nature of Union law[45].

If, in the above-mentioned case, the referring court reversed the final administrative decision and indicated in the grounds of its judgment that the applicant should be granted international protection, but its ruling was ignored by the immigration authority, then, in such a situation, the court should, on the basis of Article 46(3) of Directive 2013/32 in conjunction with Article 47 of the Charter, amend the decision in question, which is not in accordance with its judgment, and replace that decision with its own ruling to grant the applicant international protection[46].

It should be made clear that the Hungarian law applied in the referred case *Torubarov* is not in force anymore. On January 1, 2018, a completely new Code of Administrative Litigation (Act I of 2017)[47]

---

[44] See similarly: Judgment of June 30, 2016, Toma i Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci, C-205/15, EU:C:2016:499, paragraph 43.

[45] See similarly: the judgments of the Court, e.g.: of March 9, 1978, Simmenthal, 106/77, EU:C:1978:49, paragraph 22; judgment of June 24, 2019, Popławski, C-573/17, EU:C:2019:530, paragraphs 52–62.

[46] See, by analogy, the following judgments of the Court: of April 17, 2018, Egenberger, C-414/16, EU:C:2018:257, paragraph 79; of June 5, 2018 Kolev and Others, C-612/15, EU:C:2018:392, paragraph 66. The situations similar to the circumstances presented in the above judgment occurred also in the context of rulings of the CJEU in other cases: Bashir Mohamed Ali Mahdi, C-146/14, ECLI:EU:C:2014:1320 and Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín, C-243/15, ECLI:EU:C:2016:838.

[47] Act I of February 21, 2018 (*2017. évi I. törvény a közigazgatási perrendtartásról*), HUN-2017-L-106777, http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=106777&p_count=31&p_classification=01 [accessed on: 1 June 2021].

entered into force also 1st January 2018, which contains rules for proceedings before courts in administrative cases[48]. In this code, the Hungarian legislator allowed courts in administrative cases to "change" the decision of a public administration body. The Section 90 of the Code of Administrative Litigation provides that: (1) "[t]he court may change the infringing administrative act if the nature of the case allows it, the facts are sufficiently clarified, the dispute can be finally decided on the basis of the available data, and a) the administrative act was realized in several-instance proceedings, or b) reversal is allowed by law in the case of an administrative act realized in single-instance proceedings[49]. (2) With the exception determined in Subsection (3), the court shall change the administrative act if a) the nature of the case allows it and b) when in the repeated proceedings the administrative body took an act – on the basis of identical legal situation or facts – that is contrary to the final judgment of the court".

The above provision of the Code of Administrative Litigation, in force from April 1, 2020 in the above-mentioned version, due to the simplification of the regulations on the functioning of government agencies. According to Section 97(4) of this Act: "[t]he operative part of the court's decision and the reasons for it are binding on the administrative bodies in the repeated proceedings and in the execution of the act ordered by the court's decision".

[48] On the legal status before and after the reform, see: *Hungarian Public Administration and Administrative Law*, A. Patyi, Á. Rixer (eds.), Passau 2014, *passim*; A. Boros, A. Patyi, *Administrative Appeals and Other Forms of ADR in Hungary*, [in:] *Alternative Dispute Resolution in European Administrative Law*, D.C. Dragos, B. Neamtu (eds.), New York–London–Heidelberg 2014, pp. 279–335; K.F. Rozsnyai, *Current Tendencies of Judicial Review as Reflected in the New Hungarian Code of Administrative Court Procedure*, "Central European Public Administration Review" 2019, No. 17(1), pp. 7–23; K. Pollák, *The Rule of Law and Administrative Justice in Hungary*, "Nispacee: Occasional Papers" 2019, pp. 1–10; I. Hoffman, *Application of Administrative Law in the Time of Reforms in the Light of the Scope of Judicial Review in Hungary*, "Studia Iuridica Lublinensia" 2020, 29(3), pp. 101–116.

[49] With the exception determined in Subsection (3) paragraphs a)–c).

4. Types of administrative court decisions in selected European countries

At the outset, it should be noted that various models of administrative courts' decisions on matters involving judicial review of public administration activities have developed in continental Europe[50]. Academic attempts have been made to systematize the existing judicial review systems in various countries, using different criteria for the proposed divisions[51]. According to my opinion, these systems can be divided into two major groups – considering the adjudicatory powers vested in courts over the agency's final decisions. The first group includes those models in which the courts have the power to change the agency's decision on the merits, while the second group includes those models in which the courts, as a result of reviewing an agency decision, have the power only to reverse the act and remand the case to the agency for further proceedings or to take a particular action (the so-called cassatory adjudication models). In the latter group, the courts do not have the power to replace the authority in deciding the case.

The prototype of the administrative court as a specialized body resolving disputes concerning administrative matters is assumed to be the *Conseil d'Etat*, which in the French legal system is characterized not only by specific institutional features, but by the procedure and competences, specific only to these courts, for the elimination of acts violating the law[52]. This body is part of the executive branch[53].

---

[50] Z. Kmieciak, *Europejskie modele sądownictwa administracyjnego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2006, No. 4–5, p. 18; P. Daniel, F. Geburczyk, P. Ostojski, W. Piątek, [in:] *Wykonanie wyroku sądu administracyjnego*, W. Piątek (ed.), Warszawa 2017, pp. 69, 81, 94, 116, 132, 152; J.S. Bell, *Comparative Administrative Law*, [in:] *The Oxford Handbook of Comparative Law*, M. Reimann, R. Zimmermann (eds.), Oxford 2006, pp. 1278–1281.

[51] See: M. Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3 (2015).

[52] P. Rambaud, *La justicia administrativa en Francia*, [in:] *La justicia administrativa en el derecho comparado*, J. Barnés Vázquez (ed.), Madrid 1993, pp. 277 ff.

[53] The literature indicates that: "[…] the French tradition denied the courts the right to review administrative decisions by invoking the principle of separation of powers, but what it really feared was any constraint on the exercise of executive

Its model system influenced by its foundations the legal orders of France's neighbouring countries, including Switzerland, Belgium, the Netherlands or Italy. Germany used this model to create its own judiciary to deal with public administration activities[54]. The evolution of the mentioned systems led to the formation of administrative courts as a specialized division of the judiciary. The French and German models[55], as well as the Austrian model[56], influenced legislation in other European countries. The latter system was "inherited" by the Republic of Poland, reborn in 1918. The Austrian model, with certain modifications, consisting of the introduction of a two-instance administrative justice system and equipping the administrative courts with limited and optional competences to rule on the merits, still functions in the Polish legal system[57]. Nevertheless, this

power". See: R. Caranta, *Evolving Patterns and Change in the EU Governance and their Consequences on Judicial Protection*, [in:] *Traditions and Change in European Administrative Law*, R. Caranta, A. Gerbrandy (eds.), Groningen 2011, p. 15.

[54] See: T. Würtenberger, *Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz* et T. Gross, *Die deutsche Verwaltungsgerichtsbarkeit zwischen Tradition und Innovation*, [in:] *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa*, K.-P. Sommermann, B. Schaffarzik (eds.), Berlin–Heidelberg 2019, pp. 31 and 1077 ff.

[55] In Italy before 1865, the administrative judiciary followed the French model. After 1865, administrative justice became part of the general courts and was exercised by general judges. In 1889, Italy had a mixed system. This meant that some administrative matters were delegated to the Council of State (as in the French system), while the ordinary courts decided the remaining cases. Currently in Italy, specialized courts within the executive branch exercise justice in cases arising from the activities of the public administration, with specific provisions ensuring the independence of judges. See: G. Falcon, *Italia. La justicia administrativa*, [in:] *La justicia administrativa en el derecho comparado*, J. Barnés Vázquez (ed.), Madrid 1993, pp. 206 ff.

[56] See: T. Olechowski, *Geschichte der Verwaltungsgerichtsbarkeit in Österreich*, [in:] *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa*, K.-P. Sommermann, B. Schaffarzik (eds.), Berlin–Heidelberg 2019, pp. 1099 ff.

[57] W. Piątek, A. Skoczylas, *Geneza, rozwój i model sądownictwa administracyjnego w Polsce*, [in:] *System prawa administracyjnego. Volume 10. Sądowa kontrola administracji publicznej*, R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), Warszawa 2016, pp. 1 ff.; J. Borkowski, *Sądownictwo administracyjne na ziemiach polskich*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2006, No. 1, pp. 13 ff.; *Idem*: *Reforma polskiego sądownictwa administracyjnego*, "Państwo i Prawo" 2002,

does not suggest that continental countries are simply "converging" towards the French, German or Austrian models, while e.g., England keeps its "distinctiveness". Giacinto della Cananea considers that above means, rather, two things. First, legal realities evolved, and legal theories should take this into due account. Otherwise, they risk becoming mere abstractions. Second, although various kinds of public law disputes are cognizable in the civil courts of Continental Europe, most of its States have an elaborate structure of administrative courts parallel to the civil courts[58].

Organizational and functional separation from other authorities is also envisioned by states that adopted the tradition and legacy of common law systems. For instance, in the English system, courts are not 'coordinate' with the other branches of government. However, in most of these countries disputes concerning the activities of public administration are settled by courts of general jurisdiction[59], or specialized tribunals[60].

No. 5, pp. 3 ff.; W. Chróścielewski, Z. Kmieciak, J.P. Tarno, *Reforma sądownictwa administracyjnego a standardy ochrony praw jednostki*, "Państwo i Prawo" 2002, No. 12, pp. 39 ff.; J. Chmielewski, A. Bełczewski, *Koncepcja polskiego sądownictwa administracyjnego – ujęcie historyczne*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2020, No. 3, p. 45.

[58] See: G. della Cananea, *Public Law Disputes in a unified Europe*, "Italian Journal of Public Law" 2015, vol. 7, Issue 1, p. 120 and quoted there: M. Shapiro, *From Public Law to Public Policy, or the Public in Public Law*, "Political Science" 1972, No. 5, pp. 410–412.

[59] W. Wade, H. Ragnemalm, P.L. Strauss, *Administrative law: the problem of justice*, Irvington, New Jersey 1991, *passim*. Japan under the 1889 Constitution had specialized administrative law courts that were not part of the general judiciary. After the enactment of the 1946 Constitution, an adjudication system analogous to that of the United States of America was adopted in this country. See: N. Kadomatsu, *Judicial governance through resolution of legal disputes? – A Japanese Perspective*, "National Taiwan University Law Review" 2009, No. 4(2), pp. 141 ff.; *Idem*: *Legal management of urban space in Japan and the role of the judiciary*, [in:] *Comparative Administrative Law*, S. Rose-Ackerman, P.L. Lindseth, B. Emerson (eds.), Cheltenham–Northampton 2019, pp. 497 ff.

[60] P. Cane, *Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals*, [in:] *Comparative Administrative Law*, S. Rose-Ackerman, P.L. Lindseth (eds.), Cheltenham–Northampton 2010, pp. 420 ff.; *Idem*, *Administrative Tribunals and Adjudication*, Oxford 2009, *passim*.

To understand the fundamental differences between the above-mentioned adjudicatory models of administrative courts, it is advisable to examine the varied ways in which they are implemented in different legal systems. With respect to the first of these groups, in which judgments altering decisions predominate, the enforcement of judgments on the merits – in typical situations – follows the same procedure as the enforcement of final decisions. Regarding the second group of judgments – namely the "cassatory" ones, which do not replace decisions of the public administration – their executors are, as a rule, administrative authorities (agencies). The enforcement of classic cassatory judgments consist in a re-examination of the case, as a result of which the administrative body is not obliged to take a specific action or act, but only to apply the applicable law (the interpretation of which should be found primarily in the court judgment)[61]. Another type of judgments is cassatory ones combined with binding directions for further proceedings in the case (court order), the execution of which comes down primarily to the authority's consideration of these directions and the legal assessment contained in the wording of the judgment. If the court, in the exercise of its statutory authority, adjudicates – in addition to a cassatory judgment – on the obligation to comply with a specified order, the administrative body shall implement the wording of the judgment either by taking action or by refraining from certain actions, or by abolishing the state of affairs indicated in the court decision.

In Europe, an example of a typical system of cassation adjudication by courts in cases of judicial review of public administration actions is the system in force in Poland. It was modelled on the Vienna Supreme Administrative Court since its establishment in 1922[62]. However, unlike in some European countries, in Poland

[61] See: P. Ostojski, W. Piątek, *Die Vollstreckung eines kassatorischen verwaltungsgerichtlichen Urteils*, "Comparative Law Review" 2015, vol. 20, pp. 103–116.

[62] D. Malec, *Najwyższy Trybunał Administracyjny 1922–1939 w świetle własnego orzecznictwa*, Warszawa–Kraków 1999, p. 20; B. Popowska, P. Lissoń, *Verwaltungsgerichtsbarkeit in Polen*, [in:] *Ius Publicum Europaeum. Band VIII: Verwaltungsgerichtsbarkeit in Europa: Institutionen und Verfahren*, A. von Bogdandy, P.M. Huber, L. Marcusson (eds.), Heidelberg 2019, pp. 477 ff.

the notion of review is still understood in a literal and formal way[63]. The doctrine points out that the court cannot substitute the public administration in its action and issue or modify a final decision in the case. Subjecting the administrative actions to the judicial review by an administrative court does not mean that the public administration body ceases to be responsible for administering[64]. The consequence of adopting this view is equipping administrative courts with adjudicatory competences of cassatory nature in principle, which enable the court to reverse or invalidate the final decision which was issued contrary to the law. This occurs when a (significant) violation of substantive or procedural law is found, which has a (significant) impact on the outcome of the case (Article 145 of the Polish Act of 30 August 2002 – The Law of the Administrative Courts Procedure[65]). The legal assessment and recommendations as to further proceedings expressed in the court ruling are binding in the case of authorities whose actions, inaction or protracted conduct of proceedings was the subject of the appeal, as well as the courts, unless the provisions of law have changed (Article 153 of LACP).

Because of the difficulties associated with the implementation of a cassatory judgment, i.e., with obliging public administration authorities to act in accordance with the court's judgment, the modification of the adjudicatory powers of administrative courts in the direction of equipping courts with limited powers to decide on the merits of the cases heard by them, there was debated for several years

[63] See: W. Piątek, *Zakres kognicji polskiego sądu administracyjnego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2009, No. 4, pp. 67 ff.; P. Ostojski, W. Piątek, *Wykonanie kasacyjnego wyroku sądu administracyjnego,* "Zeszyty Naukowe Sądownictwa Administracyjnego" 2016, No. 2(65), pp. 143 ff.

[64] R. Hauser, *Konstytucyjny model polskiego sądownictwa administracyjnego*, [in:] J. Stelmasiak, J. Niczyporuk, S. Fundowicz (eds.), *Polski model sądownictwa administracyjnego*, Lublin 2003, pp. 145–147; W. Piątek, A. Skoczylas, *Kasacyjny czy merytoryczny model orzekania – kwestia zmiany modelu sądowej kontroli decyzji administracyjnych*, "Państwo i Prawo" 2019, Issue 1, pp. 30 ff.; J. Zimmermann, *Aksjomaty sądownictwa administracyjnego*, Warszawa 2020, p. 39.

[65] Consolidated text Journal of Laws 2019, item 2325, as amended; hereinafter: "LACP".

in Poland[66]. It resulted in the 2015 amendment to LACP[67]. When clear statutory prerequisites are met and a party files a request for a ruling stating the existence or non-existence of a right or obligation, the possibility for an administrative court to issue a ruling stating the existence or non-existence of a right or obligation is updated[68]. At the same time, the competence of the Polish administrative court to issue a judgment on the merits is of exceptional nature[69]. The adjudicatory practice has shown that Polish courts very rarely use this power, pointing to the competence of administrative bodies to resolve cases by issuing decisions *ad meritum*.

A significant example of a system that equips administrative courts, in addition to the power to reverse a final decision, with the power to issue an injunction against a public administrative body, as well as with powers to issue typical judgments on the merits, are the legal solutions in force in Germany. This system has had, and continues to have, a significant impact on the models of judgments in other European countries, such as the Baltic States (e.g., Lithuania), and even in Asian countries (e.g., Mongolia). The introduction of an administrative court system based on the German models

---

[66] R. Hauser, *Wstępne założenia nowelizacji ustawy – Prawo o postępowaniu przed sądami administracyjnymi*, "Państwo i Prawo" 2013, Issue 2, p. 30 ff.

[67] Act of April 9, 2015 amending the Law of the Administrative Courts Procedure Act, Journal of Laws of 2015, item 658.

[68] Z. Kmieciak, *Merytoryczne orzekanie przez sądy administracyjne w świetle konstytucyjnej zasady podziału władz*, "Przegląd Legislacyjny" 2015, No. 2, p. 11.

[69] Z. Kmieciak, J. Wegner, *Deference to the Public Administration in Judicial Review: A Polish Perspective*, [in:] *Deference to the Administration in Judicial Review. Comparative Perspectives*, G.B. Zhu (ed.), Heidelberg 2019, pp. 363–377; B. Popowska, P. Lissoń, *Verwaltungsgerichtsbarkeit in Polen*, [in:] *Ius Publicum Europaeum. Band VIII: Verwaltungsgerichtsbarkeit in Europa: Institutionen und Verfahren*, A. von Bogdandy, P.M. Huber, L. Marcusson (eds.), Heidelberg 2019, pp. 477 ff.; Z. Kmieciak, J. Wegner-Kowalska, *Efektywność sądowej kontroli administracji a doktryna deference*, [in:] *Prawo administracyjne wobec współczesnych wyzwań. Księga jubileuszowa dedykowana profesorowi Markowi Wierzbowskiemu*, M. Grzywacz, J. Jagielski, D. Kijowski (eds.), Warszawa 2018, pp. 327 ff.; M. Bernatt, *Konstytucyjne aspekty sądowej kontroli działalności administracji* (*między efektywnością a powściągliwością*), "Państwo i Prawo" 2017, No. 1, pp. 34 ff.

is the subject of discussion among the representatives of the US administrative law scholars[70].

A general characterization of the judgments of German administrative courts makes it possible to note that in the Federal Republic of Germany the adjudicatory model of these courts is based on the models of proceedings before civil courts – it is immanently coupled with the demand of an individual for the protection of his/her subjective rights. The German Administrative Court Act (VwGO[71]) provides for different types of judgment based on the types of administrative adjudication actions and the relevant subjects of dispute identified in this way. In the legal doctrine, it is pointed out that this act makes use of the models of civil procedure when it comes to the types of court decisions. The provision of § 113(1) of the VwGO allows for repealing an administrative act both *ex nunc* and *ex tunc*, depending on the wording of the grounds of the act in substantive law and the nature and degree of the violation of law found by the court[72]. A cassatory judgment is issued when the case is not yet ripe for a decision on the merits of the action to set aside the act and the court deems it necessary to further clarify the state of the case. In addition to ruling on setting aside the challenged act, the administrative court may, upon request, also rule on the obligation to abolish the effects of its implementation (§ 113(1), sentence 2 VwGO)[73].

Judgments upholding a particular type of action may also be of a law shaping (*Gestaltungsurteil*) or affirming (*Feststellungsurteil*) or

[70] See: M. S Greve, *Why We Need Federal Administrative Courts*, George Mason University Legal Studies Research Paper Series (vol. 28), 2020, https://administrativestate.gmu.edu [accessed on: 20 August 2021].

[71] Administrative Court Law (*Verwaltungsgerichtsordunung*) of January 21, 1960, BGBl. I 686/1991 as amended; hereinafter: "VwGO".

[72] J. Schmidt, [in:] *Verwaltungsgerichtsordnung: VwGO*, E. Eyermann (ed.), München 2014, p. 776.

[73] M. Beckmann, *Verfahrensrechtliche Anforderungen an die Standortsuche von Abfallentsorgungsanlagen*, "Deutsches Verwaltungsblatt" 1994, pp. 236 ff.; T. Würtenberger, *Verwaltungsprozessrecht*, München 2011, p. 179; W. Frenz, Öffentliches Recht. Eine nach Anspruchszielen geordnete Darstellung zur Examensvorbereitung, Köln–Berlin–München 2004, p. 317; F. Hufen, *Verwaltungsprozessrecht*, München 2011, p. 435.

awarding a benefit (*Leistungsurteil*)[74] nature. The first type includes a judgment repealing an administrative act and a decision on the objection (if it was issued in the second administrative instance), provided that the court rules on a party's additional request to shape its legal position in a certain way (§ 113(3) or (5) VwGO). This judgment is – to a basic extent – of a cassatory nature, but depending on the wording of the claim, the administrative court may issue an additional ruling on the merits. Furthermore, if the administrative act set aside has already been executed, the court may, upon application, also rule that the administrative body must eliminate the consequences thereof (*Folgenbeseitigung*). In this respect, the judgment is made on the merits, as it awards to the obligor the obligation of payment by administrative body which is enforceable in favour of the appellant[75]. In addition, if the appellant requests the amendment of an administrative act that fixes a monetary amount, the court may fix a different amount (Section 113(2) VwGO). If the appellant has already made a monetary payment, the court may, upon request, along with setting aside the act, rule on the return of that payment[76]. The provision § 113(4) provides that where there is a claim for payment in addition to setting aside of an administrative act, it is permissible to award such payment in the same proceeding. The literature indicates that this provision is dictated by considerations of procedural economy, hence an administrative court may also on this basis rule very generally on the obligation of the administrative body to eliminate the effects of an administrative act[77].

If the court finds that the authority has exceeded the limits of its discretion or that it has exercised its power in a manner that is

[74] W. Piątek, P. Ostojski, *Orzeczenie sądu administracyjnego jako podstawa odpowiedzialności administracji publicznej w Polsce i w Niemczech*, [in:] *Odpowiedzialność administracji i w administracji*, Warszawa 2013, pp. 102–103.

[75] F. Hufen, *Verwaltungsprozessrecht*, München 2011, p. 559; P. Baumeister, *Beseitigungsanspruch als Fehlerfolge des reschtswidrigen Verwaltungsakts*, Tübingen 2006, *passim*.

[76] F. Kopp, W.-R. Schenke, *Verwaltungsgerichtsordnung: VwGO. Kommentar*, München 2016, p. 1420; H. Sodan, J. Ziekow, *Nomos-Kommentar zur Verwaltungsgerichtsordnung*, Baden-Baden 2003, p. 1128.

[77] F. Hufen, *Verwaltungsprozessrecht*, p. 560; W.-R. Schenke, *Verwaltungsprozessrecht*, Heidelberg–München–Landsberg–Frechen–Hamburg 2014, pp. 289–290.

not consistent with the purpose of the authority granted, it shall set aside the decision and require the authority to reconsider the case (§ 114, sentence 1 *in fine* VwGO). In doing so, the administrative court cannot tell the authority how to exercise its discretion. The authority is only required to take into account the court's legal view on the question whether the case should be reconsidered.

The second group includes those countries (notably France[78], Switzerland[79], and, as of 2014 – Austria[80]) in which administrative courts have the power – to a broader or narrower extent – to replace the public administration in its ruling. In other words, in these systems, administrative courts have power to alter decisions, not by indicating to the administrative authorities what measures they are to take to put an end to the infringements, but by ruling "for" or "in place of" administrative authorities, or to modify its decisions[81].

In continental Europe, the forerunner of powers to rule "in place of" administrative authorities by administrative courts was France[82]. In terms of the competence of these courts, French

[78] See the Code of Administrative Justice (*Code de justice administrative*), JORF No. 107 of May 7, 2000, as amended.

[79] See Federal Law on the Federal Administrative Court (Bundesgesetz über das Bundesverwaltungsgericht), June 17, 2005, SR 173.32, AS 2006 2197, https://www.admin.ch/opc/de/official-compilation/2006/2197.pdf [accessed on: 4 November 2019].

[80] See Part 8 of the Federal Constitutional Act (*Bundes-Verfassungsgesetz*) of October 1, 1920, BGBl. I No. 194/1999, as amended; Federal Administrative Court Procedure Act (*Bundesgesetz über das Verfahren der Verwaltungsgerichte*), BGBl. I No. 33/2013 of February 13, 2013, as amended; Administrative Court Act (*Verwaltungsgerichtshofgesetz*), BGBl. I No. 194/1999 of September 3, 1999, as amended.

[81] See: R. Kiener, B. Rütsche, M. Kuhn "Öffentliches Verfahrensrecht", Zürich–St. Gallen 2015: Schulthess, p. 365; D. Leeb, *Das Verfahren der* (*allgemeinen*) *Verwaltungsgerichte unter besonderer Berücksichtigung ihrer Kognitionsbefugnis*, [in:] *Verwaltungsgerichtsbarkeit erster Instanz*, A. Janko, D. Leeb (eds.), Wien 2013, p. 98 ff.; R. Thienle, *Neuordnung der Verwaltungsgerichtsbarkeit. Die Reform der Verwaltungsgerichtsbarkeit duch die Verwaltungsgerichtsbarkeit-Novelle 2012*, "Schriftenreihe Niederösterreichische Juristische Gesellschaft" 2013, No. 116, p. 32; R. Chapus, *Droit du contentieux administratif*, Paris 1995, p. 172; S. Daël, *Contentieux administratif*, Paris 2006, p. 179.

[82] In my considerations on the jurisprudence of administrative courts in France, I largely rely on the chapter by Filip Geburczyk on this matter in our joint

doctrine uses a classification created back in the 19th century by Édouard Laferrière. The first type of administrative proceedings is those that concern reversing an administrative act (*contentieux de l'annulation pour excès de pouvoir*), while the second – full court litigation (*contentieux de pleine juridiction* or *recours de plein contentieux*)[83]. When it comes to the first type, the French courts[84] have the power to reverse the act issued, the consequence of which is that the authority has to deal with the case again. This amounts to removing an act from legal circulation, and consequently to treating it as a nullity. In this regard, the doctrine speaks of the retroactivity of an administrative court judgment (*effet rétroactif des annulations contentieuses*)[85]. In the second type, on the other hand, the administrative courts have the competence to give the authority binding guidelines on the handling of the case (through the so-called *injunction*) and to rule on the content, existence and effects of subjective rights, i.e., to issue a judgment on the merits (altering decision)[86].

Unlike proceedings seeking to reverse the challenged act (*contentieux de l'annulation pour excès de pouvoir*), full court litigations are characterized by the fact that the court, if the action is upheld, shall issue a judgment on the merits. According to the *recours de plein contentieux* order, the administrative court "takes over" the

---

monograph. See: *Execution of an administrative court judgment* (*Wykonanie wyroku sądu administracyjnego*), W. Piątek (ed.), Warsaw 2017, pp. 116 ff.

[83] E. Laferrière, *Traité de la juridiction administrative et des recours contentieux*, Tome 1, Paris 1887, pp. 15 ff.

[84] In France there are 42 administrative tribunals (31 in mainland France and 11 overseas), 8 administrative courts of appeals and the Conseil d'État: the supreme administrative court, https://www.conseil-etat.fr/en/administrative-justice-in-brief [accessed on: 21 August 2021].

[85] E. Laferrière, *op. cit*.

[86] S. Daël, *Contentieux administratif*, Paris 2006, p. 179; F. Melleray, *Recours pour excès de pouvoir* (*Moyens d'annulation*), Répertoire de contentieux administratif/el. 2014, No. 45; E. Picard, *La notion de police administrative*, Tome II, Paris 1984, p. 528; B. Seiller, *Droit administratif*, vol. 2, Paris 2011, p. 234; Gourdou, *Exécution des decisions de la jurisdiction administrative*, Répertoire de contentieux administratif/el. 2014, No. 2; R.C. de Malberg, *Contribution à la théorie générale de l'État*, vol. I, Paris 1962, p. 725; J. Zimmermann, *Prawo administracyjne*, Warszawa 2014, p. 427.

role of administration[87]. Thus, although in such a case there is no obligation on the part of the public administration body to issue an act with a specific wording, the final effect of the judgment is to shape the rights and obligations of the entity being administered in a binding manner by the administrative court.

The general prerequisites under which an administrative court has the power to modify or alter decisions have also not been codified, therefore, in order to analyse this issue, it is again necessary to refer in particular to the case law of the Council of State (*Conseil d'État*) and the literature. As a basis for the *recours de pleine juridiction*, the judgment of the Council of State in the case of *Cadot*[88] is indicated, in which the Council of State found that it had general jurisdiction to hear complaints against all acts of public administration authorities, except acts for which the law expressly reserves the jurisdiction of another court[89]. On the basis of this judgment, the doctrine drew the conclusion that the Council of State is competent to resolve any complaints against the actions of public administration authorities, through which, according to the appellants, the rights of the entity being administered have been violated[90]. It is also pointed out in the literature that, in general terms, the possibility of deciding on the merits by the French administrative courts applies to situations where the role of the court is to determine a pecuniary obligation, such as in the case of claims of a compensatory nature[91]. Nowadays, however, some administrative disputes have been brought under the regime of *plein contentieux* directly by statutory regulation or through the evolution of case law. Thus, for example, a court's ruling replaces a decision in, among other

[87] F. Geburczyk, *Wykonanie wyroków sądowoadministracyjnych we Francji*, [in:] *Wykonanie wyroku sądu administracyjnego*, W. Piątek (ed.), Warszawa 2017, p. 125, see also: R. Chapus, *Droit du contentieux administratif*, Paris 1995, p. 172.

[88] Judgment of the Council of State of December 13, 1889, Recueil Lebon, p. 1148, https://www.conseil-etat.fr/ressources/toutes-les-ressources [accessed on: 6 May 2021].

[89] B. Asso, F. Monera, H. Hillairet, A. Bousquet, *Contentieux administratif*, Levallois Perret 2006, p. 156.

[90] *Ibidem*.

[91] *Ibidem*.

things, tax disputes (including the existence and determination of the amount of tax liability)[92], electoral disputes[93] and refugee status disputes[94].

To illustrate the above, it may be pointed out at this point that in administrative adjudication proceedings of a *plein contentieux* nature, e.g. concerning the review of an administrative act on granting refugee status, the court decides not only as to the legality of the challenged act, but whether the appellant should be granted refugee status. The court decides on the merits based on the totality of the facts (*l'ensemble des circonstances de fait*) relevant to the case on the date of the court's decision.

In administrative adjudication matters falling under the regime of *plein contentieux* the court therefore somehow "takes over" the role of the public administration body in issuing the decision. Indeed, in deciding a case, it is obliged to refer to the totality of the factual and legal circumstances established up to the time of judgment. In the event that changes in the facts occur between the conclusion of the jurisdictional proceedings and the issuance of the decision in the administrative adjudication proceedings that may affect the content of the act, the court is obliged to take these changes into account in its ruling. This obligation is interpreted very broadly by the Council of State. The ruling should also cover changes that occurred after the hearing was closed and before the judgment was issued[95]. The scope of the jurisdiction of the French administrative court therefore covers the entire case as it is before the court. In effect, a ruling is a kind of substitute for an administrative decision issued by an administrative body. The scope of adjudication is not limited either, as the decision concerns the very essence of the case (is on the merits), e.g., the admissibility of granting the

[92] Judgment of the Council of State of April 5, 1996, No. 176611, ArianeWeb database.

[93] Judgment of the Council of State of December 18, 1974, No. 84383, ArianeWeb database.

[94] Judgment of the Council of State of January 8, 1982, No. 24948, ArianeWeb database.

[95] Judgment of the Council of State dated November 19, 1993, No. 100288, ArianeWeb database.

appellant refugee status. This reveals the premise underlying the review of public administration by the administrative judiciary in France: this review is objective in nature and primarily aims to bring about a state of legality in the actions of the public administration. Ultimately, the protection of individual rights is merely a side effect in such a view.

As an aside, it should be pointed out that such a regulation is, however, an exception to the rule. Nevertheless, as a rule, French administrative courts hear the case in its entirety, but rule only on the appellant's claim, unless there are irregularities that violate public order (*ordre public*)[96]. A complaint against an objectively illegal administrative act may be dismissed if the appellant fails to allege a proper violation of law by the act. In practice, however, the concept of "irregularities that violate public order" is interpreted very broadly by administrative courts[97], which – of course – results from the assumption of objective judicial review of public administration.

A number of European countries, including Switzerland, adopted the legal solutions developed by France. Although the Swiss Confederation is not a member of the European Union, the example of the regulation in force in this country perfectly illustrates the mechanism of the power of courts to alter decisions in public law cases; the solutions presented in this respect are of the most far-reaching nature.

The wording of decisions of Swiss courts in public law matters (*in öffentlich-rechtlichen Angelegenheiten*) is determined by the adjudicatory model of these courts. Their jurisdiction is distinguishable from the adjudicatory powers of public administration bodies solely because of a devolutive effect of the filing of the complaint. The hearing and determination of the case is then submitted to the judicial authority (*Devolutiveffekt der Beschwerde;* art. 54 VwVG)[98].

---

[96] J.M. Woehrling, *Die französische Verwaltungsgerichtsbarkeit im Vergleich mit der deutschen*, "Neue Zeitschrift für Verwaltungsrecht" 1985, No. 1, p. 24.

[97] *Ibidem*, p. 24.

[98] R. Rhinow, H. Koller, Ch. Kiss, D. Thurnherr, D. Brühl-Moser, Öffentliches Prozessrecht. *Grundlagen und Bundesrechtspflege,* Basel 2010, pp. 438 ff.; A. Moser, M. Beusch, L. Kneubühler, *Prozessieren vor dem Bundesverwaltungsgericht*, Basel 2013, pp. 56 and 174 ff.

The Swiss Federal Administrative Court (*Bundesverwaltungsgericht*) generally decides on the merits of an administrative case (*in der Sache selbst*), replacing the administrative body[99]. The Federal Act on Administrative Procedure[100] (VwVG) contains a general clause in Article 61, which provides that the court may modify a challenged decision in favour of a party if it violates federal law or is based on incorrect or incomplete findings of fact. The law also allows the case to be remanded to a lower court for further proceedings. The latter type of decision may be taken in special cases in which the administrative body has violated the limits of administrative discretion, as well as if an extensive evidentiary investigation is required due to incomplete (fragmentary) findings of fact[101]. Notwithstanding the above, the administrative court should also remit the case for retrial if the administrative body have ruled that the proceedings are inadmissible (*Nichteintretensentscheid*) and therefore have failed to examine the case on the merits[102], which was one of the violations of law referred to in Section 49 VwVG. However, if the authority has

[99] R. Kiener, B. Rütsche, M. Kuhn, Öffentliches Verfahrensrecht, Zürich 2015, p. 365; T. Górzyńska, [in:] *Sądownictwo administracyjne w Europie Zachodniej*, L. Garlicki (ed.), Warszawa 1990, pp. 233 ff.; M. Kania, *Sądownictwo administracyjne w Szwajcarii*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2007, Issue 1, pp. 153 ff.; W. Piątek, *Powaga rzeczy osądzonej wyroku sądu administracyjnego*, Warszawa 2015, p. 110; R. Hauser, W. Piątek, A. Skoczylas, [in:] *System Prawa Administracyjnego. Volume 10. Sądowa kontrola administracji publicznej*, R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), Warszawa 2014, pp. 472–474.

[100] Bundesgesetz über das Verwaltungsverfahren (Verwaltungsverfahrensgesetz, VwVG) vom 20. Dezember 1968, SR 172.021, as of May 5, 2021, https://www.fedlex.admin.ch/eli/cc/1969/737_757_755/de [accessed on: 6 December 2021].

[101] A. Kölz, I. Häner, M. Bertschi, *Verwaltungsverfahren und Verwaltungsrechtspflege des Bundes*, Zürich 2013, p. 404; Federal Administrative Court (*Bundesverwaltungsgericht*), judgment of June 30, 2008, ref. No. 1C-277/2007 and judgment of September 23, 2005, ref. No. 1A-37/2005, http://www.bvger.ch [accessed on: 6 December 2021].

[102] See: Federal Administrative Court (*Bundesverwaltungsgericht*), judgment of January 31, 2011, ref. No. B-6372/2010, http://www.bvger.ch [accessed on: 6 December 2021]. See also: R. Rhinow, H. Koller, Ch. Kiss, D. Thurnherr, D. Brühl-Moser, Öffentliches Prozessrecht. *Grundlagen und Bundesrechtspflege*, Basel 2010, p. 333.

expressed its opinion on the merits in such a decision, the court may refrain from issuing a cassatory judgment and rule on the merits[103].

In the Swiss system, the administrative court is empowered to clarify the facts in any case. Reversing the challenged order and referring the case back to the administrative body by the Swiss court should constitute an exception to the principle that the administrative court should rule on the merits of the case. Also, if it turns out that a public administration body violated the procedural rights of an appellant, for example, it violated the rule of hearing a party before issuing a decision (*rechtliches Gehör*), the Federal Administrative Court can issue a judgment on the merits in which it remedies the violation of the administrative body. The appropriate criteria for a court to assess the situation include the nature and gravity of the violation, the interest of the party involved, and the amount of the costs of litigation in the event of a specific ruling[104].

The principle of adjudication *in der Sache selbst* by the Swiss courts is not deconstructed by the existence of a limited possibility to appeal the decisions of the Federal Administrative Court, as issued at last instance, to the Federal Supreme Court (*Bundesgericht;* see Art. 82 of the Federal Supreme Court Act, BGG[105]), which issue either a judgment that alters the decision or a cassational judgment – referring the case back to the Federal Administrative Court (as a court of first instance) or to a lower instance (*Vorinstanz*; Art. 107(2) BGG).

It should be noted that in Swiss doctrine it is accepted that even court decisions dismissing complaints replace the challenged

[103] Federal Administrative Court (*Bundesverwaltungsgericht*), judgment of September 23, 2008, ref. No. C-8/2006, http://www.bvger.ch [accessed on: 6 December 2021].

[104] See judgments of the Federal Administrative Court (*Bundesverwaltungsgericht*): of May 6, 2015, ref. No. E-3361/2014; of July 4, 2007, ref. No. C-3180/2006; and of November 27, 2007, ref. No. E-6148/2006, http://www.bvger.ch [accessed on: 6 December 2021].

[105] Bundesgesetz über das Bundesgericht (Bundesgerichtsgesetz, BGG) vom 17. Juni 2005, SR 173.110, of May 6, 2015, ref. No. E-3361/2014; of July 4, 2007, ref. No. C-3180/2006; and of November 27, 2007, ref. No. 5, 2021, https://www.fedlex.admin.ch/eli/cc/2006/218/de [accessed on: 6 December 2021]. See: A. Moser, M. Beusch, L. Kneubühler, *Prozessieren vor dem Bundesverwaltungsgericht*, Basel 2013, pp. 17 ff.

decisions of administrative authorities, although they do not interfere with their wording. In this case, the court makes a different, correct statement of reasons for deciding the case (called *Motivsubstitution*)[106].

In contrast, in the Republic of Austria, the traditional cassatory adjudication system of administrative courts, consisting in the power to reverse or invalidate the challenged act, was constantly in place until the end of 2013[107]. It was a model system which influenced the legal orders of Austria's neighbouring countries, including Poland and Hungary. On January 1, 2014, constitutional as well as statutory regulations in the Austrian legal order were changed by the 2012 Amendment Act[108], having a significant impact on the administrative court system, the proceedings before these courts and the model of judicial decisions, and consequently on the way they are enforced[109].

---

[106] See judgments of the Federal Administrative Court (*Bundesverwaltungsgericht*): of January 18, 2013, C-4425/2011, and of November 20, 2012, C-7511/2010, https://entscheidsuche.ch [accessed on: 4 November 2019].

[107] See: T. Olechowski, *Historische Entwicklung der Verwaltungsgerichtsbarkeit in Österreich*, [in:] *Handbuch der Verwaltungsgerichtsbarkeit*, J. Fischer, K. Pabel, N. Raschauer (eds.), Wien 2014, p. 22 ff.; R. Müller, *Zur Geschichte der Verwaltungsgerichtsbarkeit*, [in:] *Verfahren vor dem Verfassungsgerichtshof und vor dem Verwaltungsgerichtshof*, R. Machacek (ed.), Wien 2008, pp. 131–135.

[108] Verwaltungsgerichtsbarkeits-Novelle 2012, BGBl. No. 51/2012.

[109] D. Leeb, *Das Verfahrensrecht der* (*allgemeinen*) *Verwaltungsgerichte unter besonderer Berücksichtigung ihrer Kognitionsbefugnis*, [in:] *Verwaltungsgerichtsbarkeit erster Instanz*, A. Janko, D. Leeb (eds.), Wien 2013, pp. 85 ff.; R. Thienel, *Neuordnung der Verwaltungsgerichtsbarkeit. Die Reform der Verwaltungsgerichtsbarkeit durach die Verwaltungsgerichtsbarkeit-Novelle 2012*, "Schriftenreihe Niederösterreichische Juristische Gesellschaft" 2013, No. 116, p. 32; A. Krawczyk, *Reforma sądownictwa administracyjnego w Austrii*, "Państwo i Prawo" 2013, Issue 4, pp. 31 ff.; Z. Kmieciak, P. Florjanowicz-Błachut, *Austria – reforma sądownictwa administracyjnego. Wybór przepisów znowelizowanych 5. ustawą federalną. Verwaltungsgerichtsbarkeit-Novelle 2012*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2013, Issue 4, pp. 187 ff.; W. Piątek, *Powaga rzeczy osądzonej wyroku sądu administracyjnego*, Warszawa 2015, pp. 100–101; P. Ostojski, W. Piątek, *Vollstreckung verwaltungsgerichtliche Urteil* (*Erkenntnisse*) *in Polen und in Österreich*, "Zeitschrift für Verwaltungsgerichtsbarkeit" 2016, No. 3, pp. 204 ff.; *Ibidem*, *Kasacyjne orzeczenia austriackich sądów administracyjnych*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2016, No. 2,

The Austrian lawmakers laid down in Sec. 130(4) of the Federal Constitutional Act (B-VG)[110] the principle that administrative courts of first instance shall decide the merits of a case, leaving the ordinary legislature with the possibility to merely regulate further cases of altering decisions by these courts[111]. In § 28(2) VwGVG, the ordinary legislator repeated verbatim the wording of the two prerequisites in Art. 130(4) B-VG on which the decision on the merits by the administrative court depends. The administrative court of first instance should rule on the merits if the facts of the case have been properly determined, or if the determination of the authoritative facts by that court will affect the speed and reduce the cost of hearing the case. Pursuant to § 28(3) VwGVG, even if none of the grounds listed in § 28(2) VwGVG applies, the court of first instance may decide on the merits of the case if the authority whose decision was challenged when the appeal was lodged has not objected to the court's ruling on the merits, with a view to significantly simplifying and expediting administrative proceedings[112]. On the other hand, if the administrative body has taken the necessary steps to establish the facts of the case, then the court of first instance may, by way of a ruling, reverse the challenged decision, thereby allowing the administrative body to issue a new decision[113]. The court's decision then

pp. 143 ff.; *Ibidem*, *Die Vollstreckung eines kassatorischen verwaltungsgerichtlichen Urteils*, "Comparative Law Review" 2015, No. 20, pp. 103 ff.

[110] Bundes-Verfassungsgesetz, BGBl 1/1930, as amended; hereinafter: B-VG.

[111] R. Thienel, *Neuordnung der Verwaltungsgerichtsbarkeit. Die Reform der Verwaltungsgerichtsbarkeit durach die Verwaltungsgerichtsbarkeit-Novelle 2012*, "Schriftenreihe Niederösterreichische Juristische Gesellschaft" 2013, No. 116, p. 32; D. Leeb, *Das Verfahrensrecht der (allgemeinen) Verwaltungsgerichte unter besonderer Berücksichtigung ihrer Kognitionsbefugnis*, [in:] *Verwaltungsgerichtsbarkeit erster Instanz*, A. Janko, D. Leeb (eds.), Wien 2013, pp. 98 ff.

[112] Judgment of the Supreme Administrative Court of Austria of October 21, 2014, case no.: Ro/2014/03/0076, https://www.ris.bka.gv.at [accessed on: 6 December 2021].

[113] A similar procedural construction has so far been found in §67 AVG. As noted in the doctrine, however, administrative bodies have not often exercised their right to object. For more see K. Pabel, *Die Rolle der Verwaltungsgerichte in verfahrensrechtlicher Hinsicht*, "Zeitschrift für Verwaltungsgerichtsbarkeit" 2014, Issue 1, p. 51. With respect to § 28(3) VwGVG, on the other hand, a restrictive, narrowing interpretation is advocated in favor of substantive adjudicatory powers

takes on a cassatory nature[114]. The authority then remains bound by the legal assessment contained in the reasoning of the order of the court of first instance. It should be emphasized, however, that in the absence of an objection from the administrative body, the court of first instance may issue a judgment on the merits of the case even if the administrative body has committed significant errors in establishing the facts of the case. The burden of making these findings is then on the court, intending to decide on the merits.

A similar construction has been adopted for the judicial review of discretionary decisions (Article 28(4) VwGVG). However, an administrative court cannot change a discretionary decision on the grounds of its inexpediency (*unzweckmäßige Ermessensübung*). Finding such a state of affairs, the court can only reverse the decision and remand the case[115].

5. Conclusions

The thesis put forward in the introduction is true. Indeed, due to the jurisprudence of the Court of Justice of the EU, reaching with its indications, it is justified to state that in the area of the EU Member

---

of the courts of first instance. See: H.P. Lehofer, *Die Grenzen der Zurückweisung durch das Verwaltungsgericht*, "Österreichische Juristen-Zeitung" 2014, vol. 16, p. 705.

[114] However, as indicated in the doctrine, only a lawful objection obliges the administrative court to issue a cassatory judgment. An objection is unlawful if it is lodged too late, i.e., after the application has been lodged, and if the court considers that it will not simplify or expedite the proceedings. See: Ch. Grabenwarter, M. Fister, *Verwaltungsverfahrensrecht und Verwaltungsgerichtsbarkeit*, Wien 2014, p. 233.

[115] J. Fischer, *Das Verfahrensrecht der Verwaltungsgerichte I. Instanz* (*VwGVG*), [in:] *Justizstaat – Chance oder Risiko?*, Wien 2014, p. 320; G. Dünser, *Ermessenkontrolle durch Gerichte? Ermessen und öffentliche Interessen im verwaltungsgerichtlichen Verfahren*, [in:] *Handbuch Verwaltungsgerichte. Die Grundlagen der Verwaltungsgerichtsbarkeit I. Instant*, A. Larcher (ed.), Wien 2013, pp. 235 ff.; A. Kölz, I. Häner, M. Bertschi, *Verwaltungsverfahren und Verwaltungsrechtspflege de Bundes*, Zürich 2013, p. 404; J.-M. Auby, R. Drago, *Taité de contentieux administratif*, T. 2, Paris 1984, pp. 238 ff.; K. Redeker, [in:] *Verwaltungsgerichtsordnung. Kommentar*, K. Redeker, J.-J. Oertzen (eds.), Stuttgart 2014, p. 779.

States there is harmonization in the field of judicial powers of administrative courts. This is evidenced by the reforms of the administrative judiciary in Austria and in Hungary.

According to French model solutions, in certain types of cases, administrative courts have the power to amend the agency's decision (to decide the case on its merits). The Court of Justice of the EU stresses in its case law that the courts of the Member States of the Union should take effective action to ensure that the fundamental rights of individuals are protected. Where necessary, if the circumstances of the case permit, the administrative court should replace the agency's decision, that violates the law, with its own judgment. Therefore, in most European legal systems the courts play an active role in the judicial review of final decisions of agencies in order to realize the fundamental rights of individuals. This applies primarily to those states that, following the French model, provide for the power of the court to alter decisions. However, even if national law does not provide the administrative court with such a power, it derives from the general provision of Article 47 of the EU Charter of Fundamental Rights.

The rule in each European system is for the administrative court to provide the correct interpretation of the law if the agency's assessment is flawed. Many European legal systems allow the taking of supplement evidences by administrative courts. Finally, as I have argued above, it is permissible for administrative courts to issue decisions on the merits.

The solutions proposed in section 90(1)(2) of the Code of Administrative Litigation may be a model for the Polish legislator, who should adapt the Polish Act on Proceedings before Administrative Courts to the requirements of EU law. Administrative courts must be empowered to change final agency decisions with their judgments when it is necessary to effectively safeguard the fundamental individual rights. Hungarian legislator should make it clearer that the "nature of the case" referred to in section 90(2)(a) concerns the issue of "protection of human rights".

In my opinion any legislative practice that results in the denial of the court's authority to do whatever is necessary to ensure the

full effectiveness of the protection of human rights is contrary to the essence of judicial review of administrative actions.

Of course, this method of adjudication by courts should not be the rule, as judicial review does not generally serve to resolve administrative matters. According to my opinion, it should merely deal with the most essential matters relating to the rights of individuals. In the era of globalization of human rights protection, this principle appears to be universal. This approach fully embodies the rule of law in the human rights protection space.

I disagree with the assertion that, in deciding the rights or duties of individuals under judicial review, courts take over the functions of the executive branch. Depriving judges of the power to effectively intervene when an agency violates the law in an arbitrary or persistent manner that threatens fundamental individual rights would violate the principle of separation of powers because it would prevent courts from performing their main function of administering justice. *De lege ferenda*, in order to ensure the full protection of fundamental rights, it would be advisable to create in statutes of every signatory state to the Convention for the Protection of Human Rights and Fundamental Freedoms – including Poland – an explicit basis of grounds for issuing the court rulings on the merits.

REFERENCES

Asimow M., Dotan Y., *Open and Closed Judicial Review of Agency Action: The Conflicting U.S. and Israeli Approaches*, "The American Journal of Comparative Law" 2016, vol. 64.

Asimow M., *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3, 2015.

Asso B., Monera F., Hillairet H., Bousquet A., *Contentieux administratif*, Levallois Perret 2006.

Auby J.-M., Drago R., *Taité de contentieux administratif*, T. 2, Paris 1984.

Beckmann M., *Verfahrensrechtliche Anforderungen an die Standortsuche von Abfallentsorgungsanlagen*, "Deutsches Verwaltungsblatt" 1994.

Bell J.S., *Comparative Administrative Law*, [in:] *The Oxford Handbook of Comparative Law*, M. Reimann, R. Zimmermann (eds.), Oxford 2006.

Bernatt M., *Konstytucyjne aspekty sądowej kontroli działalności administracji* (*między efektywnością a powściągliwością*), "Państwo i Prawo" 2017, No. 1.

Borkowski J., *Sądownictwo administracyjne na ziemiach polskich*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2006, No. 1.

Boros A., Patyi A., *Administrative Appeals and Other Forms of ADR in Hungary*, [in:] *Alternative Dispute Resolution in European Administrative Law*, C. Dacian, B. Dragos, Neamtu (eds.), New York–London–Heidelberg 2014.

Brenner M., *Allgemeine Prinzipien des verwaltungsgerichtlichen Rechtsschutzes in Europa*, "Die Verwaltung" 1998, No. 31.

Cananea della G., *Public Law Disputes' in a unified Europe*, "Italian Journal of Public Law" 2015, vol. 7, Issue 1.

Cane P., *Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals*, [in:] *Comparative Administrative Law*, S. Rose-Ackerman, P.L. Lindseth (eds.), Cheltenham–Northampton, 2010.

Caranta R., *Evolving Patterns and Change in the EU Governance and their Consequences on Judicial Protection*, [in:] *Traditions and Change in European Administrative Law*, R. Caranta, A. Gerbrandy (eds.), Groningen 2011.

Chapus R., *Droit du contentieux administratif*, Paris 1995.

Chmielewski J., Bełczewski A., *Koncepcja polskiego sądownictwa administracyjnego – ujęcie historyczne*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2020, No. 3.

Chróścielewski W., Kmieciak Z., Tarno J.P., *Reforma sądownictwa administracyjnego a standardy ochrony praw jednostki*, "Państwo i Prawo" 2002.

Daël S., *Contentieux administratif*, Paris 2006.

Daniel P., Geburczyk F., Ostojski P., Piątek W., [in:] *Wykonanie wyroku sądu administracyjnego*, W. Piątek (ed.), Warszawa 2017.

Deibl M., *Zum Prüfungsumfang im verwaltungsgerichtlichen Verfahren*, "Zeitschrift der Verwaltungsgerichtsbarkeit" 2005, No. 5.

Dünser G., *Ermessenkontrolle durch Gerichte? Ermessen und öffentliche Interessen im verwaltungsgerichtlichen Verfahren*, [in:] *Handbuch Verwaltungsgerichte. Die Grundlagen der Verwaltungsgerichtsbarkeit I. Instant*, A. Larcher (ed.), Wien 2013.

Falcon G., *Italia. La justicia administrativa*, [in:] *La justicia administrativa en el derecho comparado*, J. Barnés Vázquez (ed.), Madrid 1993.

Fenton H.N., *Where too little judicial deference can impair the administrative process: the case of Ukraine*, [in:] *Comparative Administrative Law*, S. Rose-Ackerman, P.L. Lindseth (eds.), Cheltenham–Northampton 2010.

Fischer J., *Das Verfahrensrecht der Verwaltungsgerichte I. Instanz* (*VwGVG*), [in:] *Justizstaat – Chance oder Risiko?,* Österreichische Juristenkommission (ed.), Wien 2014.

Frenz W., *Öffentliches Recht. Eine nach Anspruchszielen geordnete Darstellung zur Examensvorbereitung*, Köln–Berlin–München 2004.

Geburczyk F., *Wykonanie wyroków sądowoadministracyjnych we Francji*, [in:] *Wykonanie wyroku sądu administracyjnego*, W. Piątek (ed.), Warszawa 2017.

Górzyńska T., [in:] *Sądownictwo administracyjne w Europie Zachodniej*, L. Garlicki (ed.), Warszawa 1990.

Grabenwarter Ch., Fister M., *Verwaltungsverfahrensrecht und Verwaltungsgerichtsbarkeit*, Wien 2014.

Gross T., *Die deutsche Verwaltungsgerichtsbarkeit zwischen Tradition und Innovation*, [in:] *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa*, K.-P. Sommermann, B. Schaffarzik (eds.), Berlin–Heidelberg 2019.

Hauser R., *Konstytucyjny model polskiego sądownictwa administracyjnego*, [in:] *Polski model sądownictwa administracyjnego*, J. Stelmasiak, J. Niczyporuk, S. Fundowicz (eds.), Lublin 2003.

Hauser R., *Wstępne założenia nowelizacji ustawy – Prawo o postępowaniu przed sądami administracyjnymi*, "Państwo i Prawo" 2013, Issue 2.

Hauser R., Piątek W., Skoczylas A., [in:] *System Prawa Administracyjnego. Volume 10. Sądowa kontrola administracji publicznej*, R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), Warszawa 2014.

Hoffman I., *Application of Administrative Law in the Time of Reforms in the Light of the Scope of Judicial Review in Hungary*, "Studia Iuridica Lublinensia" 2020.

Hufen F., *Verwaltungsprozessrecht*, München 2011.

Jakimowicz W., *O tzw. merytorycznych kompetencjach orzeczniczych sądów administracyjnych określonych w art. 145a § 1 Prawa o postępowaniu przed sądami administracyjnymi*, "Casus" 2017, No. 2.

Kadomatsu N., *Judicial governance through resolution of legal disputes? – A Japanese Perspective*, "National Taiwan University Law Review" 2009, No. 4(2).

Kania M., *Sądownictwo administracyjne w Szwajcarii*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2007, Issue 1.

Kiener R., Rütsche B., Kuhn M., "Öffentliches Verfahrensrecht", Zürich–St. Gallen 2015, Schulthess.

Kmieciak Z., *Europejskie modele sądownictwa administracyjnego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2006, No. 4–5.

Kmieciak Z., *Głębokość orzekania w sprawach objętych kognicją sądów administracyjnych*, "Państwo i Prawo" 2007, Issue 4.

Kmieciak Z., *Merytoryczne orzekanie przez sądy administracyjne w świetle konstytucyjnej zasady podziału władz*, "Przegląd Legislacyjny" 2015, No. 2.

Kmieciak Z., *Zarys teorii postępowania administracyjnego*, Warszawa 2014.

Kmieciak Z., Florjanowicz-Błachut P., *Austria – reforma sądownictwa administracyjnego. Wybór przepisów znowelizowanych 5. ustawą federalną. Verwaltungsgerichtsbarkeit-Novelle 2012,* "Zeszyty Naukowe Sądownictwa Administracyjnego" 2013, Issue 4.

Kmieciak Z., Wegner J., *Deference to the Public Administration in Judicial Review: A Polish Perspective*, [in:] *Deference to the Administration in Judicial Review. Comparative Perspectives*, G.B. Zhu (ed.), Heidelberg 2019.

Kmieciak Z., Wegner-Kowalska J., *Efektywność sądowej kontroli administracji a doktryna deference*, [in:] *Prawo administracyjne wobec współczesnych wyzwań. Księga jubileuszowa dedykowana*

profesorowi Markowi Wierzbowskiemu, M. Grzywacz, J. Jagielski, D. Kijowski (eds.), Warszawa 2018.

Kölz A., Häner I., Bertschi M., *Verwaltungsverfahren und Verwaltungsrechtspflege des Bundes*, Zürich 2013.

Kopp F., Schenke W.-R., *Verwaltungsgerichtsordnung: VwGO. Kommentar*, München 2016.

Krawczyk A., *Reforma sądownictwa administracyjnego w Austrii*, "Państwo i Prawo" 2013.

Laferrière E., *Traité de la juridiction administrative et des recours contentieux*, Tome 1, Paris 1887.

Langrod J., *Kontrola administracji. Studja*, Warszawa–Kraków 1929.

Leeb D., *Das Verfahrensrecht der* (*allgemeinen*) *Verwaltungsgerichte unter besonderer Berücksichtigung ihrer Kognitionsbefugnis*, [in:] *Verwaltungsgerichtsbarkeit erster Instanz*, A. Janko, D. Leeb (eds.), Wien 2013.

Leeb D., *Verfahrensökonomie und VwGVG*, "Zeitschrift der Verwaltungsgerichtsbarkeit" 2005, No. 3.

Lehofer H.P., *Die Grenzen der Zurückweisung durch das Verwaltungsgericht*, "Österreichische Juristen-Zeitung" 2014, vol. 16.

Lorenz D., *Der grundrechtliche Anspruch auf effektiven Rechtsschutz*, "Archiv des öffentlichen Rechts" 1980, vol. 105, No. 4.

Madison J., *Federalist No. 48*, [in:] *The Federalist Papers*, https://guides.loc.gov/federalist-papers [accessed on: 6 December 2021].

Malberg R.C. de, *Contribution à la théorie générale de l'État*, vol. I, Paris 1962.

Malec D., *Najwyższy Trybunał Administracyjny 1922–1939 w świetle własnego orzecznictwa*, Warszawa–Kraków 1999.

Massot J., *The powers and duties of the French administrative law judge*, [in:] *Comparative Administrative Law,* II ed., S.R. Ackerman, P.L. Lindseth, B. Emerson (eds.), Cheltenham–Northampton 2019.

Melleray F., *Recours pour excès de pouvoir* (*Moyens d'annulation*), "Répertoire de contentieux administrative" 2014, No. 45.

Moser A., Beusch M., Kneubühler L., *Prozessieren vor dem Bundesverwaltungsgericht,* Basel 2013.

Müller R., *Zur Geschichte der Verwaltungsgerichtsbarkeit*, [in:] *Verfahren vor dem Verfassungsgerichtshof und vor dem*

Verwaltungsgerichtshof, R. Machacek (ed.), Wien 2008, pp. 131–135.

Olechowski T., *Geschichte der Verwaltungsgerichtsbarkeit in Österreich*, [in:] *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa*, K.-P. Sommermann, B. Schaffarzik (eds.), Berlin–Heidelberg 2019.

Olechowski T., *Historische Entwicklung der Verwaltungsgerichtsbarkeit in Österreich*, [in:] *Handbuch der Verwaltungsgerichtsbarkeit*, J. Fischer, K. Pabel, N. Raschauer (eds.), Wien 2014.

Ostojski P., Dalkowska A., *Die "Macht" des Verwaltungsgerichts im Bereich der öffentlichen Verwaltung – eine rechtsvergleichende Analyse*, "Zeitschrift der Verwaltungsgerichtsbarkeit" 2020.

Ostojski P., Piątek W., *Vollstreckung verwaltungsgerichtlicher Urteile* (*Erkenntnisse*) *in Polen und in Österreich*, "Zeitschrift der Verwaltungsgerichtsbarkeit" 2016, No. 5.

Ostojski P., Piątek W., *Wykonanie kasacyjnego wyroku sądu administracyjnego,* "Zeszyty Naukowe Sądownictwa Administracyjnego" 2016, No. 2(65).

Pavlidis L., *Zur Sache*; *Die Entscheidung in der Sache* (*selbst*) *und ihre Implikationen*, "Zeitschrift der Verwaltungsgerichtsbarkeit" 2015, No. 1.

Piątek W., *Die Effektivität der verwaltungsgerichtlichen Kontrolle in Europa*, "Zeitschrift der Verwaltungsgerichtsbarkeit" 2018, Issue 2.

Piątek W., *Powaga rzeczy osądzonej wyroku sądu administracyjnego*, Warszawa 2015.

Piątek W., *Sposób rozumienia pojęcia sądu administracyjnego*, [in:] *Wykonanie wyroku sądu administracyjnego*, W. Piątek (ed.), Warszawa 2017.

Piątek W., *Vollstreckung verwaltungsgerichtliche Urteil* (*Erkenntnisse*) *in Polen und in Österreich*, "Zeitschrift für Verwaltungsgerichtsbarkeit" 2016.

Piątek W., *Zakres kognicji polskiego sądu administracyjnego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2009, No. 4.

Piątek W., Ostojski P., *Orzeczenie sądu administracyjnego jako podstawa odpowiedzialności administracji publicznej w Polsce*

i w Niemczech, [in:] *Odpowiedzialność administracji i w administracji*, Warszawa 2013.

Piątek W., Skoczylas A., *Geneza, rozwój i model sądownictwa administracyjnego w Polsce*, [in:] *System prawa administracyjnego. Volume 10. Sądowa kontrola administracji publicznej*, R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), Warszawa 2016.

Piątek W., Skoczylas A., *Kasacyjny czy merytoryczny model orzekania – kwestia zmiany modelu sądowej kontroli decyzji administracyjnych*, "Państwo i Prawo" 2019, No. 1, p. 36.

Picard E., *La notion de police administrative*, Tome II, Paris 1984.

Pollák K., *The Rule of Law and Administrative Justice in Hungary*, "Nispacee: Occasional Papers" 2019.

Popowska B., Lissoń P., *Verwaltungsgerichtsbarkeit in Polen*, [in:] *Ius Publicum Europaeum. Band VIII: Verwaltungsgerichtsbarkeit in Europa: Institutionen und Verfahren*, A. von Bogdandy, P.M. Huber, L. Marcusson (eds.), Heidelberg 2019.

Rambaud P., *La justicia administrativa en Francia*, [in:] *La justicia administrativa en el derecho comparado*, J. Barnés Vázquez (ed.), Madrid 1993.

Redeker K., [in:] *Verwaltungsgerichtsordnung. Kommentar*, K. Redeker, J.-J. Oertzen (eds.), Stuttgart 2014.

Rhinow R., Koller H., Kiss Ch., Thurnherr D., Brühl-Moser D., Öffentliches Prozessrecht. *Grundlagen und Bundesrechtspflege*, Basel 2010.

Rozsnyai K.F., *Current Tendencies of Judicial Review as Reflected in the New Hungarian Code of Administrative Court Procedure*, "Central European Public Administration Review" 2019, No. 17(1).

Schenke W.-R., *Verwaltungsprozessrecht*, Heidelberg–München–Landsberg–Frechen–Hamburg 2014.

Schoch F., *Die Europäisierung des verwaltungsgerichtlichen Rechtsschutzes*, Berlin, New York 2000.

Seiller B., *Droit administratif*, Vol. 2, Paris 2011.

Sodan H., Ziekow J., *Nomos-Kommentar zur Verwaltungsgerichtsordnung*, Baden-Baden 2003.

Sommermann K.-P., *Das Recht auf effektiven Rechtsschutz als Kristallisationspunkt eines gemeineuropäischen Rechtsstaatsverständnisses*, [in:] *Rechtsstaat und Grundrechte. Festschrift für Detlef*

Merten, F. Kirchhof, H.-J. Papier, H. Schäffer (eds.), Heidelberg 2007.

Sommermann K.-P., *Die Europäisierung der nationalen Verwaltungsgerichtsbarkeit in rechtsvergleichender Perspektive*, [in:] *Verwaltungsgerichtsbarkeit in der Europäischen Union*, R.P. Schenke, J. Suerbaum (eds.), Baden-Baden 2016.

Strąk K., *Polityka Unii Europejskiej w zakresie powrotów*, Warszawa 2019.

The Nature of Judicial Review, [in:] *De Smith's Principles of Judicial Review*, H. Woolf, J. Jowell, C. Donnelly (eds.), London 2020.

Thienle R., *Neuordnung der Verwaltungsgerichtsbarkeit. Die Reform der Verwaltungsgerichtsbarkeit duch die Verwaltungsgerichtsbarkeit-Novelle 2012,* "Schriftenreihe Niederösterreichische Juristische Gesellschaft" 2013, No. 116.

Wade W., Ragnemalm H., Strauss P.L., *Administrative law: the problem of justice,* Irvington, New Jersey 1991.

Woehrling J.M., *Die französische Verwaltungsgerichtsbarkeit im Vergleich mit der deutschen*, "Neue Zeitschrift für Verwaltungsrecht", 1985, No. 1.

Würtenberger T., *Verwaltungsprozessrecht*, München 2011.

Zimmermann J., *Aksjomaty sądownictwa administracyjnego*, Warszawa 2020.

Zimmermann J., *Prawo administracyjne*, Warszawa 2014.

DR MATEUSZ PSZCZYŃSKI
University of Opole

The digitalisation and automatisation of the Polish administrative judiciary

1. Introduction

The first questions about the use of artificial intelligence replacing a judge's actions arose as early as in the 1970s. When asked by Weizenbaum, McCarthy said that there is no difference between the way judges think or knowledge they acquired and the data that can be implemented into a computer[1]. Thanks to the present AI technology, this thesis is not only the theory, but slowly it becomes a reality, that should be used (on every day basis). An example of work on legal reasoning, and at the same time, one of the core questions of legal theory and philosophy[2], was an expanded study on law and artificial intelligence by Anne Gardner. Interesting discussions on automatic drafting of court pleadings have been made by L. Karl Branting, James C. Lester and Charles B. Callaway, proposing a model based on the discourse structure of already existing pleadings[3]. These

[1] J. Weizenbaum, *Computer power and human reason, From Judgement to calculation*, New York–San Francisco 1976, p. 207.

[2] A. Lieth Gardner, *An Artificial Intelligence Approach to Legal Reasoning*, Masachuset–London 1987, p. 1.

[3] L.K. Branting, J.C. Lester, C.B. Callaway, *Automating Judicial Document Drafting: A Discourse-Based Approach*, [in:] *Judicial applications of AI*, G. Sartor, K. Branting (eds.), 1998, pp. 111–149.

sample studies show the great potential that exists in the use of AI and automated processes in the judiciary or law in general.

The inspiring research field of artificial intelligence and related fields has been expanding for over 70 years. The scale and growth of the field is evidenced by the fact that in June 2021, a search on Google Scholar for the keyword *artificial intelligence* generated 1 140 000 results entered since 2010, and 95 000 of them was entered since 2020. When narrowed the search to a phrase *AI and law*, there results are as small as 614 from the year 2010, with almost 1/3 of the results (245) that have been published since 2020. When narrowing the query to *judiciary* or *justice* in relation to *artificial intelligence*, only single papers appear. Similarly, the phrase *digitisation of justice* provides a result of 44 papers since 2010.

A search using the Web of Science platform provides similar results. It is worth to mention that the scientific value of the content presented in this system is higher, as it checks strictly scientific publications, whereas the Google Scholar is much wider in its research. It searches through the whole internet, when WoS covers scientific journal databases only. Additionally, the WoS is under human supervision, whereas Google Scholar is governed by algorithms. Some advantage of Google Scholar is that it searches through full text material, whereas the WoS analyses only abstracts, keywords and titles of papers. The query of WoS for the keyword *artificial intelligence* for the years 2010–2021 resulted in 57555 publications. In this number there are only 596 results in category *law*, which represents only 1.036% of all publications containing the phrase *AI* in the title, abstract or keywords.

Although there are several hundred articles on law and automation in databases and search engines, only one strictly legal article is among the most cited and recommended. This shows at the same time that the mainstream of AI studies is in the broader information sciences. It is worth mentioning that a sharp increase in interest in *AI and law* topics occurred in 2018 with 50 more publications, a 175% increase on 2017, rising to 178 publications in 2019, 201 publications in 2020 and 56 items by May 2021. By narrowing down the searches in the WoS database to the phrase *AI* and *Justice* for the years 2010–2021, a total of 189 results are obtained, with

only 61 falling into the category of *Law*. Meanwhile, the phrase *Digitalization/digitalisation* and *justice* for 2010–2021 results in 85 hits. Thus, the study of law and new technologies is developing strongly, which shows that the research field is wide and interesting for many researchers.

As far as strictly legal national databases are concerned, it can be pointed out that in Poland the key one is the Polish Legal Bibliography, which is maintained by the Polish Academy of Sciences Institute of Sciences in cooperation with Wolters Kluwer. In the database, it was noted that 21 items for the phrase *artificial intelligence* were recorded between 2010 and 2021. In relation to *justice*, there was only one record and no records for the phrase *artificial intelligence* + *judiciary*. In Hungarian database – "MATARKA" – we can find 4 articles *AI and Law* and one article *AI and judiciary* in years 2010–2021. In contrast, the database provided by the Hungarian Wolters Kluwer for the query *mesterséges intelligencia bírói* gave 18 results, and *mesterséges intelligencia jobbra* – 71. These are mostly documents relating to EU legislation from the last few years.

This brief statistic does not reflect the full picture of research on automation, artificial intelligence and the judiciary. Therefore, it is worth pointing out some of the most important and interesting research trends in this area.

Susskind's book is one of the more interesting works on the judiciary and justice run online in recent years. The English researcher has been working on law and artificial intelligence since the 1980s. In his latest work, he makes it clear that law and justice are to be accessible to everyone. At the same time, the court should be service, a process and not a place[4]. Therefore, this approach leads to a rather obvious conclusion that in the future, justice will be administered electronically.

Another question posed recently is whether a machine/artificial intelligence can be a judge? One study has shown that citizens may perceive artificial intelligence replacing a judge as procedurally unjust. If this was indeed the case, the legitimacy of the judicial

[4] R. Susskind, *Online Courts and the Future of Justice*, Oxford 2019, pp. 8–9.

system as a whole would be undermined[5]. This conclusion is particularly important in the situation of a higher position of a public administration body conducting administrative proceedings against an individual. In such a situation, the administrative court, when reviewing the actions of the administration, is particularly vulnerable to negative judgement from citizens. The introduction of AI-based solutions requires special attention to protect the citizen from illegal actions of state bodies and to build trust in this area.

The social context of the administration of justice results in its legitimacy. At the same time, the introduction of automated or semi-automated decisions into the legal sphere means that judges will be in a position of leadership as arbiters or supervisors of AI-based solutions[6]. Therefore, the role of the judge will change, not only in the perception of an ordinary citizen, but also in his or her position in the process of applying the law. This statement is especially relevant as it is imperative to adapt procedures to the new role and redefine the status of the judge, and at the same time define the status of the robot judge. Any changes in this area will undoubtedly have implications for the entire justice system.

Currently, one of the major challenges that the application of AI and ADM in the judiciary faces is the risk of potential bias and prejudice in the solutions designed and used. For instance, there is discrimination in the prison system, racism – in recruitment processes or access to services, racial segregation in access to economic goods – access to credit or other financial services. For instance, there is discrimination in the prison system[7], racism – in

[5] B. Chen, A. Stremitzer, K. Tobia, *Having Your Day in Robot Court*, "Public Law & Legal Theory Research Paper" 2021, No. 3(21).

[6] J. Morison, A. Harkens, *Re-Engineering Justice? Robot Judges, Computerised Courts and (Semi) Automated Legal Decision-Making*, "Legal Studies" 2019, March 15, https://ssrn.com/abstract=3369530 [accessed on: 30 March 2021]; T. Sourdin, *Judge v Robot?: Artificial intelligence and judicial decision-making*, "The University of New South Wales Law Journal" 2018, No. 41(4), pp. 1114–1133, https://search.informit.org/doi/10.3316/informit.040979608613368 [accessed on: 30 March 2021].

[7] J. Angwin, J. Larson, S. Mattu, *Machine bias*, "ProPublica" 2016, https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [accessed on: 16 March 2021].

recruitment processes or access to services[8], racial segregation in access to economic goods – access to credit or other financial services[9]. Experience of using this technology in court systems or those where selection or choice of a particular solution is made, shows that the risk of undesired effects is high. These risks must therefore be taken into account in order to eliminate them before they are introduced into public use.

The problems and challenges that the application of AI solutions is facing, including the application in law, are rooted in ethics. Among the many studies, the notable ones are those carried out by such researchers as Floridi[10], Dignum[11] and Bryson[12], and the concepts presented concerning the creation of AI for the good of humanity and responsible AI have a strong influence on the legislation of states and supra-state organisations in this field. It is worth pointing out that ethical threads are the starting point of legal studies and analyses prepared by the EU[13], OECD[14] or UNESCO[15]

[8] A. Monea, *Race and Computer Vision*, [in:] *The Democratization of Artificial Intelligence Net Politics in the Era of Learning Algorithms*, A. Sudmann (ed.), Bielefeld 2019, https://www.degruyter.com/document/doi/10.14361/9783839447192/html [accessed on: 30 March 2021]; T. Gebru, *Race and Gender*, [in:] *Oxford Handbook on AI Ethics*, M.D. Dubber, F. Pasquale, S. Das (eds.), New York 2020, https://arxiv.org/abs/1908.06165 [accessed on: 5 March 2021].

[9] C. O'Neil, *Weapons of math destruction: How big data increases inequality and threatens democracy*, New York 2017, p. 141.

[10] F. Luciano, *The Ethics of Information*, Oxford 2013, p. 19.

[11] V. Dignum, *Ethics in artificial intelligence: introduction to the special issue*, "Ethics and Information Technology" 2018, No. 20:1–3, https://doi.org/10.1007/s10676-018-9450-z [accessed on: 30 March 2021].

[12] J.J. Bryson, *Robots should be slaves*, [in:] *Close Engagements with Artificial Companions, Key social, psychological, ethical and design issues*, Yorick Wilks (ed.), University of Oxford, pp. 63–74, https://doi.org/10.1075/nlp.8.11bry [accessed on: 30 March 2021].

[13] Ethical framework for artificial intelligence, robotics and related technologies European Parliament resolution of 20 October 2020 with recommendations to the Commission on an ethical framework for artificial intelligence, robotics and related technologies (2020/2012(INL)).

[14] OECD, Recommendation of the Council on Artificial Intelligence, OECD/LEGAL/0449.

[15] UNESCO COMEST. (2019). *Preliminary study on the ethics of artificial intelligence*, https://doi.org/10.1007/s11273-020-09706-3%0a; http://dx.doi.org/10.1016/

on the development and use of AI and automated decision-making. There is a high correlation of ethical concepts with law and the influence on legislative action.

It is worth noting, from the more detailed studies, the issues related to the practical applications of new technologies in electronic identification, that is of key importance in accessing services, including legal services, via the Internet. Further studies concern legal frameworks of automated judicial actions[16]. There is an interesting summary of European countries' regulations on new technologies in the administration of justice[17]. From among studies that are directly related to administrative judiciary, the work of P. Pietrasz is worth mentioning, that deals with the subject of informatisation of administrative judiciary and the relation of this process to the general rules of proceedings before administrative courts[18].

Generally, there are not many studies that are strictly related to the usage of AI and ADM in administrative judiciary. At the same time, it should be noted that the literature on ADM and AI in public administration and administrative proceedings is relatively wide, and studies mainly present legal and organisational solutions in this area[19]. The example of polish studies on the usage of the use

---

j.jweia.2017.09.008%0a; https://doi.org/10.1016/j.energy.2020.117919%0a; https://doi.org/10.1016/j.coldregions.2020.103116%0a; http://dx.doi.org/10.1016/j.jweia.2010.12.004%0a; http://dx.doi.o [accessed on: 30 March 2021].

[16] J. Gołaczyński, D. Adamski, W. Łukowski, S. Kotecka, D. Szostek, M. Kutyłowski, *Założenia elektronicznego postępowania upominawczego*, http://cbke.prawo.uni.wroc.pl/modules/Projects/files/EPU.31.01.pdf [accessed on: 30 March 2021].

[17] M. Diehl, J. Jagura, K. Jarzmus, I.C. Kamiński, P. Kładoczny, M. Szwed, K. Wiśniewska, A. Zwolankiewicz, *Wdrażanie nowych technologii w wymiarze sprawiedliwości*, Warszawa 2021.

[18] P. Pietrasz, *Informatyzacja polskiego postępowania przed sądami administracyjnymi a jego zasady ogólne,* Warszawa 2020.

[19] M. Suksi, *Administrative due process when using automated decision-making in public administration: some notes from a Finnish perspective*, "Artificial Intelligence and Law" 2021, 29:87–110, https://doi.org/10.1007/s10506-020-09269-x 1 3 [accessed on: 30 March 2021]; J. Cobbe, *Administrative law and the machines of government: Judicial review of automated public-sector decision-making*, Legal Studies 2019 39(4), pp. 636–655, available at: doi:10.1017/lst.2019.9 [accessed on: 30 March 2021].

of IT tools in administrative proceedings are works of G. Sibiga[20]. Consequently, a large research area is arising in the use of new AI and ADM technologies in the administration of justice, especially those involving the administrative judiciary.

2. Aim, methodology, theses

This study is an attempt to show the opportunities and threats facing administrative courts. These challenges may be reflected in changes both in the judiciary and in public administration. The same new technologies are able to change a wide area of state activity for better. Since the state and its bodies fulfil a service role towards citizens, any attempt to reform and improve their operation is highly expected.

The main purpose of the research is to determine the legal limits of introducing solutions based on automatic decision-making (ADM) and artificial intelligence technology in the administrative judiciary. At first, it has to be determined what technical possibilities of introducing AI, ADM and e-courts are available. Another element of the research will be to establish the impact of modern solutions on the way administrative judiciary functions. At the same time, the impact of new technologies on judicial and administrative proceedings should be assessed. It should be emphasised that new technological and legal solutions must be confronted with the rights of the individual.

A subsidiary concern is whether the introduction of AI and ADM will get rid of paper as a physical form of public administration, administrative justice and the state as such.

In order to achieve the stated aim, the following main thesis was initially adopted:

[20] G. Sibiga, *Stosowanie technik informatycznych w postępowaniu administracyjnym ogólnym*, Warszawa 2019; G. Sibiga, *Czy algorytm może zastąpić człowieka w administracji*, https://www.rp.pl/Opinie/307019986-Grzegorz-Sibiga-o-doreczeniach-elektronicznych-Czy-algorytm-moze-zastapic-czlowieka-w-administracji.html [accessed on: 9 August 2021].

> "The introduction of ADM and AI-based solutions to administrative justice is possible, but the protection of individual rights must be ensured and the implementation of the rules constituting a democratic state under the rule of law must be guaranteed".

It seems appropriate, in order to achieve the assumed research objective, to put up secondary theses, which will help to realise the main thesis. These are:

I. "Some citizens will not be able to use new technologies – alternative procedures should be maintained in order to protect their rights;
II. The introduction of new technologies into administrative justice will force parallel changes in administrative procedure and public service delivery;
III. The AI and ADM solutions for the administrative judiciary will improve the efficiency of the administrative judiciary".

In the light of the main and secondary theses presented above, it is clear that there is a strong correlation between judicial and administrative proceedings. At this point, an additional question arises when it comes to introducing solutions using ADM and AI into these spheres of social life. Whether the introduction of new technologies into the judiciary should be preceded by their full introduction into public administration, or whether these methods can be introduced simultaneously. Of course, in addition to strictly legal factors relating to the proceedings, there are important systemic, organisational, economic, social and other factors. This thesis will appear in the study, but is not the main focus of the study, nor is it an assumed claim.

It will analyse Polish and European legal regulations concerning artificial intelligence and ADM in relation to the operation of justice, the state and regulations concerning these technologies. It will focus in particular on the rights of the individual in the context of the development of new technologies. Due to the fact that there are not many existing legal norms on AI and ADM, many observations will be presented as *de lege ferenda*. The proposed legal solutions are currently at the stage of regulatory proposals submitted by EU

bodies or individual states. Some countries have adopted relevant solutions, partly or fully dealing with AI and ADM in the justice system. Therefore, the established proposals and legal solutions will also be reviewed. A second important research material will be the views of the legal doctrine of law on new technologies and administrative justice. The current literature on information technology, sociology, economics and ethics will be used complementarily.

Due to the strongly multidisciplinary research area, the study is planned to use the methods of dogmatic legal analysis and complementary legal and economic analysis of law. A critical analysis was adopted for the analysis of non-legal literature.

3. Artificial intelligence in the system of justice

Nowadays, the terms AI, robots, autonomous vehicles are today at an economic and cultural center of research. The state apparatus recognizes the potential and challenges of new technology. Multidisciplinary research on solutions implementing AI in the legal sphere is extensive. It is worth mentioning the MIREL project concerning the identification, development of tools for understanding and interpretation of legal texts so that they can be used to find the right standards, support the decision-making process and verify the correctness of legal documents[21]. In order to demonstrate the capabilities of AI solutions, ADM and related technologies requires a brief definition of these terms and an indication of possible legal definitions in this area.

The above-mentioned McCarthy proposed the term *artificial intelligence* – AI – in a research project in 1955. The aim of this research project was to create a machine "that behaves in a way that we would call intelligent, if that is how humans behave"[22]. Currently, McCarthy's proposal is treated as a certain idea that we are moving towards as science and technology develops, although in the

[21] https://www.mirelproject.eu/index.html [accessed on: 18 August 2021].

[22] J. McCarthy, M.L. Minsky, N. Rochester, C.E. Shannon, *A proposal for the Dartmouth summer research project on artificial intelligence*, 1955, pp. 1–13.

mid-20th century the outcome of the research was considered a success. However, the development of AI research shows that the more we know, the more AI as a finite solution moves away from us and new research fields and interesting challenges emerge.

Another important aspect is the multifaceted nature of human intelligence – the result of a person's correlation with the environment of other individuals and society. During human adolescence, a person learns how to interact with people, and this ability is called the social norm[23]. Social, ethical, and consequential legal norms defined without a social, cultural and religious context will be rejected. Therefore, AI must also consider cultural and social specificities. This is important because of the significant differences in preferred values among Asian, North American, and European societies. In the sphere of new technologies, this is evident when considering the protection of personal data, so highly valued in Europe, and digital surveillance widely used in China.

A. Chłopecki, when analysing legal aspects of new technologies, assumed that weak AI is based on developed learning algorithms and functioning autonomously. At the same time, this system is not subject to supervision by natural persons, who can take follow-up control actions[24]. This concept relates to an idea of weak and strong AI. It has to highlight that present AI categorized as weak AI, while strong AI remains, for now, an unattainable goal. A certain summary of the legal discussion on artificial intelligence that has been going on for several years is the current EU proposal, formulated in the draft regulation of April 2021. According to Article 3 of the proposed legislation, "an 'artificial intelligence system' means software developed using one or more of the techniques and approaches listed in Annex I that can, for a given set of human-defined purposes, generate outputs such as content, predictions, recommendations or decisions that affect the environments with which it interacts"[25].

---

[23] R.J. Stenberg, C. Smith, *Social intelligence and decoding skills in non-verbal communication*, "Social Cognition" 1985, No. 3, p. 169.

[24] A. Chłopecki, *Sztuczna inteligencja – szkice prawnicze i futurologiczne*, Warszawa 2018, p. 5.

[25] Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence

This definition is the basis for building an EU legal order in the field of new technologies. It is also a kind of model on which European countries will base their national regulations. Of course, this definition is a certain development of McCarthy's ideas, but it also demonstrates how we now understand AI. It is an open and broad concept, so that the possible leap in the development of technology will not require a significant revision of the definition. Needless to say, the concept does not include the social and cultural context. These areas will require special attention when the legislation is drafted, but it seems that in terms of definition alone the solution adopted is satisfactory. These areas will require special attention when the legislation is drafted, but it seems that in terms of definition alone the solution adopted is sufficient.

Implementation of AI into the legal field most often uses a tool in the form of natural language processing – Natural Language Process – NLP. Language is analysed at both syntactic and phonetic levels for simple mistakes, searches and extractions, automatic summarization, optical character recognition (OCR) and speech synthesis[26]. In addition, NLP uses statistical methods of word occurrence, their place in a sentence and the contexts in which they are used[27]. This contextual meaning is particularly important for similar words, whether in phonetic or written form[28]. In Polish language, the word "*może*" (maybe) and "*morze*" (sea) have different spellings but are pronounced identically. The first one is a third- person singular verb meaning may and at the same time it expresses a speculation, the second word is a noun describing a large salty body of water. AI trained on large sets of texts, called corpuses, allows automatic translation from multiple languages. It enables analysis of contracts, agreements and regulations. As pointed out by Haney, it is currently the most widely used AI method for analysing legal texts[29]. Primary recognition, searching and extraction of legal texts or those with

Act) and amending certain legislative acts of the Union, Brussels, 21/04/2021 COM(2021) 206 final 2021/0106 (COD).

[26] M. Flasiński, *Wstęp do sztucznej inteligencji*, Warszawa 2011, pp. 234–235.

[27] *Ibidem*, p. 235.

[28] M.A. Bodem, *Sztuczna inteligencja*, Łódź 2020, p. 75.

[29] B.S. Haney, *Applied Natural Language Processing for Law Practice*, 2020.

legal implications (e.g., speech of hate) will save and facilitate the work of many people Moreover, it allows for a more comprehensive and in-depth analysis as regards the huge corpuses of judicial or administrative decisions. Thus, it can become a technology highly recommended for both administrative and public administration judiciaries, as well as public administration bodies. NLP-based solutions are also used in other fields, especially those requiring the review of large amounts of data, such as clinical trial texts in medicine[30]. Thus, the potential that stands in favour of NLP in law should be used appropriately for the creation of advanced tools to support and partially automate the judicial-administrative process.

An example of NLP usage in law is the automatic query of textual data for provisions related to a specific branch of law. Studies that use NLP and ML to analyse legal texts have achieved 97.2% search accuracy in traffic cases and 92.4% in trade, environmental, health, labour and criminal law cases. As the researcher's report, longer syntactic compounds appearing in legal texts were reflected by lower result, indicating the challenges of this technique in the area of analysis and searching through legal texts[31]. Other examples of legal solutions based on NLP are classification of legal documents, legislative change and amendment monitoring, advanced search options[32].

The potential of NLP in law is demonstrated by a study on the automated identification of national implementations of European directives. The transposition of 43 EU directives into the legal order of Ireland, Luxembourg, Italy was evaluated. It turned out that "unsupervised lexical and semantic methods had better results than word and paragraph embedding models"[33]. However, word

[30] P.M. Nadkarni, L. Ohno-Machado, W.W. Chapman, *Natural language processing: an introduction*, "J Am Med Inform Assoc" 2011; 18:544e551, doi:10.1136/amiajnl-2011-000464 [accessed on: 18 August 2021].

[31] A. Sleimi, N. Sannier, M. Sabetzadeh, L. Briand, M. Ceci, J. Dann, *An Automated Framework for the Extraction of Semantic Legal Metadata from Legal Texts*, 2020.

[32] G. Boella, L. Di Caro, V. Leone, *Semi-automatic knowledge population in a legal document management system,* "Artificial Intelligence & Law" 2019, No. 27, pp. 227–251, https://doi.org/10.1007/s10506-018-9239-8 [accessed on: 18 October 2021].

[33] R. Nanda, G. Siragusa, L. Di Caro, et al., *Unsupervised and supervised text similarity systems for automated identification of national implementing measures*

and paragraph embedding models have proven to be effective in identifying certain types of transposition that have been missed by other methods. Thus, if it is possible to verify effectively the correctness of transposition of EU directives into national law, this tool may be used, to a greater extent, in testing e.g., the compliance of local laws with universally binding law. This tool may be used both by administrative courts, voivode supervision, and the organs of territorial self-government themselves in the preliminary assessment of the correctness of enacted legal acts.

Alongside the NLP process, a machine learning based ML solution is used, often simultaneously. It is not classified as AI, but because of the similarity at the level of functioning, it requires legal judgement. ML uses elements of statistics and probability to analyse large data sets, performing billions of calculations in a second. At the same time, as part of machine learning, we distinguish between self-directed learning – known as unsupervised learning, human-guided learning – known as supervised learning, and learning in which there are "penalties" and "rewards" – known as ML reinforced. All these methods have wide applications, but it seems that reinforcement learning, and supervised learning are better adapted for use in the legal field. They will allow certain patterns to be identified as good, appropriate, and desirable, and therefore achieving them will be considered a reward by the programme. When adapting the programme, the lawyer can specify the boundary conditions to be searched for in the metadata – whether in judgements or in legal texts. Moreover, ML is in a way similar to law, as the lawyer decodes action patterns from the legal text, based on his experience and knowledge already acquired. A computer, on the other hand, puts together certain analogies and patterns in data, looking for repetitive patterns of action[34]. When looking for ML-based solutions for legal analysis, researchers adapt the algorithms to the legal text

of European directives, "Artificial Intelligence and Law" 2019, No. 27, pp. 199–225, https://doi.org/10.1007/s10506-018-9236-y [accessed on: 30 March 2021].

[34] T.D. Grant, D.J. Wischik, *On the Path to AI: Law's Prophecies and the Conceptual Foundations of the Machine Learning Age*, 2020, p. 3, https://doi.org/10.1007/978-3-030-43582-0 [accessed on: 30 March 2021].

characteristics. Such an example is the ABCN2 algorithm, which is an improved version of the CN2 algorithm. The use of arguments has enabled greater precision and generated a lower number of errors than comparable tools used in administrative cases[35]. Thus, research clearly indicates the usefulness of ML in law analysis, decision support in public administration bodies and the judiciary.

The use of AI solutions appears to be a certain element of automatisation – not only of tedious, repetitive activities, but also those of a more conceptual nature. Work in judiciary or public administration is, at some level, repetitive. Checking the timeliness of filing a plea, paying legal costs, proving a power of attorney, etc. are essential, but recursive and rudimentary. With the volume of cases, an appropriate form of automatisation would be a huge relief to staff and judges. If one adds to this the preliminary preparation of a decision and even the issuing and sending of that decision in non-contentious cases, simple ones, it would definitely improve the operation of administrative courts. After all, a summons to complete a signature or pay a fee does not have to be made by a person. Similarly, discontinuing a case filed out of time does not require the knowledge and skills of a qualified judge or clerk. For such tasks, automatic or semi-automatic processes can be of use. Automatic Decision-Making – ADM refers to a process in which a computer program makes a decision independently or semi-autonomously, under supervision, based on a specified pattern of actions. It may be a simple algorithm, as in the case of payment of a court fee or filing a letter in due time. Much more complex will be an algorithm, already using artificial intelligence in the case of designing a decision on rights and obligations arising from multiple pieces of evidence and legally relevant circumstances. There are both supporters of this method, such as the aforementioned Susskind[36], as

[35] M. Možina, J. Žabkar, T. Bench-Capon, I. Bratko, *Argument based machine learning applied to law*, "Artificial Intelligence and Law" 2005, No. 13(1), pp. 53–73, https://doi.org/10.1007/s10506-006-9002-4 [accessed on: 30 March 2021].

[36] R. Susskind, D. Susskind, *The future of the professions. How technology will transform the work of human experts*, Oxford 2015, p. 68.

well as its sceptics[37]. The advantages and challenges of ADM will be discussed below.

It should be noted that ADM also appears in the context of making decisions in association with or based on profiling of an individual. When the decision is based on such data as web traffic, location, opinions expressed, answers to questions, etc., the ADM-based solution significantly intrudes into the privacy of the individual. When personal data make it possible to foresee or evaluate a person and affect his/her personal, economic and health situation, there a profiling is undoubtedly involved. According to Article 22 of the GDRP[38], "the data subject has the right not to be subject to a decision which is based solely on automated processing, including profiling, and produces legal effects on the person concerned or significantly affects him or her in a similarly". The use of ADM is permitted under certain conditions. The first condition is that the relevant regulations are introduced into the national or EU order. Another condition is that the addressee of the decision consents to the action using ADM. The last one, the use of ADM, is necessary for the performance of a contract, or a right. As Fajgielski raises, it is not about automating certain elements of the decision-making process, but the whole fully automatic situation[39]. An important element in this process is that the addressee should know and understand what data has been taken into account and why. However, as the research shows, this is not always the case.

---

[37] F.A. Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, "George Washington Law Review 1" 2019, https://ssrn.com/abstract=3135549 [accessed on: 19 August 2021].

[38] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Journal of the EU L. of 2016, No. 119, p. 1, as amended).

[39] P. Fajgielski, [in:] *Komentarz do rozporządzenia nr 2016/679 w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE* (*ogólne rozporządzenie o ochronie danych*), [in:] *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz*, Warszawa 2018, art. 22.

Many state actions are already of *quasi automatic type*. For, how can we call a process in which an authority issues a decision based on data it has had for years, and the only variable is, for example, the property tax rate? In this case, an employee with a power of attorney formally signs the decision. However, when hundreds of decisions prepared in advance by the programme are signed every day, we are dealing with a quasi-ADM decision[40]. Thus, it should be considered whether ADM is permissible in those areas of law where there are simple, routine situations, and they are of a repetitive nature, e.g. on an annual basis. However, it is necessary to clarify the rules related to the use of ADM so that the protection under the GDRP is not illusory. At the same time, as Geburczyk points out, the justification of the decision taken by the machine should present "how the input information has been structured for the needs of a given algorithm, as well as how it has been processed by the algorithm and how these operations have translated into the concrete content of the final decision"[41]. This implements one of the main principles of AI, which is explainability and transparency. Thus, the critical points that the possible introduction of ADM into the judiciary will have to acknowledge are numerous, but this does not mean that success is out of question.

4. From computerisation to artificial intelligence in the judiciary

In the light of the Preamble to the Constitution of the Republic of Poland, the operation of state bodies should be characterized by efficiency. This constitutional principle should significantly shape the way of thinking about the state, its bodies and the law regulating their operation. The issue of the efficiency, or effectiveness, of

[40] M. Pszczyński, *Administrative Decisions in the Era of Artificial Intelligence*, "Adam Mickiewicz University Law Review" 2020, No. 11.

[41] F. Geburczyk, *Automatyzacja załatwiania spraw w administracji samorządowej a gwarancje procesowe jednostek. Uwagi de lege ferenda w kontekście ogólnego rozporządzenia o ochronie danych* (*RODO*), "Samorząd Terytorialny" 2021, No. 5, pp. 21–32.

public authority is also important as regards the exercise of judicial authority. Complicated court procedures, slow handling of citizens' cases and judicial bureaucracy are not only the ills of the Polish justice system. This state of affairs weakens the sense of justice, and indeed violates the right to a court of law. Therefore, in implementing the standards deriving from Article 45 of the Constitution of the Republic of Poland[42], all available means, including technical ones, should be used to improve the work of courts, including administrative courts. In addition to court costs paid by the parties, economising the costs of litigation also means examining a case within a reasonable time, not to say quickly and efficiently. This is important in administrative-court cases, where the court intervenes only after the administrative proceedings have been exhausted, and thus only at the "third stage" of examining the case of a citizen or entrepreneur. In a situation where the administrative proceedings have been going on for a relatively long time, efficiency in the execution of the administrative courts takes on an extraordinary tone and importance.

Undoubtedly, the administrative courts' computerisation has sped up their activities and made the work of judges and court clerks easier. These measures translate into a potential increase in the satisfaction of individuals facing the justice system. As Flaga-Gieruszyńska observes, computerisation of the judiciary, apart from improving and raising the level of efficiency, contributes to increased confidence in the judiciary due to access to non-specialist, but court-related information[43]. Therefore, this cannot be considered only in the context of the equipment used, but more comprehensively, especially from a legal, economic and social point of view.

A good indicator that shows the level of computerisation of the judiciary is certainly the expenditure on information technology and internet infrastructure. Poland is in the group of countries

[42] Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws No. 78, item 483, as amended).

[43] K. Flaga-Gieruszyńska, *Wpływ informatyzacji na sprawności i efektywność sądowego postępowania egzekucyjnego*, [in:] *Elektronizacja sądowego postępowania egzekucyjnego w Polsce*, A. Marciniak (ed.), Sopot 2015, p. 84.

spending relatively much on ICT (Information and Communication System), with slightly more than 4% of total expenditures on the judiciary and prosecutor's office[44] – data from 2016. These expenditures also include, for example, the introduction and operation of electronic court registers and electronic land and mortgage registers. The computerisation of the judiciary in the early 1990s was the *de facto* replacement of the old-fashioned typewriter with an electronic typewriter. With the new technology, IT tools began to be developed to support the work of the courts in both bureaucratic and adjudicatory terms.

The problem of computerisation and digitisation of the judiciary is a highly complex process. It covers many aspects, from archiving and digitalisation of documents, through interactive forms, decision automation, electronic court actions, including evidence, identification of participants in proceedings, verification of authenticity of electronic documents, electronic files, to security of processed data and court IT networks The problem of computerisation and digitisation of the judiciary is a highly complex process. It covers many aspects, from archiving and digitalisation of documents, through interactive forms, automation of decisions, electronic court actions, including evidence, identification of participants of the proceedings, verification of authenticity of electronic documents, electronic files, to security of processed data and court IT networks[45]. It is worth mentioning support for the judicial process and the issue that is most up to date at the time of the pandemic, namely participation in judicial activities by means of electronic communication. All these elements are linked to each other to a greater or lesser extent. It is not possible to perform electronic evidentiary acts at a distance if we are not able to confirm the authenticity of evidence, or documents. Similarly, it is necessary to identify participants in procedural

[44] A. Siemaszko, B. Gruszczyńska, M. Marczewski, P. Ostaszewski, A. Więcek-Durańska, *Sądownictwo. Polska na tle pozostałych krajów Unii Europejskiej* (*na podstawie bazy danych CEPEJ 2014*, "Prawo w Działaniu. Sprawy Karne" 2016, No. 26.

[45] J. Janowski, *Informatyzacja prawnicza wobec elektronizacji sądowego stosowania prawa*, [in:] *Wizja europejskiego społeczeństwa informacyjnego i jej realizacja w prawie polskim*, J. Misztal-Konecka. G. Tylec (eds.), Lublin 2012, p. 121.

activities and to ensure real participation in procedural activities, such as hearings, in real time and with relative ease. Then there is the issue of legal and judicial professional privilege, the personal data protection and, above all, cybersecurity.

The challenge that follows technological changes in the administration of justice should be confronted with the basic principles defining the model of administrative judiciary. The right to a court, resulting from Article 45 of the Constitution of the Republic of Poland, is of fundamental importance; it is worth noting that it has an autonomous character in relation to other constitutional principles. It is not merely an instrument enabling the execution of other constitutional rights and freedoms but has an intrinsic nature and is subject to protection irrespective of the infringement of other subjective rights, as was clearly emphasised by the Constitutional Tribunal more than ten years ago. It is not merely an instrument enabling the execution of other constitutional rights and freedoms but has an intrinsic nature and is subject to protection irrespective of the infringement of other subjective rights, as was clearly emphasised by the Constitutional Tribunal more than ten years ago[46].

Therefore, when analysing the computerisation of administrative justice in the broadest sense, it is necessary to refer to this standard and the content it brings about. When discussing computerisation *sensu largissimo*, I mean both the provision of equipment and the necessary software enabling the use of technological achievements. At the same time, computerisation and informatisation are accompanied by the challenge of process automation and the use of artificial intelligence.

The idea of using artificial intelligence in law, as indicated above, already took root several decades ago. The turning point was undoubtedly when the AlphaGo programme won against the world GO game champion player – Lee Sedol – in March 2016[47].

[46] Decision of the Constitutional Tribunal of 14 April 2004, SK 32/01, https://sip-1lex-1pl-1xabt047b0a58.han.uni.opole.pl/#/document/520201210?cm=DOCUMENT [accessed on: 30 March 2021].

[47] https://spectrum.ieee.org/alphago-wins-match-against-top-go-player [accessed on: 10 August 2021].

The computer programme's ability to *self-learn* showed the world that the capabilities of neural networks had reached unprecedented heights. At the same time, this success has interested researchers and decision-makers from different spheres of social and economic life. As Yadong Cui points out, the idea of harnessing the power of AI and building a Digital Court (Data Courts) and Intelligent Court was then formed, which evolved into a programme to introduce AI into Shanghai's courts[48]. China is not the only center that has been involved in designing and using AI and ADM solutions in judiciary and public administration. Estonia, for example, in 2019 initiated work on a court system based on artificial intelligence. Civil litigation with a value of up to €7,000 in the first instance is to be dealt with by artificial intelligence, while at the second instance level a human is to adjudicate[49, 50].

US Supreme Court decisions from 1816–2018 were used as training data. By practising on the data, a solution was developed that predicts with an accuracy of more than 70% what a US Supreme Court ruling will be and allows an anticipation of the vote of individual judges of 71.9%[51]. Similar research has been conducted in Europe regarding the judgements of the European Court of Human Rights. Natural language-based tools and machine learning were used to determine whether the court would rule on a violation of Article 9 of the European Convention on Human Rights. Research has shown that, based on previous judgments, it is possible to predict the verdict in a new case with a 75% success rate, and using

[48] C. Yadong, *Artificial Intelligence and Judicial Modernization*, Spiringer 2020, p. 5.

[49] E. Niller, *Can AI Be a Fair Judge in Court? Estonia Thinks So*, https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/ [accessed on: 10 August 2021].

[50] J.-M. Mandri, *Kohtunikud saavad robotabilised: riik otsib võimalusi kohtusüsteemis tehisintellekti rakendamiseks*, https://forte.delfi.ee/artikkel/85777829/kohtunikud-saavad-robotabilised-riik-otsib-voimalusi-kohtususteemis-tehisintellekti-rakendamiseks? [accessed on: 30 March 2021].

[51] D.M. Katz, M.J. Bommarito, J. Blackman, *A general approach for predicting the behaviour of the Supreme Court of the United States*, "PLoS ONE" 2017, No. 12(4), https://doi. org/10.1371/journal.pone.0174698 [accessed on: 30 March 2021].

data on the formations of the court, it is possible to predict with 65% how the panel will vote in a particular case[52].

Similar analyses based on ML and NLP were conducted in France, based on alimony judgments. The study made it possible to determine the criteria influencing the amount of alimony awarded. It has been established how judges, exercising their discretionary power, amend the law. The analysis of the judgements also makes it possible to detect possible hidden bias of the judges[53]. At the same time, this result shows that the use of AI in the context of law and legal adjudication has wide-ranging possibilities.

In addition, Chen's research has shown that ML-based methods make it possible to identify the judges' lack of attention, the omission of certain circumstances, which affects the judicial decision[54]. This instrument makes it possible to point out these mistakes and subsequently correct them.

These examples show how judgement can be predicted based on historical data, in this case judgements. Judgement prediction software can be used to support both judges and attorneys preparing trial tactics in administrative, civil and criminal cases. It can be addressed both to judges, public administration and professional attorneys. It allows understanding how the law is applied and understood and what, if any, gaps exist. Such solutions will enable an appropriate reaction on the part of the legislator and those applying the law. Moreover, tools based on ML and NLP can help in the preliminary analysis of a case in administrative court proceedings, where the correctness, legality of an administrative decision is assessed.

---

[52] M. Medvedeva, M.M. Wieling, *Using machine learning to predict decisions of the European Court of Human Rights*, "Artificial Intelligence and Law" 2020, No. 28, pp. 237–266, https://doi.org/10.1007/s10506-019-09255-y [accessed on: 30 March 2021].

[53] F. Muhlenbach, L. Nguyen, P. Isabelle, *Predicting Court Decisions for Alimony: Avoiding Extra-legal Factors in Decision made by Judges and Not Understandable AI Model*, 2020, https://arxiv.org/pdf/2007.04824.pdf [accessed on: 2 September 2020].

[54] D.L. Chen, *Machine Learning and the Rule of Law*, "Law as Data" 2019, pp. 433–441, https://doi.org/10.37911/9781947864085.16 [accessed on: 30 March 2021].

New digital solutions are not without defects. For example, in many state courts in the US, COMPAS ('Correctional Offender Management Profiling for Alternative Sanctions'), based on extensive data, predicts how likely a person is to return to crime. Unfortunately, the widely used solution is not free of biases, e.g., it treats fair-skinned people more kindly, while it tends to impose harsher sentences on darker-skinned people[55]. Public bodies in the Netherlands had similar problems with discrimination and prejudice. Algorithms provided for the defrauding of social benefits by people of non-European origin or with dual nationality[56]. The problem was the input data, probably poorly chosen, but the Dutch authorities banned the further use of the SyRi[57] system for adjudication.

On the one hand, AI may be riddled with errors, but some solutions significantly support the work of judges and officials. In the already cited Netherlands, trials began in 2020 with an application that automatically anonymises court judgments[58]. The Finnish Ministry of Justice has launched the Anoppi project, using a semi-automatic solution to anonymise judicial documents containing personal data. The tool is based on machine learning (ML) and natural language[59]. Similar solutions are checked by Germany[60]. With the number of decisions issued by administrative courts (in 2020, the Polish administrative court had 42 367 cassation complaints to examine), the implementation of the constitutional norm concerning the publicity of court proceedings set out in Article 45 of the Polish Constitution is a costly challenge. This rule

[55] J. Angwin, J. Larson, S. Mattu, L. Kirchner, *Machine Bias. There's software used across the country to predict future criminals. And it's biased against blacks*, "ProPublica", https://www.propublica.org/article/machine-bias- risk-assessments-in-criminal-sentencing [accessed on: 10 August 2021].

[56] M. Dieh, *op. cit.*, p. 148.

[57] R. Allen, D. Masters, *Regulating for an equal AI: a new role for equality bodies*, Brussels 2020, pp. 107–109.

[58] M. Diehl, *op. cit.*, p. 148.

[59] https://seco.cs.aalto.fi/projects/anoppi/en/ [accessed on: 11 August 2021].

[60] M. Keuchen, *Anonymization of court decisions in Germany, an essential requirement for E-Justice*, https://ec.europa.eu/info/sites/default/files/law/cross-border_cases/documents/anonymisation_webinar_26032021_germany.pdf [accessed on: 11 August 2021].

reinforces the principle of judicial impartiality, and its implementation is therefore essential in a democratic state under the rule of law. The need to conceal personal data before they are published significantly burdens the activity of the courts. Therefore, the use of solutions allowing for automatic or semi-automatic anonymisation is essential. The use of these tools will speed up the work and increase the guarantee of impartiality. Moreover, the use of ML and natural language-based solutions is an opportunity for a more efficient court performance and the protection of the individual's rights, both in terms of privacy and the fulfilment of the right to a court. Moreover, the use of ML and natural language-based solutions is an opportunity for a more efficient court performance and the protection of the individual's rights, both in terms of privacy and the realisation of the right to a court.

5. Guarantees of citizens' rights in e-court proceedings

The potential behind solutions based on AI, ML, NLP and ADM is growing by leaps and bounds. Analysis of legal texts in terms of their compliance with other regulations, searching for errors in contracts and decisions, anonymisation, support of the adjudicatory process and simple official and court actions are just a few examples of the possibilities of new technologies in the field of law. The tools exist and their capabilities are growing. The question is, however, whether the new solutions should be used in this way fully and beyond reasonable doubt? In the context of digital justice development, Susskind raises five important questions. First, whether it is technologically possible, second: whether it is morally acceptable, next: whether it is cost-effective, fourth: whether it is culturally acceptable? The final question, according to Susskind, has philosophical overtones and concerns whether legal reasoning is beyond the computational capabilities of artificial intelligence[61].

The first question was answered above, generally in the affirmative. The use of AI-based tools will increase the efficiency of

[61] R. Susskind, *Online Courts…*, pp. 278–279.

the judiciary and administrative bodies, which may contribute to lowering the costs of state action. Questions of a sociological and legal nature, concerning moral and cultural acceptance in combination with problems of the nature of guarantees of individual rights, require further verification.

In the area of law and the administration of justice, fundamental rules and norms are of key importance. Such are undoubtedly the constitutional principles or provisions constituting the foundation of the adopted political model. In the Polish legal system, the key role, defining this model, is the principle of a democratic state of law, set out in Article 2 of the Constitution of the Republic of Poland. Furthermore, the determining role of the judiciary is established by the principle of the division of power and the position of courts, including administrative courts, resulting from Article 10 of the Constitution of the Republic of Poland.

Administrative courts, appointed to control public administration, play an important role in the administration of justice. They ensure the balance in the tripartite division of power, and fulfil the obligation of authorities to act on the basis and within the limits of the law. Serving such an important role in the systemic model of the state, they do not act on their own, as they become active at the moment of filing a complaint by an individual against the actions of public administration bodies. The object of the case is the control of legality of this action, and the result, as a rule, is the cassation of the act of action of public administration in case of violation of law.

At the same time, the administrative judiciary, by controlling the legality of actions of public authorities, ensure protection of individual rights and freedoms. Administrative courts use cassation or reform judgements to eliminate an illegal act of public administration from legal turnover. As Piotrowski writes, "the Polish Constitution makes judges guardians of values independent of temporary political conjunctures and changing parliamentary majorities"[62]. At this point it is worth mentioning that they are also independent of local political constellations. Furthermore, in the case of local

[62] R. Piotrowski, *Władza sądownicza w Konstytucji RP*, *KRS* 2010, No. 1, pp. 17–26.

self-government, the scope of control also extends to created normative acts, where the administrative court has powers similar to those of the Constitutional Tribunal in relation to laws and regulations. The administrative court exercises the administration of justice in the area of law control, both towards public authorities and the judiciary, in the case of the Supreme Administrative Court[63]. Indeed, this is a specific position of the administrative courts and should be taken into account when introducing new solutions, whether legal or technological.

For the individual, the protection of rights and freedoms is verified not only by the systemic location within the State of the authorities responsible for their protection. Also, important is the whole system classified as a right to a court, which should be evaluated when Information and Communication System and AI and ADM solutions are used in administrative justice. This assessment should be based on the following principles deriving from Article 45 of the Polish Constitution:

1. The requirement of an impartial, independent and autonomous court;
2. The right of access to court;
3. The right to a fair hearing;
4. The right to have a case heard without undue delay;
5. The right to public proceedings.

These principles must be read in the context of other constitutional norms, and in particular in the light of the rule of law already referred to. The constitutional right to court protects against arbitrariness of public authority, and the judiciary is the guardian of these values. Each of these constitutional principles should be a kind of test for new technologies introduced into the judiciary.

The issue of judicial impartiality is a crucial element in the implementation of the right to court. If a judge does not act independently, is subject to external pressures and is dependent on certain groups or entities, this discredits him or her. In the case of a robot judge, or the use of court support systems, a risk of breaching the

[63] H. Izdebski, *Sądy administracyjne a podział władz*, "ZNSA" 2017, No. 1, pp. 9–17.

principle of impartiality also arises. It also occurs on a designer's part, a software developer who operates on the commercial market and prepares digital solutions for the justice system. The aim of the entrepreneur is to make a certain profit while minimizing costs. Purchasing AI solutions designed for the law means that a certain adjudication process, or an important element of it, goes outside the court. In such a case, the judge will not have full control over the case, as the key elements of the decision will be prepared outside the court. The process of analysis, the interpretation of legal texts – regulations and rulings will not take place in the head of a judge but in the laboratory of a private company. It is therefore easy to become under pressure, influence, and control. Influence may be exerted not only directly on teams of computer scientists, linguists and lawyers preparing AI solutions, but also indirectly, for example through faulty definition of the terms of a public procurement. Therefore, a significant influence on the shape of the decision will not have a judge, but an official acting for and on behalf of the executive power. This can be observed from the Random Case Allocation System in the ordinary courts, which is not really random and transparent[64], but pseudo-random. If the use of a simple algorithm by the judiciary results in doubts about the independence of the panel, what about a complex algorithm supporting or replacing a human judge? Impartiality is a fundamental element for the right to a court, so particular care must be taken in designing, testing, and implementing these solutions. These measures must be transparent so that it can be objectively demonstrated that the principle of the independence, impartiality and autonomy of the court has been preserved despite the transfer of judicial power to artificial intelligence. Such an approach requires the use of transparent and explainable AI solutions and is crucial not only in the field of law.

[64] See: https://informatykzakladowy.pl/system-pseudolosowego-przydzialu-spraw/; https://oko.press/entliczek-pentliczek-system-losowego-przydzialu-spraw-sadach-powszechnych/; NIK Informacja o wynikach kontroli, https://www.nik.gov.pl/kontrole/wyniki-kontroli-nik/pobierz,kpb~p_19_038_20200211143459158142809 9~01,typ,kk.pdf [accessed on: 6 September 2021].

Another important element of the right to court is the right of access to court. This principle is connected with Article 77 of the Constitution of the Republic of Poland. The right of access to court includes the right to launch a procedure before a court, also in the face of violation of rights and freedoms by a state organ. This principle is of particular importance in the administration of justice by administrative courts. An authority is always a party to administrative proceedings, and a complaint concerns its activities. Of course, the right of access to a court is not absolute. May be restricted in order to protect legal certainty, the principle of legality or trust in the law[65]. These limitations should be interpreted narrowly and in special cases. As Jan Boć argues, the right to a court against actions of public authorities should be read in the light of Art. 2 of the Polish Constitution. A clear definition of the executive and its separation from other powers should serve to protect citizens' rights and freedoms[66]. This raises the question of how the possible introduction of AI into administrative justice will affect not only the procedural right of access to a court, but the actual possibility of this right to be realised. The highly simplified procedure before public administration bodies at the stage of courts is no longer fast and easy. Of course, the use of a professional representative is not required, but due to their specific nature, lawyers often represent individuals as well as legal entities. In the absence of a professional representative, the administrative court, acting pursuant to Article 6 of Law on Proceedings before Administrative Courts[67] shall instruct the parties as to the procedural steps to be taken and the consequences of their failure to act. A similar principle appears in Article 11 of the Code of Administrative Procedure. The Chinese system uses online legal aid using AI solutions[68]. It seems that this

[65] M. Florczak-Wątor, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, wyd. II, P. Tuleja (ed.), LEX/el. 2021, art. 77.

[66] J. Boć, *Komentarz do art. 77 Konstytucji RP*, [in:] *Konstytucja Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.*, J. Boć (ed.), Wrocław 1998, p. 139.

[67] Act of August 30, 2002. Law on proceedings before courts administrative (i.e. Journal of Laws of 2019, item 2325, as amended), hereinafter: p.p.s.a.

[68] J. Yu, J. Xia, *E-justice evaluation factors: The case of Smart Court of China, Information Development*, 2020, https://doi.org/10.1177/0266666920967387 [accessed on: 30 March 2021].

is an area where the state, especially in the administrative judiciary and public administration, should use new solutions to provide legal assistance to individuals. The introduction of new legal and technological solutions would improve trust in the state, and also facilitate court proceedings when individuals, instructed or even assisted by AI, take legitimate and appropriate procedural steps. These solutions are not quite perfect, as there is a risk of professional attorneys being pushed out of representing parties in a situation where the courts/state prefer fully automatic solutions over traditional litigation[69]. However, in a well-defined situation, e.g., for poorer people, it would perhaps be an optimal solution at the initial stage of the judicial-administrative process.

At this point it is important to point out one more danger related to the realisation of the right of access to court and digitisation in the broad sense. The challenge is the high level of IT exclusion. Thus, a technological and cultural context emerges, lying not on the side of administrative justice, but on the side of social competences. The judiciary may potentially be prepared to use AI, at least at the IT level, but the citizen, the entrepreneur may not have sufficient digital skills to use the new tools. Moreover, there should also be taken into account the issue of equipment and software with Internet access. Since 2015, there has been a constant increase in the use of electronic services in dealing with the public administration, but only 33% of people in Poland in 2019 send completed forms electronically to the authority, which does not give much cause for optimism[70]. It has to be noted that all forms of use are included in the statistics, including, for example, the recruitment process for secondary and higher education, which is only conducted online, and areas not digitised at all. The access to e-government, the use of already available digital tools, how many cases are settled in the course of an instance and how many are closed as a material-technical or

[69] A.L. Xu, *Chinese judicial justice on the cloud: a future call or a Pandora's box? An analysis of the 'intelligent court system' of China*, "Information & Communications Technology Law" 2017, No. 26(1), pp. 59–71, https://doi.org/10.1080/13600834.2017.1269873 [accessed on: 30 March 2021].

[70] *Społeczeństwo informacyjne w Polsce w 2020 r.*, 2020, p. 163.

reporting activity should be studied in more detail. What access to e-government is like, according to the types of cases in question, the first and second instance, the territorial location of bodies, etc. It is important to establish whether by chance traditional access to the matter has not been restricted by regulations, thus forcing citizens to use e-government without leaving alternative forms of communication. It is also important to measure access to electronic services according to age and education. The picture of the whole Polish society in its contacts with the administration allows us to draw preliminary conclusions that society is not yet technologically and culturally ready for the digital revolution in the administration of justice. So, the starting point is anticipatory digitisation, automation, and the introduction of AI into public administration. This will allow a smoother preparation for the next digital step change. Perhaps in many areas, the introduction of AI-based solutions to administrative courts can run parallel to the digital transformation of public administration, but certainly, it cannot overtake it.

The fact of imposing an obligation to use digital services, and especially AI and ML in the judiciary raises the risk of excluding a part of society. Thus, when introducing such a solution, traditional solutions should be allowed to remain to preserve the guarantee of the right to court also for social groups not fully proficient in new technologies. It is necessary to point out that a separate problem, not analysed here, is the issue of identification of participants in the proceedings, secure communication via the Internet, both during the online hearing and implementation of procedural actions. Failure to ensure cybersecurity on the state' side can be considered a violation of the right to a court.

The problem of fair hearing, both in procedural and substantive terms, is not easily solvable. The question is whether AI and ML algorithms are able to perceive nuances, to deviate from patterns of conduct, that are formally just, but undermined from the point of view of the average citizen's sense of justice? As A. Solow-Niederman and R. Re argue, algorithmic justice may fail to see mitigating

factors in a criminal case and fail to consider mercy in sentencing[71]. The assessment of a public administration action's legality is based on regulations. Many administrative decisions are of a binding nature, which means that the authority, after the facts have been correctly established, issues a specific decision. The content of the decision is clearly defined by law. However, many verdicts are based on provisions containing values-based norms or refer to general clauses. The nuances in this regard are crucial. O'Neill showed that algorithms tend to favour the wealthy and white over the poor and dark skinned[72]. Machine learning uses databases to find connections and patterns. Certainly, an AI and ML based system will find patterns not seen by humans as well as those that are already known. Some of the patterns found by AI and ML will objectively be judged negatively by humans, due to discrimination, economic, gender, age segregation etc. Moreover, in machine learning, new results will be taken into account when the application undergoes further self-improvement. Thus, the algorithm may fall into a loop, generating new errors based on previous errors found in rulings and administrative decisions.

In order to avoid, or minimise the risk of making mistakes, it is essential, above all, to make a careful selection of the source material i.e., judgements and administrative decisions. Of course, on a volume of many hundreds of thousands, this cannot be done alone, even by a large human team. It will therefore be necessary to delegate this task to algorithms. Another important aspect of the implementation of justice by the robot judge is the initial evaluation of the results at the stage of learning and testing new solutions. The use of the so-called "AI sandbox" is therefore essential in the case of law so that practitioners, whether lawyers, computer scientists or representatives of other sciences, repeatedly test AI-based tools designed for the legal domain. Of course, the low level of discretionary power of public authorities, e.g., for bound decisions, makes it

[71] R.M. Re, A. Solow-Niederman, *Developing Artificially Intelligent Justice*, "Stanford Technology Law Review" 2019, No, 242(22), pp. 242–289, https://perma.cc/9DQ6-MH7E [accessed on: 30 March 2021].

[72] C. O'Neil, *op. cit.,* p. 84 and nn.

much easier to design, test and implement AI-based solutions. The high level of AI discretion, e.g., in cases based on general clauses, will require special attention. In other words, easy cases, where the solution is the sum of facts and laws, are easy to put into an algorithm. Complex cases, where deeper interpretation, logically extended reasoning, and subsumption are required, will not be so easy, and thus handing it over to AI to solve will already be a big challenge.

As Matthew M. Young, Justin B. Bullock, Jesse D. Lecy write, an AI system used in connection with discretionary power can significantly reduce the cost of administration, but at the same time it can do a lot of harm. It is relatively easy for artificial discretionary to be manipulated, and this risk increases when power is exercised by people who want to subjugate other groups in society[73]. The effectiveness of AI is visible while working in the field of law at a large scale, and therefore errors and intolerance, if they occur, can affect large social groups. Therefore, special attention must be paid not only to the selection of data for training, but also to the testing stage and the selection of people responsible for designing, teaching and testing new solutions. The risk of falling into the machine learning loop should be corrected permanently, and AI systems should be subject to permanent evaluation.

Another element constituting the right to a court is the right to examination reasonably promptly. It seems that the introduction of AI, ML, ADM solutions will increase the speed of resolving cases by administrative courts. Undoubtedly, the introduction of new technologies to the judiciary will ensure more complete realisation of the above mentioned right. However, it should be borne in mind that efficiency is not the main element in assessing whether the right to a court has been guaranteed or not. Lengthy proceedings are a disadvantage, but in the event of a trial that is unfair and violates fundamental rights, speed alone is not a sufficient argument. Nor

[73] M.M. Young, J.B. Bullock, J.D. Lecy, *Artificial Discretion as a Tool of Governance: A Framework for Understanding the Impact of Artificial Intelligence on Public Administration*, "Perspectives on Public Management and Governance" 2019, vol. 2, pp. 301–313, https://doi.org/10.1093/ppmgov/gvz014 [accessed on: 30 March 2021].

is it a value in itself of such importance that it can be considered to offset a violation of due process or the right to have a case heard by an independent court.

The introduction of AI-based solutions to the judiciary may, especially in the initial, test phase, lengthen the time required to hear a case. Only appropriate preparation of legal, organisational and technological solutions will make it possible to conduct court proceedings without disruptions. However, the abrupt introduction of new technologies, in the absence of procedural and organisational changes, instead of improving efficiency, will prolong the proceedings before the administrative court. Also, the introduction of partial solutions, which are not compatible with available and recognised standards, and based on closed IT solutions as well as violating digital security may constitute not only a manifestation of wastefulness and unreliability, but also a violation of the right to a court.

The last element constituting the realisation of the right to a court is the right to openness of judical procedure. The condition of conducting court proceedings in an open manner includes both internal and external publicity. It is therefore addressed to the parties, participants in the proceedings, as well as outsiders, the public. Openness of proceedings is an element of a fair trial and a guarantee of the appropriate right, both to be heard, and to have the case heard in a fair and independent manner. In the context of the use of AI in administrative court proceedings, there is one more element which, for the preservation of the constitutional principle of openness of judicial procedure, will be of key importance. It is the explainability and transparency of artificial intelligence. Many researchers emphasise that the basic premise of using AI is actually transparency and explainability[74]. These features build trust in AI and allow one to see why a process using AI/ML ended up the way it did. The use of explicit algorithms makes it possible to analyse what

[74] See: C. Coglianese, D. Lehr, *Transparency…*; T. Miller, *Explanation in artificial intelligence: Insights from the social sciences*, "Artificial Intelligence" 2019, vol. 267, pp. 1–38, https://doi.org/10.1016/j.artint.2018.07.007 [accessed on: 30 March 2021].

factual and legal elements mattered. In a situation when these elements are *de facto* known before the case is heard, the party knows, based on this very algorithm, how the case may end. So there is no doubt that with a well-designed solution based on AI and ML the courts, and thus the state, are predictable, they do not surprise with their decision, which builds trust in the justice system.

Of course, transparency at the level of AI and ML is a different kind of openness than we have known so far in courtrooms. Given the level of complexity of the models and algorithms, it is important that, in addition to formal transparency, there is a parallel right to an explanation of the decision taken. Currently, the problem of explainability of AI and ML is a major challenge. Some researchers point out that there are limitations to the explicability of algorithms[75]. Others are reasonably optimistic about the use of AI and ML solutions. The state should act to increase the transparency of the algorithms, to prevent the *black box phenomenon* and to increase public confidence[76]. This requires the implementation of appropriate legal and IT solutions. Linking the principle of openness of the judicial procedure with the principle of transparency and explicability of AI and ML is one of the fundaments of the digital revolution in courts, common courts as well as administrative ones.

Ethical questions about the use of AI arise alongside, and even ahead of legal challenges. These are as fundamental as constitutional principles when it comes to the use of new technologies in the administration of justice. Ethical and legal issues are closely connected and require a collaborative approach in the design of solutions using AI and ML. The discussion of the ethical foundations of AI is ongoing in many scientific and political centres. Among the numerous ethical principles, five aspects that are crucial for the development of AI and humanity can be identified. These are beneficence, non-maleficence,

[75] M. Neely, S.F. Schouten, M.J.R. Bleeker, A. Lucic, *Order in the Court: Explainable AI Methods Prone to Disagreement*, 2021, http://arxiv.org/abs/2105.03287 [accessed on: 30 March 2021].

[76] C. Coglianese, D. Lehr, *op. cit.*

autonomy, justice, and explicability[77]. Artificial intelligence is to be created for the benefit of humanity as a whole, not of individuals. It must not act to the disadvantage of human beings or violate their autonomy. At the same time, it must be fair, understandable, and accountable. The proposed ethical principles are a guideline for creating a legal framework to support new technologies. In creating AI-enabled solutions, we need to build trust, security, and reliability, based on ethical values and legal principles[78]. Legal and ethical canons should be integrated with autonomous systems[79] so that both designers and users would be protected from the negative effects of their actions. It is also important to bear in mind the role of ordinary citizens, to whom the justice system has a servant role. Equally important is the role of those who will apply AI on behalf of the state. What judges and judicial officials need to know is not only the law, as they have done until now, but to understand the principles of AI and to be aware of the ethical challenge posed by the use of new technologies. Mark Coeckelbergh makes it explicit that not only those making the law, but also those applying it, along with AI designers, need to understand the ethical issues and social challenges associated with AI[80].

Among the social challenges, special attention should be paid to cultural issues. Numerous researchers draw attention to this circumstance by pointing out that cultural differences are becoming a significant challenge to the development of AI ethics[81]. Indeed,

[77] L. Floridi, J. Cowls, *A Unified Framework of Five Principles for AI in Society*, "Harvard Data Science Review" 2019, pp. 1–15, https://doi.org/10.1162/99608f92.8cd550d1 [accessed on: 30 March 2021].

[78] A. Theodorou, V. Dignum, *Towards ethical and socio-legal governance in AI. Nature Machine Intelligence*, 2020, pp. 2, 10–12, https://doi.org/10.1038/s42256-019-0136-y [accessed on: 30 March 2021].

[79] M. Ebers, *Regulating AI and Robotics: Ethical and Legal Challenges*, [in:] *Algorithms and Law*, M. Ebers, S. Navas (eds.), 2020, p. 98, https://doi.org/10.1017/9781108347846 [accessed on: 30 March 2021].

[80] M. Coeckelbergh, *AI Ethics*, "The MIT Press", Massachusetts 2020, pp. 146–147.

[81] P.H. Wong, *Cultural Differences as Excuses? Human Rights and Cultural Values in Global Ethics and Governance of AI*, "Philosophy & Technology" 2020, No. 33, pp. 705–715, https://doi.org/10.1007/s13347-020-00413-8 [accessed

it is observed that while there are cultural differences between *the West* and *the East,* the ethical policies of AI are similar[82]. However, it should be taken into account that the approach to e.g., individual privacy protection is crucial for the development of AI in European countries, while other countries are more liberal. Ethical, cultural, and social differences should be a challenge, not a barrier. A legislator aware of them should create such legal, organisational and financial solutions that they become a starting point for the development and improvement of both the state and AI systems for the benefit of citizens, not for the sake of digital reform itself.

6. Towards an electronic administrative court – reform proposals

Artificial intelligence standing at the threshold of justice is not only a legal challenge. It is also a task that requires a broad approach that takes into account the purpose of introducing new technologies, namely the good of humanity. The existing social and economic model, the values recognised by society, are factors that set certain limits to the development of AI and ML. All of this is augmented by technological capabilities, not only in terms of know-how, but also in terms of infrastructure that enables the safe and secure use of the potential of artificial intelligence.

The potential behind artificial intelligence in the legal field is large, and the current experience of AI solutions that are being introduced is promising. However, the benefits of introducing tools based on AI and ML cannot overshadow the risks that follow the new technology in the justice system. It seems that the construction of administrative law and its implementation by pending public administration bodies are even predisposed to this type of solutions.

---

on: 30 March 2021]; S.S. Éigeartaigh, J. Whittlestone, Y. Liu, et al., *Overcoming Barriers to Cross-cultural Cooperation in AI Ethics and Governance*, "Philosophy & Technology" 2020, No. 33, pp. 571–593, https://doi.org/10.1007/s13347-020-00402-x [accessed on: 30 March 2021].

[82] M. Coeckelbergh, *op. cit*., pp. 156–157.

Also, the administrative judiciary, which is the executive power control apparatus, should benefit from digitisation and automation of both administrative and judicial processes. However, bearing in mind that administrative courts often deal with cases which significantly interfere with the rights and freedoms of individuals, the assessment of innovative methods should be evaluated from a legal point of view.

The key criterion for assessing the legitimacy and legality of the introduction of AI and ML into administrative judiciary is a measure based on the principle of the right to a court expressed in Article 45 of the Constitution of the Republic of Poland, but also derived from international documents such as Article 10 of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights – Article 14(1), Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms and Article 47(2) of the Charter of Fundamental Rights of the EU. These documents clearly emphasise the importance of the right to a court, judicial autonomy and independence, judicial impartiality, the right to a fair, public and speedy trial and the right of access to a court. All of these elements that make up the fundamental right to a court interact or may interact with AI/ML systems. Some of the interaction will be indifferent to these rights, some will enhance them, but there is a risk that a large proportion may undermine or violate them. Therefore, when introducing digitalisation and automatisation to administrative judiciary, these risks should be taken into account and attempts should be made to mitigate them.

Consequently, a gradual introduction of solutions to administrative justice is postulated. It is necessary to start with technical activities of a non-judicial nature, through simple judicial activities, and then move on to matters typically belonging to judges. This will make it possible to prepare for the new solutions both the administrative courts, professional attorneys, public administration bodies, but above all the society. At the same time, all activities must be properly planned, and their introduction must not come as a surprise to participants in the judicial-administrative process. An appropriate road map should be prepared, realistically corresponding to technological and legal possibilities and social and cultural

competences. A robot judge and the law resolved by algorithms will have a huge impact on citizens, on society as a whole. Therefore, a new model of justice using AI and ML is required[83]. Regulations introducing new legal solutions should be issued with appropriate *vacatio legis* at the level of the law and executive orders. Due to the fact that certain solutions may be of almost revolutionary nature, the period for preparation should be relatively long. This will allow not only actors of the judicial-administrative process to prepare themselves, but also to evaluate the system and to correct possible mistakes. It may be worth trying to carry out tests at the level of an administrative court, so that the above-mentioned aspects can be checked, and appropriate legal and organisational solutions could be prepared.

Furthermore, in parallel with the introduction of digitisation, broad access to AI-based legal aid should be considered within the framework of the so-called poor relief. In the case of administrative cases, which are the subject of a complaint to the court, in many cases the commanding action of state authorities is addressed to individuals. In addition, many times they act as non-entrepreneurs. At the same time, in such cases, trial attorneys at the pre-trial stage appear relatively rarely. Therefore, legal aid through AI solutions seems to be a model element of the justice system. The introduction of new technologies will make it possible to raise the level of professionalisation in administrative cases by appropriate and targeted legal advice provided directly by the state or on its behalf. In addition, it will increase the efficiency of the judicial process by minimising incorrect actions made by parties in administrative and judicial-administrative proceedings. The introduction of AI/ML may contribute to increasing the quality of administrative decisions and unifying the decisions of administrative courts. Of course, in certain situations excessive standardisation of decisions may be a shortcoming, so this element of introducing new technologies should be monitored with particular care.

[83] E. Katsh, O. Rabinovich-Einy, *Digital Justice Technology and the Internet of Disputes*, Oxford 2017, p. 175.

As above mentioned, within the framework of administrative law, which is the standard of judicial administrative control, we have a number of norms of a binding, simple nature. However, a large part of them is evaluative, value judgements or are based on discretion. Therefore, it is necessary to review the legislation in terms of the application of AI/ML and first allow new solutions to the simple and bound norms. The analysis of legal texts in this regard should be carried out in advance, so that possible changes, both of digital and legislative nature, could be properly tested and checked in many aspects. The abuse of trust in the judiciary at the initial stage of applying AI/ML may negatively affect not only trust in the new technology, but in the entire state apparatus. Proper evaluation of AI/ML solutions in administrative judiciary is a *sine qua non* for building trustworthy artificial intelligence in the service of justice.

REFERENCES

Allen R., Masters D., *Regulating for an equal AI: a new role for equality bodies*, Brussels 2020.

Angwin J., Larson J., Mattu S., Kirchner L., *Machine Bias. There's software used across the country to predict future criminals. And it's biased against blacks*, "ProPublica", https://www.propublica.org/article/machine-bias- risk-assessments-in-criminal-sentencing, [accessed on: 10 August 2021].

Boć J., *Komentarz do art. 77 Konstytucji RP*, [in:] *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.*, J. Boć (ed.), Wrocław 1998.

Bodem M.A., *Sztuczna inteligencja*, Łódź 2020.

Boella G., Di Caro L., Leone V., *Semi-automatic knowledge population in a legal document management system*, "Artificial Intelligence & Law" 2019, No. 27, https://doi.org/10.1007/s10506-018-9239-8 [accessed on: 18 October 2021].

Branting L.K., Lester J.C., Callaway C.B., *Automating Judicial Document Drafting: A Discourse-Based Approach*, [in:] *Judicial applications of AI*, G. Sartor, K. Branting (eds.), 1998.

Bryson J.J., *Robots should be slaves*, [in:] *Close Engagements with Artificial Companions, Key social, psychological, ethical and design issues*, Yorick Wilks (ed.), University of Oxford, https://doi.org/10.1075/nlp.8.11bry [accessed on: 30 March 2021].

Chen B., Stremitzer A., Tobia K., *Having Your Day in Robot Court*, "Public Law & Legal Theory Research Paper" 2021, No. 3(21).

Chen L., *Machine Learning and the Rule of Law*, "Law as Data" 2019, https://doi.org/10.37911/9781947864085.16 [accessed on: 30 March 2021].

Chłopecki A., *Sztuczna inteligencja – szkice prawnicze i futurologiczne*, Warszawa 2018.

Cobbe J., *Administrative law and the machines of government: Judicial review of automated public-sector decision-making*, Legal Studies, 2019, 39(4), doi:10.1017/lst.2019.9 [accessed on: 30 March 2021].

Coeckelbergh M., *AI Ethics*, "The MIT Press", Massachusetts 2020.

Diehl M., Jagura J., Jarzmus K., Kamiński I.C., Kładoczny P., Szwed M., Wiśniewska K., Zwolankiewicz A., *Wdrażanie nowych technologii w wymiarze sprawiedliwości*, Warszawa 2021.

Dignum V., *Ethics in artificial intelligence: introduction to the special issue*, "Ethics and Information Technology" 2018, No. 20:1–3, https://doi.org/10.1007/s10676-018-9450-z [accessed on: 30 March 2021].

Ebers M., *Regulating AI and Robotics: Ethical and Legal Challenges*, [in:] *Algorithms and Law*, M. Ebers, S. Navas (eds.), 2020, https://doi.org/10.1017/9781108347846 [accessed on: 30 March 2021].

Éigeartaigh S.S., Whittlestone J., Liu Y., et al., *Overcoming Barriers to Cross-cultural Cooperation in AI Ethics and Governance*, "Philosophy & Technology" 2020, No. 33, https://doi.org/10.1007/s13347-020-00402-x [accessed on: 30 March 2021].

Flaga-Gieruszyńska K., *Wpływ informatyzacji na sprawności i efektywność sądowego postępowania egzekucyjnego*, [in:] *Elektronizacja sądowego postępowania egzekucyjnego w Polsce*, A. Marciniak (ed.), Sopot 2015.

Flasiński M., *Wstęp do sztucznej inteligencji*, Warszawa 2011.

Florczak-Wątor M., [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, wyd. II, P. Tuleja (ed.), LEX/el. 2021, art. 77.

Floridi L., Cowls J., *A Unified Framework of Five Principles for AI in Society,* "Harvard Data Science Review" 2019, https://doi.org/10.1162/99608f92.8cd550d1 [accessed on: 30 March 2021].

Gebru T., *Race and Gender*, [in:] *Oxford Handbook on AI Ethics*, M.D. Dubber, F. Pasquale, S. Das (eds.), New York 2020, https://arxiv.org/abs/1908.06165 [accessed on: 5 March 2021].

Geburczyk F., *Automatyzacja załatwiania spraw w administracji samorządowej a gwarancje procesowe jednostek. Uwagi de lege ferenda w kontekście ogólnego rozporządzenia o ochronie danych* (*RODO*), "Samorząd Terytorialny" 2021, No. 5.

Gołaczyński J., Adamski D., Łukowski W., Kotecka S., Szostek D., Kutyłowski M., *Założenia elektronicznego postępowania upominawczego*, http://cbke.prawo.uni.wroc.pl/modules/Projects/files/EPU.31.01.pdf [accessed on: 30 March 2021].

Grant T.D., Wischik D.J., *On the Path to AI: Law's Prophecies and the Conceptual Foundations of the Machine Learning Age*, 2020, https://doi.org/10.1007/978-3-030-43582 [accessed on: 30 March 2021].

Haney B.S., *Applied Natural Language Processing for Law Practice*, 2020.

Izdebski H., *Sądy administracyjne a podział władz*, "ZNSA" 2017, No. 1.

Janowski J., *Informatyzacja prawnicza wobec elektronizacji sądowego stosowania prawa*, [in:] *Wizja europejskiego społeczeństwa informacyjnego i jej realizacja w prawie polskim*, J. Misztal-Konecka. G. Tylec (eds.), Lublin 2012.

Katsh E., Rabinovich-Einy O., *Digital Justice Technology and the Internet of Disputes*, Oxford 2017.

Katz D.M., Bommarito M.J., Blackman J., *A general approach for predicting the behaviour of the Supreme Court of the United States*, "PLoS ONE" 2017, No. 12(4), https://doi. org/10.1371/journal.pone.0174698 [accessed on: 30 March 2021].

Keuchen M., *Anonymization of court decisions in Germany, an essential requirement for E-Justice*, https://ec.europa.eu/info/sites/

default/files/law/cross-border_cases/documents/anonymisation_webinar_26032021_germany.pdf [accessed on: 11 August 2021].

Lieth Gardner A., *An Artificial Intelligence Approach to Legal Reasoning*, Masachuset–London 1987.

Luciano F., *The Ethics of Information*, Oxford 2013.

Mandri J.-M., *Kohtunikud saavad robotabilised: riik otsib võimalusi kohtusüsteemis tehisintellekti rakendamiseks*, https://forte.delfi.ee/artikkel/85777829/kohtunikud-saavad-robotabilised-riik-otsib-voimalusi-kohtususteemis-tehisintellekti-rakendamiseks [accessed on: 30 March 2021].

McCarthy J., Minsky M.L., Rochester N., Shannon C.E., *A proposal for the dartmouth summer research project on artificial intelligence*, 1955.

Medvedeva M., Wieling M.M., *Using machine learning to predict decisions of the European Court of Human Rights*, "Artificial Intelligence and Law" 2020, No. 28, https://doi.org/10.1007/s10506-019-09255-y [accessed on: 30 March 2021].

Miller T., *Explanation in artificial intelligence: Insights from the social sciences*, "Artificial Intelligence" 2019, vol. 267, https://doi.org/10.1016/j.artint.2018.07.007 [accessed on: 30 March 2021].

Monea A., *Race and Computer Vision*, [in:] *The Democratization of Artificial Intelligence Net Politics in the Era of Learning Algorithms*, A. Sudmann (ed.), Bielefeld 2019, https://www.degruyter.com/document/doi/10.14361/9783839447192/html [accessed on: 30 March 2021].

Morison J., Harkens A., *Re-Engineering Justice? Robot Judges, Computerised Courts and* (*Semi*) *Automated Legal Decision-Making*, "Legal Studies" 2019, https://ssrn.com/abstract=3369530 [accessed on: 30 March 2021].

Možina M., Žabkar J., Bench-Capon T., Bratko I., *Argument based machine learning applied to law*, "Artificial Intelligence and Law" 2005, No. 13(1), https://doi.org/10.1007/s10506-006-9002-4 [accessed on: 30 March 2021].

Muhlenbach F., Nguyen L., Isabelle P., *Predicting Court Decisions for Alimony: Avoiding Extra-legal Factors in Decision made by*

Judges and Not Understandable AI Model, 2020, https://arxiv.org/pdf/2007.04824.pdf [accessed on: 2 September 2020].

Nadkarni P.M., Ohno-Machado L., Chapman W.W., *Natural language processing: an introduction*, "J Am Med Inform Assoc" 2011; 18:544e551, doi:10.1136/amiajnl-2011-000464 [accessed on: 18 August 2021].

Nanda R., Siragusa G., Di Caro L., et al., *Unsupervised and supervised text similarity systems for automated identification of national implementing measures of European directives*, "Artificial Intelligence and Law" 2019, No. 27, https://doi.org/10.1007/s10506-018-9236-y [accessed on: 30 March 2021].

Neely M., Schouten S.F., Bleeker M.J.R., A. Lucic, *Order in the Court: Explainable AI Methods Prone to Disagreement*, 2021, http://arxiv.org/abs/2105.03287 [accessed on: 30 March 2021].

Niller E., *Can AI Be a Fair Judge in Court? Estonia Thinks So*, https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/ [accessed on: 10 September 2021].

O'Neil C., *Weapons of math destruction: How big data increases inequality and threatens democracy*, New York 2017.

Pasquale F.A., *A Rule of Persons, Not Machines: The Limits of Legal Automation*, "George Washington Law Review 1" 2019, https://ssrn.com/abstract=3135549 [accessed on: 19 September 2021].

Pietrasz P., *Informatyzacja polskiego postępowania przed sądami administracyjnymi a jego zasady ogólne*, Warszawa 2020.

Piotrowski R., *Władza sądownicza w Konstytucji RP*, *KRS* 2010, No. 1.

Pszczyński M., *Administrative Decisions in the Era of Artificial Intelligence*, "Adam Mickiewicz University Law Review" 2020, No. 11.

Re R.M., Solow-Niederman A., *Developing Artificially Intelligent Justice*, "Stanford Technology Law Review" 2019, No. 242(22), https://perma.cc/9DQ6-MH7E [accessed on: 30 March 2021].

Sibiga G., *Czy algorytm może zastąpić człowieka w administracji*, https://www.rp.pl/Opinie/307019986-Grzegorz-Sibiga-o-doreczeniach-elektronicznych-Czy-algorytm-moze-zastapic-czlowieka-w-administracji.html [accessed on: 9 August 2021].

Sibiga G., *Stosowanie technik informatycznych w postępowaniu administracyjnym ogólnym*, Warszawa 2019.

Siemaszko A., Gruszczyńska B., Marczewski M., Ostaszewski P., Więcek-Durańska A., *Sądownictwo. Polska na tle pozostałych krajów Unii Europejskiej* (*na podstawie bazy danych CEPEJ 2014*, "Prawo w Działaniu. Sprawy Karne" 2016, No. 26.

Sleimi A., Sannier N., Sabetzadeh M., Briand L., Ceci M., Dann J., *An Automated Framework for the Extraction of Semantic Legal Metadata from Legal Texts*, 2020.

Sourdin T., *Judge v Robot?: Artificial intelligence and judicial decision-making*, "The University of New South Wales Law Journal" 2018, No. 41(4), https://search.informit.org/doi/10.3316/informit.040979608613368 [accessed on: 30 March 2021].

Stenberg R.J., Smith C., *Social intelligence and decoding skills in non-verbal communication*, "Social Cognition" 1985, No. 3.

Suksi M., *Administrative due process when using automated decision-making in public administration: some notes from a Finnish perspective*, "Artificial Intelligence and Law" 2021, 29:87–110, https://doi.org/10.1007/s10506-020-09269-x 1 3 [accessed on: 30 March 2021].

Susskind R., *Online Courts and the Future of Justice*, 2019.

Susskind R., Susskind D., *The future of the professions. How technology will transform the work of human experts*, Oxford 2015.

Theodorou A., Dignum V., *Towards ethical and socio-legal governance in AI. Nature Machine Intelligence*, 2020, https://doi.org/10.1038/s42256-019-0136-y [accessed on: 30 March 2021].

Weizenbaum J., *Computer power and human reason, From Judgement to calculation*, New York–San Francisco 1976.

Wong P.H., *Cultural Differences as Excuses? Human Rights and Cultural Values in Global Ethics and Governance of AI*, "Philosophy & Technology" 2020, No. 33.

Xu L., *Chinese judicial justice on the cloud: a future call or a Pandora's box? An analysis of the 'intelligent court system' of China*, "Information & Communications Technology Law" 2017, No. 26(1), https://doi.org/10.1080/13600834.2017.1269873 [accessed on: 30 March 2021].

Young M.M., Bullock J.B., Lecy J.D., *Artificial Discretion as a Tool of Governance: A Framework for Understanding the Impact of Artificial Intelligence on Public Administration*, "Perspectives on

Public Management and Governance" 2019, vol. 2, https://doi.org/10.1093/ppmgov/gvz014 [accessed on: 30 March 2021].

Yu J., Xia J., *E-justice evaluation factors: The case of Smart Court of China, Information Development*, 2020, https://doi.org/10.1177/0266666920967387 [accessed on: 30 March 2021].

DR RAFAŁ WIELKI
University of Opole

Problems of evidence in administrative judiciary

1. Introduction

The administrative judiciary is continually evolving, and, in various legal systems, certain solutions are considered, whose objective, on the one hand, is to improve the efficiency of the system of justice, and, on the other, to adjust the law to the contemporary realities of social life, which is undergoing dynamic changes – primarily due to the progressive computerization. The range of administrative matters is very broad, and it covers the issues related to infrastructure, environmental management, waste management, public health, public levies, migration thus, very thoughtful analyses related to introducing changes in this area are required.

The aim of this paper is to draw attention to the issues related to the use of evidence in administrative court proceedings. In the light of such a target, several research problems ought to be formulated, which then will be analysed. In particular, the following should be clarified: (a) What are the current problems of the administrative judiciary in Poland? (b) What legal norms regulate the issue of taking evidence before an administrative court and do the current regulations fit with contemporary problems of law? (c) What legal solutions regarding evidence before administrative courts are applied in other countries? (d) Can the general theory of evidence

be applicable in administrative court proceedings? (e) Does the administrative judiciary come into contact with electronic evidence? (f) Are there recommendations or standards for dealing with electronic evidence in administrative matters? (g) What postulates of *de lege ferenda* can be formulated in relation to pieces of evidence in administrative judiciary for national, Hungarian and international legislators? This research paper is the outcome of the exchange of ideas within the Polish-Hungarian Research Platform, therefore the legal realities of Poland and Hungary are of particular importance for the conducted deliberations.

Mainly universal methods, which are independent of the legal system put under scrutiny, such as logic and analysis, and, to a lesser extent, the comparative law method as well as a case study have been used in the thesis.

2. Current Problems of Administrative Justice in Poland against the Background of Regulations in Selected European Countries

New voices over the shape of the administrative judiciary have been gradually appearing already for a long time. These voices however, are not present only in the Polish legal reality, it can be ascertained that discussions on the shape of the administrative judiciary and the jurisprudence of administrative courts are international in nature. Before we discuss the individual models of administrative judiciary and their characteristics, it seems necessary to establish the current 'pain points' of administrative judiciary in Poland.

One of the most frequently cited arguments regarding the necessity to introduce changes in the administrative judiciary is the problem of the ineffectiveness of administrative court proceedings. Whereas it should be highlighted that the efficiency of administrative court proceedings should not be equated with the problem of lengthiness of proceedings.

In 2019, regional administrative courts, within 3 months, settled, on average, 44.01% of appeals about acts and other activities, as well as inactivity of authorities and lengthy proceedings. 61.13%

of cases were settled within 4 months, and 81.28% of the indicated appeals within 6 months[1]. In the case of the Supreme Administrative Court SA, 42.33% of all cases within 12 months, and 80.43% within 24 months were settled. With regard to cassation appeals, 23.54% of cases were settled within 12 months. In the case of appeals, 91.13% are examined within 2 months, and within 12 months, the ratio is 99.72%[2]. In 2020, regional administrative courts, within 3 months, settled, on average, 39.94% of appeals about acts and other activities, as well as inactivity of authorities and lengthy proceedings. 53.45% of cases were settled within 4 months, and 73.71% of the indicated appeals within 6 months[3]. In 2020, the Supreme Administrative Court settled 57.70% of all cases within 12 months, and 78.66% within 24 months. With regard to cassation appeals, 44.06% of cases were settled within 12 months. In the case of appeals, 75.99% are examined within 2 months, and within 12 months, the ratio is 99.57%[4]. Nevertheless, it is worth bearing in mind that due to the COVID-19 pandemic and a partial limitation of the activities of public institutions, the year 2020 is not reliable.

Thus, it can be noted that the deadlines for settling cases by administrative courts do not differ significantly from those observed in other European countries, yet it is emphasized that in Poland there is a cassatory model, the essence of which will be presented later in the paper. Irrespective of further considerations, it is worth mentioning what that might mean. Well, the final and binding conclusion of a case before an administrative court – even in the light of the presented data – does not in any way mean that the entity will obtain a judgement defining its administrative and legal rights or obligations. No successful proceedings guarantee that the applicant's situation would change for the better, especially with

[1] Naczelny Sąd Administracyjny, *Informacja o działalności sądów administracyjnych w 2019 r.*, NSA, Warsaw 2020, p. 14.

[2] *Ibidem*, p. 18.

[3] Naczelny Sąd Administracyjny, *Informacja o działalności sądów administracyjnych w 2020 r.*, NSA, Warsaw 2021, p. 14.

[4] *Ibidem*, p. 18.

regard to the material effects of the trial[5]. Counting the duration of administrative and administrative court proceedings as a general waiting time for the final settlement of an administrative matter seems understandable, as the mere annulment of a decision (ruling) by an administrative court does not end the administrative matter. It is also justified from the perspective of the protection of the rights of the parties, for whom the model of administrative court proceedings is often incomprehensible, and thus – it does not correspond to their sense of justice[6].

The effectiveness of administrative judiciary should be equated with the effectiveness of legal protection provided by this judiciary. It can be mainly considered on the subjective level (protection of violated subjective rights). Moreover, through the examination and adjudication of legal measures aimed at removing the violation of rights and freedoms, administrative courts also exercise objective (rightful) supervision over the public administration, ensuring the protection of the legal order in question[7]. The issue of the effectiveness of administrative court control is very extensive, albeit it is not the essence of the considerations, nevertheless it is worth getting acquainted with the detailed views on this matter[8].

It is indicated that one of the ways to increase the efficiency of administrative judiciary is to reinforce the competence of administrative courts to conduct evidence proceedings, which allows

[5] Social Codification Commission, Administrative Judiciary Reform Team, *Podstawowe założenia reformy sądownictwa administracyjnego. Raport zespołu*, http://www.komisjakodyfikacyjna.pl/wp-content/uploads/2019/05/PDF-RAPORT-KO%C5%83COWY-s%C4%85downictwo_administracyjne-SKK-5.pdf [accessed on: 29 August 2021].

[6] S. Szuster, *Koncepcja merytorycznych kompetencji orzeczniczych sądów administracyjnych*, Unpublished PhD Thesis, Kraków 2009, p. 351; D. Gut, *Merytoryczne orzekanie polskich sądów administracyjnych w świetle konstytucji RP*, [in:] *Aktualne problemy sądowej kontroli administracji publicznej*, W. Piątek (ed.), Warsaw 2019, pp. 11–26.

[7] M. Kamiński, *Mechanizm i granice weryfikacji sądowo administracyjnej a normy prawa administracyjnego i ich konkretyzacja*, Warsaw 2016, p. 325 and n.

[8] See: M. Kamiński, *Efektywność kontroli sądowo administracyjnej rozstrzygnięć wydawanych w procedurach administracyjnych trzeciej generacji. Rozważania na tle wybranych rozwiązań normatywnych w prawie polskim*, "Opolskie Studia Administracyjno-Prawne" 2019, vol. XVIII, No. 1, pp. 141–151.

supplementing the findings documented in the case files or to conduct factual findings from scratch[9].

Currently, on the grounds of Polish law, there are several options for action in relation to evidence in administrative proceedings. Article 75 § 1. of act of 14 June 1960 Code of Administrative Procedure (CAP)[10] says that: "Anything which is not contrary to law, and which is of assistance in clarifying a case shall be admissible as evidence. Evidence includes documents, the evidence of witnesses, the opinions of experts and inspections". Apart from that, the evidence proceedings are set out in Article 77 of the CAP, which states that:

> "*§ 1. The public administration body is required to comprehensively collect and examine all evidential material.*
> *§ 2. At each stage of proceedings*, a body can amend, supplement, or withdraw rulings made regarding the examination of evidence.
> *§ 3. A body conducting proceedings as a result of having been required to do so by the body having jurisdiction to settle the case* (*Article 52*) *may, on an ex officio basis or on application by one of the parties, hear new witnesses or experts on circumstances that form the objects of such proceedings.*
> *§ 4. Universally accepted facts and facts known to the body ex officio do not require proof. Parties to proceedings should be informed of facts that are known to the body*".

The interpretation of these provisions in the case law is not uniform. It presents a strict standpoint, according to which the obligation to collect all the evidence is usually imposed on a public administration body, as well as a compromise position, according to which, if a party does not provide evidence to support its claims, then the public administration body does not always have to act *ex*

[9] Z. Kmieciak, *Efektywność sądowej kontroli administracji publicznej*, "Państwo i Prawo" 2010, No. 11, p. 23.

[10] Act of 14 June 1960 Code of Administrative Procedure, consolidated: Journal of Laws of 2021, item 735.

officio. There is also the current position that the body may require a party to provide evidence in support of its claims[11].

Another legal act significantly regulating the issue of evidence is the Act of 30 August 2002, the Law on Proceedings Before Administrative Courts (LPAC)[12]. It defines the role of evidence in administrative court proceedings. Article 106 § 3. of LPAC says that: "The court may, on its own motion or at the request of the parties, request additional documentary evidence, if this is necessary to resolve substantial doubts and will not extend excessively the proceedings on the case". Two more important provisions appear in the aforementioned act – Article 106 § 4: "The court shall consider commonly known facts, even if they are not invoked by the parties" – and Article 106 § 5: "The provisions of the Code of Civil Procedure shall apply as appropriate to the evidentiary proceedings referred to in § 3".

As it can be noticed, the administrative court proceedings refers very poorly to the issue of taking evidence. This is because the purpose of any evidence proceedings before administrative courts is not to establish the factual state of an administrative matter, but to assess whether public administration bodies have established these facts in accordance with the provisions of administrative proceedings. This standpoint regarding the modest scope of evidence proceedings before the administrative court was shared by the Supreme Administrative Court, pointing out that: "Only evidence from a document, whether official or private, may be taken before an administrative court. Conducting these proceedings from other means of evidence is inadmissible. Statement of a witness recorded in the form of minutes does not constitute evidence from a document, thus is not covered by the content of Article 106 § 3 of LPAC.

[11] Wróbel L., *Art. 7*, [in:] *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel (eds.), LEX/el. 2021.

[12] Act of 30 August 2002 Law on proceedings before administrative courts, consolidated: Journal of Laws of 2019, item 2325.

Similarly, an expert opinion or visual inspection evidence does not constitute evidence from a document"[13].

The presented state of affairs has its source in the binding cassatory model of administrative judiciary. The court has an impact only on the act challenged to it but does not decide on the merits of the administrative matter. In general, the court may dismiss an appeal, revoke the contested act, annul it, declare the act issued in violation of the law, or consider an appeal about the inactivity of a body or declare an act or other legal act ineffective. An interpretation of the law by an administrative court is legally binding for the administrative body. Limiting the competence of the court only to leave the act in legal circulation, or to eliminate it may lead to a legal deadlock, in which the case is returned to the administrative court several times and ultimately is not resolved properly. Such 'passing the buck' between an administrative body and an administrative court in Anglo-Saxon countries – but also in some countries of continental Europe – is called the yo-yo effect[14]. Undoubtedly, this fact causes that there are accusations against the cassatory model related to the above-mentioned viewpoint on the problem of the ineffectiveness of administrative judiciary.

On the other hand, on the grounds of administrative judiciary, a reformatory model, also called substantive model, has formed. Its essence is that the administrative court, instead of the administrative body, ends the administrative proceedings by issuing a substantive decision, and thus settling the administrative matter. This means that the administrative body not only does not have to but cannot even exercise its competence by issuing an administrative act. In the classic reformatory model, the administrative court has the power to issue a judgement replacing the administrative decision,

[13] Judgment by the Supreme Administrative Court, 1 September 2015 (I FSK 166/14), Centralna Baza Orzeczeń Sądów Administracyjnych.

[14] See: S. Jannsen, *Towards and Adjustment of the Trias Politica: The Administrative Courts As (Procedural) Lawmaker; A Study of the Influence of the European Human Rights Convention and the Case Law by the European Court of Human Rights on the Trias Politica, in Particular the Position of Dutch Administrative COurts in Relation to the Administration*, [in:] *Judicial Lawmaking and Administrative Law*, F. Stroink, E. van der Linden (eds.), Antwerpen–Oxford 2005, p. 54.

and thus, to exercise the powers of the administrative body itself. It is inherently connected with the necessity for the court to make new factual findings[15]. Determining facts is associated with granting administrative courts significant powers in the field of taking evidence, which are the essence of the considerations in question therefore it seems vital to pay attention to this model.

The literature indicates that both models meet the minimum standards of protection of the individual specified in the recommendation of the Committee of Ministers of the Council of Europe No. 20/2004 on the judicial control of administrative acts[16, 17]. Nonetheless, on the basis of the Polish doctrine, the substantive model, and its possible implementation, raise serious doubts, especially under Art. 184 of the Polish Constitution[18] and the constitutional principle of separation of powers. This issue is very extensive, going far beyond the considerations adopted for the purposes of this research work, moreover, it requires in-depth analyses by specialists in the field of constitutional law, which is why the Reader should be referred to the paper, which in a synthetic approach presents the main arguments of supporters of each of the presented concepts[19].

Yet, there seems to be a third way as well, which may raise less doctrine doubt. Namely, in many legal systems, hybrid solutions are implemented, which allow increasing the substantive competences of administrative courts while maintaining the applicable cassatory

---

[15] K. Flisek, *Główne modele orzecznictwa sądów administracyjnych*, "Studia Prawnicze. Rozprawy i Materiały" 2018, vol. 23, No. 2, pp. 128–129.

[16] Council of Europe, *Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts*, Adopted by the Committee of Minister on 15 December 2004 at the 909th meeting, of the Ministers Deputies, https://rm.coe.int/09000016805db3f4 [accessed on: 30 August 2021].

[17] See: H. Izdebski, *Sądownictwo administracyjne w Europie*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2007, vol. 3, No. 4, pp. 133–138.

[18] The Constitution of the Republic of Poland of 2nd April 1997, Journal of Laws of 1997, No. 78, item 483.

[19] See: M. Kłopocka-Jasińska, *Kilka uwag o poszerzaniu zakresu merytorycznych kompetencji sądów administracyjnych w świetle art. 184 Konstytucji i konstytucyjnej zasady podziału władz*, "Przegląd Prawa i Administracji" 2020, vol. CXX, No. 1, pp. 175–185.

model. Such a solution was chosen by the Polish legislator when amending the Law on proceedings before administrative courts in 2015. The implemented change, referred to in the literature as an injunction, provided the court with the opportunity to oblige the body to issue a decision within a specified period, indicating the manner of settling the case. The competent public administration body is obliged to notify the court about the settlement of cases within 7 days from the issuance of the decision or order, under pain of imposing a fine on the body.

Regardless of the views of the doctrine and the possible path chosen by the Polish legislator, it seems that the increase in the scope of substantive competences by administrative courts is not only an expression of the tendency to change the paradigm of administrative judiciary, but it is also, above all, strengthening the function of protecting individual rights in relations with administration. It also seems that the extended substantive competences of courts may affect the efficiency of administrative judiciary, and they are certainly required for a full and exhaustive assessment of the evidence or indication of the need to supplement it.

Bearing in mind the considerations related to the law of evidence in administrative proceedings, it seems critical to examine the powers of the administrative courts in selected European countries with regard to evidence. Outlining the proposed changes in the administrative judiciary in relation to the law of evidence justifies the need to analyse the legal regulations in various European legal systems. This is vital because the tendencies to expand the substantive competences of administrative judiciary, also with regard to evidence, are strongly noticeable in many European countries[20]. However, the objective of this part of the paper is not to analyse the system of administrative judiciary and the jurisdiction of administrative courts, as such considerations are undertaken by other authors of this monograph. Instead, let us focus on issues related to the law of evidence in various legal systems, hoping that they will be examples,

[20] See: K. Flisek, *op. cit.*, pp. 132–134; A. Skoczylas, *Modele uprawnień orzeczniczych sądów administracyjnych w Europie*, "Państwo i Prawo" 2012, No. 10, pp. 21–32.

indicating what shape the administrative judiciary can be given to make it effective and so it could express care for the protection of individual rights.

A large dilemma related to some systems, including the Polish one, is the fact that the administrative court adjudicates on the basis of the case files. This means that the evidence collected by administrative authorities is the basis for making factual findings, to which the court refers when assessing the correctness of the proceedings. However, the problem is that there is often no agreement at this stage of the procedure[21]. Additionally, limiting the evidence proceedings to documentary evidence may have negative consequences for the effectiveness of administrative control exercised by the regional administrative court, and raise doubts as to compliance with the indications of the judgements of European courts[22].

As W. Piątek indicates, it is actually difficult to talk about the existence of pure cassatory or substantive models in European legal systems. The natural evolution of administrative judiciary has resulted in a combination of both models dominated by powers in the cassation (e.g., in the Czech Republic, Slovakia or Poland) or reformatory spirit (e.g., in Germany or Switzerland)[23].

A good example of the changes taking place in Europe is the Hungarian judicial system, which was finally modified in 2017, and reformatory powers in administrative matters became the principle[24]. The Hungarian Act I of 2017 on the Code of Administrative Court Procedure (CACP)[25] in many places relates to the issue of evidence. Interestingly, the Hungarian legislator decided to apply

[21] B. Banaszak, K. Wygoda, *Funkcjonowanie sądownictwa administracyjnego w Polsce w zderzeniu z problemami współczesności – wybrane zagadnienia*, "Studia Iuridica Lublinensia" 2014, No. 22, pp. 176–177.

[22] J. Chlebny, W. Piątek, *Ewolucja ustrojowa i kompetencyjna sądownictwa administracyjnego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2021, vol. 94–95, No. 1–2, pp. 26–30.

[23] W. Piątek, *Nowe kompetencje do merytorycznego orzekania przez sądy administracyjne*, "Państwo i Prawo" 2017, No. 1, pp. 21–22.

[24] I. Hoffman, *Application of Administrative Law in the Time of Reforms in the Light of the Scope of Judicial Review in Hungary*, "Studia Iuridica Lublinensia" 2020, vol. XXIX, No. 3, p. 109.

[25] Act I of 2017 on the Code of Administrative Court Procedure, Hungary.

the provisions of the Code of Civil Procedure to the taking of evidence – unless the law provides otherwise (section 78 (1) CACP). Moreover, the court assesses the evidence separately, comparing it with the facts established in the previous administrative proceedings (section 78 (2) CACP), so it is not obliged to consider the case on the basis of the findings of fact made by the administrative body. It is also worth noting the further provisions set out in that are regarding reformatory powers of the court. The court shall amend the unlawful administrative act if it is possible by the nature of the case, the facts are properly clarified, and the legal dispute may be ultimately settled on the basis of the data available (section 90 (1) CACP). If the nature of the case makes it possible, the court may also amend the administrative

act if the administrative organ in the repeated procedure took an act that is contrary to the court's final and binding judgment (section 90 (2) CACP). It should be noted, however, that an amendment is not allowed in the case of an administrative act taken, in accordance with the law, through the assessment of specific circumstances, in the case of an administrative act concerning a payment with budgetary implications based on the exercise of discretionary power, or if it is excluded by an act (section 90 (3 a–d) CACP).

Similar powers are found in the French system, where the administrative procedure in question is based on the investigative powers of the judge, both in terms of taking evidence and taking expert evidence, although the burden of proof rests with the applicant. The judge may question any person if it is useful to establish the truth or perform a field inspection. Nevertheless, most often the opinion of an expert in a particular domain is used, however it may dismiss the opinion of an expert without justification or change it if it does not properly perform its function[26].

In Germany, administrative courts are entitled to take evidence in accordance with the principle of the free assessment of evidence. It results from the ordinance on proceedings before administrative

[26] M. Wilbrandt-Gotowicz, *Francja*, [in:] *Elementy ustrojowo-funkcjonalne sądownictwa administracyjnego w wybranych państwach europejskich*, B. Majchrzak (ed.), Warsaw 2020, pp. 31–32.

courts (VwGO)[27], section 86 (1): "The court shall investigate the facts ex officio; those concerned shall be consulted in doing so. It shall not be bound to the submissions and to the motions for the taking of evidence of those concerned". Moreover, in line with section 108 VwGO: the court shall rule in accordance with its free conviction gained from the overall outcome of the proceedings. The judgement shall state the grounds which were decisive for the judicial conviction. The judgement may only be based on facts and results of evidence on which those concerned have been able to make a statement. Moreover, in the German model, very much attention is paid to the right to be heard by a court, which means – in the light of the jurisprudence – that it is a principle of any court proceeding, and it relates, inter alia, to the right to participate in evidence proceedings by trial participants. It is expressed in VwGO, in section 97: "Those concerned shall be informed of all evidence-taking dates and can attend the taking of evidence. They may address expedient questions to witnesses and to expert witnesses. If a question is objected to, the court shall decide". What is more, in the German legal solutions there is no hierarchy of evidence, nor are there any rules of evidence, and therefore the court's conduct is consistent with its free conviction based on the principles of logical reasoning.

A similar approach to evidence is noticeable in the Austrian solutions. As D. Gut points out, the principle of objective truth has not been expressed directly in the provisions of the administrative court proceedings, albeit the court may make factual findings if they have not been sufficiently established by the administrative body. Then, the court must also take the evidence necessary to resolve the case[28]. Pursuant to section 17 of the Federal Act (VwGVG)[29], the rules of administrative procedure apply to the taking of evidence, and not, as in the Hungarian case, to civil

[27] Verwaltungsgerichtsordnung (VwGO), German Ordinance on Proceedings Before Administrative Courts, BGBl. I S 686.

[28] D. Gut, *Austria*, [in:] *Elementy ustrojowo-funkcjonalne sądownictwa administracyjnego w wybranych państwach europejskich*, B. Majchrzak (ed.), Warsaw 2020, p. 100.

[29] Bundesgesetz über das Verfahren der Verwaltungsgerichte (Verwaltungsgerichtsverfahrensgesetz – VwGVG), Austrian Federal Act, BGBl. No. 33/2013.

procedure. Moreover, the administrative courts adjudicate in accordance with the principle of the free assessment of evidence, in line with their own conviction, and on the basis of all evidence. The principle of unlimited measures of inquiry is related to it, which means that evidence may be anything that is appropriate and purposeful in a specific case to establish the facts[30].

It seems that we should expect that some norms related to administrative and administrative court proceedings will be – to some extent – unified. Such tendencies are visible in the area of the European Union, where efforts are made to develop universal standards of administrative procedures[31]. Although in many legal systems we can encounter the cassatory model, there is a tendency to a gradual shift towards a reformatory model. Moreover, the evolution of the administrative judiciary system does not necessarily have to mean a complete transition to an extreme other solution, but, as the examples presented show, it is possible to increase the substantive competences of administrative courts while leaving the general cassatory approach. Such steps seem necessary as the expansion of the powers of administrative courts in taking evidence is treated as an expression of increasing the effectiveness of administrative judiciary and must be taken into account by the legislator in the future.

3. General Comments on the Meaning of Evidence

The general theory of evidence, even though rather related to issues in criminal law, is also reflected in other branches of law. It is quite imperative as there are many divergent standpoints in the context of evidence in law, and the conceptual apparatus applied by lawyers is not uniform, as many concepts have the features of ambiguity.

Undoubtedly, it is the criminal procedure that focuses the most on the evidence, and in this area the academic discussions related to

[30] D. Gut, *op. cit.*, p. 100.

[31] See: P. Ostojski, *Standardy postępowania administracyjnego według ReNEUAL Modelu kodeksu postępowania administracyjnego Unii Europejskiej*, "Roczniki Administracji Publicznej" 2019, vol. 5, pp. 157–173.

the issue of evidence are most discernible. For these reasons, in this part of the discourse, despite general considerations conducted on the basis of administrative issues, we will partially use the achievements of penal sciences. The rationale for such a choice is primarily the fact that, in the field of the criminal law, a school of thought has developed that treats the science of evidence as universal for all branches of law and independent of the legal norms in a given place, since its central assumption is to refer to the principles of logic.

Using the historical background, we can refer to the words of J. Bentham, who indicated that evidence can be understood as any matter concerning fact, effect, tendency, intention, which in the mind constitutes a persuasion of the existence of other factual matters. Persuasion may or may not confirm their existence[32]. J. Konieczny interprets these words in such a way that "a matter concerning a fact" means information about this fact and is the basis for recognizing or not recognizing other facts, therefore it is a premise in reasoning about other facts[33]. The scholars of administrative law take a similar position, pointing out that every source of information that enables evidence is evidence. Hence, evidence and means of evidence can be treated synonymously[34]. Firstly, it should be borne in mind that evidence is a set of information that can be refined and presented in court to estimate the probability of certain facts that are relevant to the case in such a way that this information can serve to confirm or contradict facts[35].

The universal reasoning about evidence in law, as mentioned in the introductory part, originates from the achievements of J.H. Wigmore, although it should be emphasized that on the Old Continent his work is relatively rarely the subject of attention that he deserves,

[32] J. Bentham, *Rationale*, [in:] *Evidence, Proof, and Facts: A Book of Source*, P. Murphy (ed.), Oxford 2003, p. 25.

[33] J. Konieczny, *Z zagadnień teorii dowodzenia w procesie karnym*, Warszawa 2020, p. 23.

[34] See: B. Adamiak, *Dowody i postępowanie wyjaśniające*, [in:] *Postępowanie administracyjne i sądowoadministracyjne*, B. Adamiak, J. Borkowski (eds.), Warszawa 2019, pp. 266–314.

[35] D. Johnstone, G. Hutton, *Blackstone's Police Manual. Evidence & Procedure*, Oxford 2009, p. 93.

still the legacy is recognized as the world rank monuments. Wigmore proposed a descriptive (methodological) approach to evidence instead of applying normative principles. He demonstrated that a skilful analysis of evidence requires reasoning naturally, as all people reason, and not according to legal norms[36]. When specifying synthetically the meaning of Wigmore's research, it can be said that the descriptive aspect consists in treating court evidence as a certain procedure that is methodologically defined and not specific to legal norms, thus also independent of the legal system, for instance based on the principles of logic which are the same everywhere and are not related to the content of the procedural law. On the other hand, the normative aspect consists in treating court evidence as a procedure regulated by law, which relates to the issue of the methods of taking evidence or its admissibility.

Wigmore was convinced that a systematic approach to examining evidence, which is based on the foundations of logic, would benefit both scholars and legal practitioners. He had no illusions about the difficulty of the task that he set before himself but was motivated by the belief that the science of evidence reasoning cannot afford to be primitive and neglected[37]. He also identified that the assumptions of his research led to the target of developing a certain method that allows us to increase awareness and formulate verbally the reasons why a large amount of evidence is to convince us to formulate such and no other conclusions. This method also leads to the justification of why conclusions may or should be different when some of the evidence changes. If we are able to establish and work out a mathematical equation, why could we not establish and work out equations for evidence reasoning in court[38]. A similar approach, intended to show the common feature of evidence in general, makes us treat

[36] See: J.H. Wigmore, *The Problem of Proof*, "Illinois Law Review" 1913, vol. VIII, No. 2, pp. 1–15.

[37] P. Roberts, C. Aitken, *The Logic of Forensic Proof: Inferential Reasoning in Criminal Evidence and Forensic Science: Guidance for Judges, Lawyers, Forensic Scientists and Expert Witnesses*, London 2014, p. 64.

[38] J.H. Wigmore, *op. cit.*, p. 4.

the evidence as the idea of the role of linking data with hypotheses or with facts proven by inferential reasoning[39].

The evidence corresponds to the principle of objective truth that is present in the administrative procedure. It obliges the public administration body to establish the correct facts of the case. As indicated in the doctrine, this principle refers to the precise explanation of the facts of the case and is implemented primarily by the provisions regulating the evidentiary proceedings, imposing the assessment of the fact of proving individual circumstances based on all evidence[40]. Moreover, the principle of objective truth has a great influence on the shaping of the entire proceedings, especially in the distribution of the burden of proof in administrative proceedings. Therefore, as a result, the administrative body is obliged to exhaustively examine all the factual circumstances related to a given case in order to create a real image of it and obtain a basis for the correct application of the law[41].

It is not difficult to notice that there are also issues of facts or factual circumstances that require commentary around the issue of evidence. As in the case of evidence, there are tendencies in the literature on the subject to give universal character to considerations of facts and factual findings that are far from legal norms[42]. Moreover, on the basis of the considerations on factual findings, we can encounter many views in the literature as to how they should be conducted by lawyers, although this is an issue that is so extensive and complicated that we will limit ourselves only to a reference,

[39] W. Twining, *Rethinking Evidence. Exploratory Essays*, Cambridge 2006, pp. 438–439.

[40] P. Przybysz, *Kodeks postępowania administracyjnego. Komentarz*, Warsaw 2021.

[41] See: W. Dawidowicz, *Ogólne postępowanie administracyjne. Zarys systemu*, PWN, Warsaw 1962, p. 108; M. Grzeszczuk, *Zasada prawdy obiektywnej jako zasada stosowania prawa*, "Studia Iuridica Lublinensia" 2016, vol. XXV, No. 1, pp. 269–290.

[42] See: S. Haack, *Evidence Matters: Science, Proof, and Truth in the Law*, Cambridge 2014, pp. 11–16.

which the Reader – who could be interested in the subject – might wish to explore[43].

Let us focus on taking into account what facts we can deal with under the law. The traditional typology of facts in the evidential context is as follows:

- *ultimate probandum* it is the main fact of a case; its determination rests with the party who bears the burden of proof;
- *factum probandum* is a fact to be proved, sometimes briefly referred to as *probandum*;
- *factum probans* it is a proving fact, that is, a fact that provides support for *factum probandum*;
- *interim probandum* is a fact to be proved that either supports or denies, directly or indirectly *ultimate probandum* in a case;
- *penultimate probandum* is used to prove the aspect of the main fact which determines the essence of the decision-maker's decision[44].

It is worth adding that according to F.J. Bex, one more category can be defined – *facta explananda* – that is, facts that are to be explained, in other words: states of affairs described in a justified manner in sentences and sentences explaining various issues. We also need to indicate here that they can play both an evidence and explanatory role[45].

Undoubtedly, the facts play a far-reaching role as they activate the norms of substantive law, and the effective ascertaining of factual findings is one of the most imperative tasks of the participants in the process, be it criminal, civil, or administrative. Very often, disputes over establishing facts and proving them require consumption of much time[46]. To that end, one may wonder whether in such a case

[43] See: B. Schafer, *Twelve Angry Men or One Good Woman? Asymmetric Relations in Evidentiary Reasoning*, [in:] *Legal Evidence and Proof: Statistics, Stories, Logic*, H. Kaptein, H. Prakken, B. Verheij (eds.), Farnham 2009, pp. 255–282.

[44] T. Anderson, D. Schum, W. Twining, *Analysis of Evidence*, Cambridge 2005, pp. 383–384.

[45] F.J. Bex, *Arguments, Stories and Criminal Evidence. A Formal hybrid Theory*, Dordrecht 2011, pp. 12–13.

[46] D.A. Binder, P. Bergman, *Fact Investigation: From Hypothesis to Proof*, St. Paul 1984, pp. 3–4.

it is necessary to develop any standards related to evidence and factual findings under the law. In the scientific stream, which is the inspiration for these considerations, we can note that no norm-maker has ordered the location of law as a section of the logic field, or as a field of epistemology, therefore it can be argued that the use of logic and epistemology is beyond control. Thus, there is no need to write down general rules of legal evidence, nor to define the level of intellectual qualifications of persons making factual findings. We just need sane laymen, not logicians or statisticians, to judge and make decisions[47].

It seems worth sharing the view that logic is the most important tool in making factual findings, as it becomes a universal tool for solving legal problems. Hence, such a philosophy, present – though perhaps insufficiently established – in legal sciences, will guide further considerations on the issue of evidence in administrative justice.

4. Evidence in the Judicature of Administrative Courts – Selected Examples

Administrative judiciary is often confronted with complex cases in which the means of evidence are of a very diverse nature, although it may seem that such a situation occurs primarily in common courts. As J. Chmielewski points out, the reasons for this state of affairs should be sought primarily in three factors:

- systemic changes;
- harmonization of Polish law with European Union law;
- technological progress[48].

As the author indicates, both the constitutional and administrative substantive law has undergone significant transformations with regard to individual regulations and legal institutions due to the systemic shift. The political changes themselves did not have such

[47] A. Stein, *Foundations of Evidence Law*, Oxford 2005, pp. 178–179.

[48] J. Chmielewski, *Ciekawe środki dowodowe w postępowaniu administracyjnym – uwagi na tle orzecznictwa sądów administracyjnych*, "Palestra" 2016, No. 7–8, pp. 27–28.

a large impact on administrative law, as a significant responsibility for this state of affairs should be assigned to the Europeanisation of administrative law, understood as a dynamic, one-sided process of the influence of European administrative law on the administrative law of the Member States. This is mainly about the implementation of European Union law, application of its legal principles, or taking into account the jurisprudence of the Court of Justice of the European Union. The third factor presented by the author covers socio-economic issues related to technological progress, which primarily affects the law and administrative procedure due to its progressive computerization, but also including telecommunications devices or scientific research achievements among the means of evidence[49].

The objective of this part of the paper is to review and select case law in terms of cases where evidence beyond what may be said to be classical understanding has played an important role in clarifying the facts by administrative bodies. Due to the very extensive research issues that could constitute the basis of more than one legal monograph, the author decided to narrow the search to issues related to the application of new technologies. It seems that such a limitation is justified in the light of the social changes taking place in the world, which involve the use of IT achievements in everyday life, and certainly also affect the shape of legal practice.

Let us consider a case where the subject of the considerations was, inter alia, the issue of evidence in the form of electronic documents under the provisions of tax law[50]. G.L.S.A., with its seat in G., applied for an individual interpretation of tax law provisions regarding the possibility of reducing the tax base by including expenses documented with source evidence stored in digital form as tax-deductible costs. When presenting a future event, the company indicated that in connection with its operations and transactions, it receives – within the meaning of the Accounting Act of September 29, 1994 – accounting evidence from contracting partners, such as invoices, bills, receipts, debit notes, credit notes and other

[49] *Ibidem*, pp. 27–28.

[50] Judgment by the Voivodship Administrative Court in Gdansk, 10 August 2021, (I SA/Gd 874/21), Centralna Baza Orzeczeń Sądów Administracyjnych.

documents recording a particular economic event (purchase of goods or services from other entities) in paper form, constituting the basis for making entries in the accounting books. In order to improve the circulation of documents and their archiving, the applicant plans to implement an electronic document storage system, "S."). After scanning, the documents will be saved in electronic form with the data that were on the paper document, and will be stored on the internal server, unchanged, for the time required by law for individual documents. At the request of the tax authorities, the applicant will be able to print the document and save it on an electronic data carrier; within the limits that enable maintaining the authenticity of the origin and integrity of the document. The system would also be used to automatically settle employee expenses related to business trips.

The company asked, inter alia, whether in the light of Art. 15 sec. 1 of the Act of February 15, 1992 on corporate income tax in connection with Art. 9 sec. 1 of this Act, the applicant's action would be correct, if it consisted in the reduction of the taxable base with corporate income tax by tax-deductible costs recognized on the basis of expenses recognized in the books of accounts (booked) on the basis of source evidence, the original versions of which were destroyed, and only copies in the digital form remained. Moreover, the company wanted to clarify whether its position was correct that in the future event presented in the application, the applicant has the right to deduct VAT from VAT invoices documenting the purchase of goods or services in connection with the economic activity conducted by the applicant and kept by the applicant in the system only as digital documents, without the applicant keeping the paper version of VAT invoices in a situation where the paper version of VAT invoices was destroyed by the applicant. The company believed that such action would be correct.

The Director of the National Revenue Information, referring to Art. 13 § 2a, Art. 165a § 1 in connection with Art. 14h of the Tax Ordinance Act, refused to initiate proceedings, indicating, among others, the fact that the Corporate Income Tax Act did not in any way address the question of how accounting documents should be kept. Thus, the body is not authorized to interpret the provisions

of the Accounting Act and may not sanction (by individual interpretation) the solutions adopted by the applicant in terms of entries in the accounting books and recognition of expenses in the accounting books. The applicant's questions are not *sensu stricto* issues that are related to the subject, entity, creation of a tax liability, tax base, tax settlement, but also technical issues related to the method/system/procedure for storing documents in electronic form, requiring the assessment of the procedure presented in the application in terms of evidence referred to in the provisions of Section IV of the Tax Ordinance on tax proceedings and regulating the powers of tax authorities during tax proceedings or inspections. The charging company's request therefore concerns the provisions of the Accounting Act which are not the provisions of the tax law and the provisions of the Tax Ordinance governing the powers of the tax authorities to assess evidence collected in tax or audit proceedings, and it cannot constitute the basis for initiating proceedings to issue an individual interpretation. The Director of the National Revenue Information, by way of a decision, having examined the party's complaint, upheld the appealed decision.

The court has quashed the contested decision and indicated that the company may reasonably expect an answer whether the method of storing accounting documents in electronic form in the context of the Accounting Act is correct, and whether it is correct that the expenditure documented in electronic form or stored in electronic form would document the expense constituting the tax-deductible cost in the context of the cited provisions of the Corporate Income Tax Act.

In another case, which was the subject of a cassation appeal before the Supreme Administrative Court, the dispute concerned factual findings and the lack of evidence regarding the issues of regulations related to the provision of air services[51].

By decision of […] November 2018, the President of the Civil Aviation Authority, pursuant to Art. 205a sec. 1, Art. 205b sec. 1 point 2 and Art. 209b sec. 1 of the Act of July 3, 2002 – Aviation Law

[51] Judgment by the Supreme Administrative Court, 25 August 2021, (II GSK 260/21), Centralna Baza Orzeczeń Sądów Administracyjnych.

and Art. 4, Art. 7, Art. 8, Art. 9, Art. 14, Art. 16 sec. 2 of Regulation EC 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation No. 295/91 found an infringement by the air carrier – [A] with its seat at […] consisting in the absence of:

- compensation payments to the complainant passenger in the amount of EUR 400 (Art. 7 (1) (b) of Regulation (EC) No. 261/2004);
- reimbursement to the complainant of the full cost of the unused ticket in the amount of PLN 771.36 (Art. 8 (1) of Regulation (EC) No. 261/2004);
- providing assistance to the passenger (Art. 9 of Regulation (EC) No. 261/2004);
- information on the passenger's rights (Art. 14 (2) of Regulation (EC) No 261/2004).

The authority imposed an obligation on the carrier to remove the infringement found in point a) and b) of the decision within 14 days from the date of the decision and a fine in the total amount of PLN 1,600. The authority justified this by the fact that the carrier did not offer the passenger another flight, nor refunded the full cost of the ticket, and refused to compensate the complainant. The carrier, who was called to provide explanations, stated that the passenger was not admitted on board because he was under the influence of alcohol. To confirm this, he presented the CEO's declaration, the director of the […] and [B] S.A. branch of the handling agent servicing the flight. The carrier did not provide evidence in the form of a monitoring record of the situation at the entrance to the plane (at the gate), or tests with a breathalyser. The managers of the Warsaw airport did not present the evidence either […]. The applicant submitted statements from five witnesses, which showed that neither he nor another person from the group had acted negatively. The carrier's explanations did not convince the authority that the passenger was under the influence of alcohol or other intoxicants and posed a threat to the safety of passengers and crew on board. In the opinion of the

authority, the passenger was groundlessly denied boarding, and for unjustified reasons.

The carrier decided to submit an application for reconsideration of the case by the President of the Civil Aviation Authority, who eventually revoked his own decision and stated that the air carrier did not breach the provisions of Regulation (EC) No. 261/2004. The Provincial Administrative Court in Warsaw upheld the complaint against the above decision pursuant to Art. 145 § 1 point 1 letter c) of the Act on Proceedings Before Administrative Courts due to its issuance in breach of Art. 7, Art. 75 § 1 and Art. 77 § 1 in connection with Art. 80 of the Code of Administrative Procedure. The court found that the authority had not taken all steps necessary to thoroughly clarify the facts and to settle the case, and the assessment of the evidence gathered in the case was arbitrary. In the opinion of the Court of First Instance, the facts established in the contested decision – vital from the point of view of a possible breach of the provisions of Regulation (EC) No. 261/2004 – were not sufficiently supported by the evidence collected. In the opinion of the second-instance authority, the applicant had rightly been denied boarding due to his behaviour. Such arrangements were made on the basis of a letter from [B] S.A. with its seat in W. of November 19, 2018 and correspondence between [B] S.A. with its seat in W., and [A] of August 27, 2018, but a detailed analysis of these documents, in particular in the context of the applicant's submissions, did not allow it to be established that the applicant, under the influence of alcohol, had behaved in a manner that would give rise to denied boarding. In the letter of 19 November 2018, there is no description of the event in question, and in particular no description of the applicant's behaviour. It refers to a group of people and behaviour indicating significant alcohol consumption, without specifying that it posed a threat or risk to a passenger, other passengers, crew or property. In such a situation, the authority should show initiative in collecting evidence, which is required by Art. 7 and Art. 77 of the Code of Administrative Procedure. The evidence gathered until that time gave no grounds for an unequivocal statement that there was a justified – at the fault of the passenger – denied boarding.

Ultimately, the authority filed a cassation appeal to the Supreme Administrative Court, which dismissed it, pointing out, inter alia, that the grounds for the assessments must be based on the facts, and the contested decision was annulled due to deficits of factual findings underlying its issuance and deficits in assessment collected regarding the evidence.

The analysis of the case law also shows that materials from modern internet services are increasingly presented as evidence in administrative proceedings. This is especially true in real estate cases, where the parties use publicly available internet maps or satellite imagery as evidence. This problem had to be faced by the Provincial Administrative Court in Poznań. When examining the appeal, the court noted that the administrative files attached to the appeal contained screenshots – orthophotomaps, as well as printouts of photos from the Google Earth application, with the numbers of plots belonging to the complainant. Printouts from Google Earth accompany the decision of the second instance authority of (…) September 2020 on including evidence in the case file; in the opinion of the authority, all evidence indicates that the areas actually used for the plots declared in the application are smaller than indicated by the complainant. The court found that pursuant to Art. 75 § 1 of the Code of Administrative Procedure, everything that may contribute to the clarification of the case, and is not contrary to the law, should be admitted as evidence. In particular, the evidence may include documents, testimonies of witnesses, expert opinions and visual inspections. The court has no doubts that the applicable law does not prevent the authority from confronting the findings resulting from the orthophotomap with photos from the Google Earth application. Consequently, it should be assumed that the correctness of the designated area was also verified against these printouts and based on the date corresponding to the submitted payment request. Thus, the court stated that the applicable law does not oppose the confrontation by the authority of the findings resulting from the orthophotomap with the evidence from photos from the Google Earth application[52].

[52] Judgment by the Voivodship Administrative Court in Poznan, 7 May 2021, (III Sa/Po 769/20), LEX: No. 3184698.

In another case, the body represented by the Silesian Voivode, in order to conduct the explanatory proceedings, used photos from Google Street View and electronic maps of this service provider to determine whether the designed building is adjusted to the scale and architectural form of the existing buildings. The Provincial Administrative Court in Gliwice, examining the appeal, noted that the mere reference to the Google map, without precisely describing and verifying the buildings in this area, could not be considered sufficient and convincing. The collected evidence did not provide a basis for determining what type of development was there on the neighbouring plots, as the administrative authorities had not made any analysis in this respect and therefore, in such circumstances, the decision of the authority should be considered at least premature. It cannot be considered that re-proceeding with the case was limited only to adding to the case file the printouts of Google Maps as sufficient and fulfilling the recommendations of the court contained in the said judgement[53].

In administrative matters, there is also evidence that is close to the current achievements of science. An example may be a case in which the court controlled the legality of a personal order to dismiss a police officer from the service since he drove a passenger car while being drunk and caused a road accident. The court, using the opinion based on biological research, stated that the authority had correctly established that it was the policeman who had been dismissed from the service – contrary to his denials – that was driving the vehicle. This was indicated by the DNA test results from the vehicle's steering wheel. As noted by the administrative court of first instance: "if we were to accept the extremely unlikely version of the incident presented in the course of the appeal proceedings by the applicant that the vehicle was driven by another, unknown man, there should be at least a mixture of the party's and other person's traces on the driver's side airbag. Yet, no genetic micro traces of another person, apart from the complainant, were disclosed there

[53] Judgment by the Voivodship Administrative Court in Gliwice, 13 June 2019, (II SA/Gl 140/19), LEX: No. 2692992.

[…]"[54]. In the above facts, the public administration body took into account the evidence that had been collected and prepared as part of the preparatory proceedings. Moreover, as J. Chmielewski points out, the use of genetic tests as evidence is also important in cases related to environmental protection or in proceedings conducted by sanitary inspection authorities[55].

In practice, you can come across requests from the parties regarding the use of evidence from the monitoring recording system located in the public administration building to submit relevant documents or the use of recordings of calls or video recordings by administrative bodies[56]. Although administrative and judicial practice show that such evidence is used in administration, its use may often raise further doubts and require an expert opinion.

An example of it can be a case related to the disciplinary ruling of the Commander-in-Chief of the Border Guard, who upheld the disciplinary ruling of the Commander-in-Chief of the Border Guard Unit on the imposition of a reprimand to the officer. Among the evidence in the case, there were recordings of the course of the inspection of the duty. The complainant alleged that the authority had not established whether the minute-long recording of the inspection performed by the services had been made on the basis and within the limits of the applicable law. In the event that the legality of the recording is confirmed, failure to conduct appropriate tests and assessing the credibility of the recording by seeking the necessary opinion of a competent phonoscopy expert, which consequently leads to the conclusion that the act attributed to the complainant does not constitute an act for which the Border Guard officer is disciplinary liable. In the opinion of the Court, the analysis of the files of the disciplinary proceedings documenting the above-mentioned acts does not allow accepting complainant's claims regarding the possibility of manipulating the content of the

[54] Judgment by the Voivodship Administrative Court in Łódź, 24 October 2012, (III SA/Łd 593/12), Centralna Baza Orzeczeń Sądów Administracyjnych.

[55] J. Chmielewski, *op. cit.*, p. 31.

[56] *Vide:* Judgment by the Voivodship Administrative Court in Poznań, 17 August 2021, (III SA/Po 114/21), Centralna Baza Orzeczeń Sądów Administracyjnych.

recording. The inspector's mobile phone was secured and handed over to the Operations and Investigations Department of the Border Guard Unit for an expert opinion. The data extraction performed showed that the source file was missing, and therefore it was not possible to check the integrity of the file located on the above-mentioned DVD). The file was deleted due to its size. Accordingly, the authority cannot be criticized for refusing the request of the complainant's representative for the appointment of a specialist phonoscopy expert in a situation where the recording (MP4 file) was previously secured from the inspected official mobile phone on a DVD.

In the court's opinion, during the disciplinary proceedings, the course of the event was clearly established, in particular as to the nature and content of the questions asked by the inspector and the answers given by the complainant. This is mainly confirmed by consistent and logical testimonies of witnesses. Therefore, the authority rightly gave this evidence the value of credibility. Whereas evidence in the form of a recording made with the use of the official mobile phone by the inspecting person was one of the elements of the entire evidence collected in the course of the proceedings and was assessed by the authority in this context[57].

Although this part of the paper refers, in accordance with the presented preliminary assumptions, to the jurisprudence of administrative courts, it seems that the use of exemplification related to a public administration body should not be considered as useless. The President of the Office of Competition and Consumer Protection (UOKiK) stated that the prices of dietary supplements offered by the S. brand were determined as a result of an agreement restricting competition[58]. S. sp. z o.o. with its registered office in Warsaw is a company that markets dietary supplements in Poland, including vitamins, herbs and trace elements produced by the American company: S. Inc. They are sold both in stationary points of sale, mainly in pharmacies, and via the Internet. In the issued decision, the President

[57] Judgment by the Voivodship Administrative Court in Warsaw, 18 November 2020, (II SA/Wa 1064/20), LEX: No. 3157274.

[58] Decision of the President of the Office for Competition and Consumer Protection, 27 August 2021, No. DOK-4/2021.

of UOKiK stated that S. agreed with its contractors – retailers on the application of minimum resale prices for dietary supplements. The unlawful agreement lasted at least from March 2010 to at least October 2017. The arrangements were initially made in writing and were precisely expressed in the anticompetitive provisions contained in the agreements between S. and the distributors. Additionally, the agreement was supported by informal activities, based on e-mail contacts, telephone conversations and face-to-face meetings. As of 2015, the content of the agreements with the distributors was changed and the provisions relating to the use of fixed retail resale prices were removed from them. Nevertheless, in the opinion of the authority, S. and the retail distributors continued to make arrangements based on e-mail and telephone contacts as well as face-to-face meetings. S. monitored the prices charged by its trading partners and took action if any of them attempted to sell the supplements cheaper. For failure to comply with the arrangements, the distributors were threatened by retaliatory measures, such as the loss of preferential terms of cooperation, or even termination of the agreement. The sellers also watched each other's rates and informed S. Polska if any of them used any lower ones. The decision is not final and may be appealed against to the court, but due to the above-mentioned circumstances, it seems that at the stage of possible administrative court proceedings, the case will arouse scientific interest.

As it is apparent from the review of the jurisprudence of administrative courts, in administrative practice, one can often find evidence that is not necessarily regulated in the provisions of the Code of Administrative Procedure as documents, testimonies of witnesses, expert opinions, inspection or questioning of the parties. Current views of science and jurisprudence seem to consider such evidence as so-called unnamed evidence. The provisions of law do not specify in detail the rules and procedure for carrying them out, but they are used to clarify the case and constitute an important source of knowledge of the actual situation[59]. At this point, it is worth high-

[59] See: G. Łaszczyca, B. Wartenberg-Kempka, *Środki dowodowe nienazwane w ogólnym postępowaniu administracyjnym*, "Roczniki Administracji i Prawa: Teoria i praktyka" 2000, No. 1, pp. 58–59.

lighting the remark formulated by M. Rudnicki, who believes that the current development of technology will lead to the necessity to either supplement the catalogue of statutory evidence, or to create a universal regulation on non-statutory evidence. It may turn out that soon electronic sources of information will completely replace the traditional ones, and the scope of the 'special knowledge' needed to obtain a given piece of information will be so large that it will be necessary to turn to entire institutes for help in this type of issues, and not to individual experts, even in administrative matters[60].

5. Electronic Evidence in Administrative Justice

The provided examples related to the jurisprudence of administrative courts demonstrate that it is crucial to consider the role of new media, which can be a source of electronic and expert evidence. In the first case, we are dealing with a new category of evidence that the administrative courts are beginning to face, and its use will certainly soon become the norm. In the second case, we are dealing with a category of evidence that is known to the judiciary, also to administrative courts, but in this case, in the methodological context in recent decades, significant changes have been taking place. At the outset, the currently proposed electronic evidence should be quoted: "*Electronic evidence is any data resulting from the output of an analogue device and/or a digital device of potential [probative] value that are generated, processed, stored or transmitted using any electronic device. Digital evidence is that electronic evidence that is generated or converted to a numerical format*"[61]. This definition does not seem to raise any doubts and can be adopted for the purposes of further considerations.

---

[60] M. Rudnicki, *Zagadnienie otwartości katalogu środków dowodowych w ogólnym postępowaniu administracyjnym*, "Studia Prawnicze i Administracyjne" 2013, No. 2, p. 72.

[61] M.A. Biasiotti, J.A. Cannataci, J.P. Mifsud Bonnici, F. Turchi, *Introduction: Opportunities and Challenges for Electronic Evidence*, [in:] *Handling and Exchanging Eectronic Evidence Across Europe*, M.A. Biasiotti, J.P. Mifsud Bonnici, J. Cannataci, F. Turchi (eds.), Cham 2018, p. 4.

The need to include electronic evidence in administrative proceedings is enormous, at the same time it is necessary to take into consideration the standards of handling such evidence and its possible evidence strength. This is imperative as the administrative courts, like the entire public service sector, must keep up with the socio-economic changes that are taking place due to electronic services. Such a need was noticed under international law, which is why in 2016 the Council of Europe presented a study on electronic evidence in civil and administrative procedures[62].

The author has attempted to examine how individual countries approach the issue of electronic evidence in administrative proceedings and how the adopted legal regulations are shaped. The problems formulated by the researcher include the following issues:

- If a party wants to submit evidence from publicly available internet websites, will a court customarily require that the copies of websites be collected in a specific manner to ensure the authenticity – such as the use of a process server or an appointing by a court a digital evidence specialist?
- Regarding administrative proceedings, are there any special rules that relate to the submission of evidence, especially in terms of electronic signatures, and whether a specific form of electronic signature is required when submitting evidence electronically?
- Is there a presumption referring to electronic evidence regarding it as 'reliable', 'in order', 'accurate', 'properly set or calibrated' or 'working properly'?
- Is a party wishing to submit electronic evidence in administrative proceedings, required to obtain it with the use of a specific procedure, as required by law or otherwise?

[62] See: S. Mason, *The Use of Electronic Evidence in Civil and Administrative Law Proceedings and Its Effect on the Rules of Evidence and Modes of Proof. A Comparative Study and Analysis*, European Committee on Legal Co-Operation (CDCJ), Council of Europe, Strasbourg 2016.

– If electronic evidence is not obtained in accordance with any standard or special procedure, will the court take this into account in deciding whether to admit the evidence?[63]

In the case of evidence such as content from publicly available websites, the vast majority of courts do not have specific requirements, such as the use of IT experts to make sure that the content presented by the website is authentic, although, for instance, in Andorra, one might be required to authenticate the website printout certificates from the notaries. In turn, in Armenia, the practice of lawyers is to provide links to websites so that the court can check the evidence and make sure it is authentic. What is more, if any doubts arise, then, in accordance with the provisions of the Code of Administrative Procedure, the court may appoint an expert to help solve the problem[64].

It looks quite the same way in terms of the principles of admissibility of evidence in administrative proceedings, especially in the context of electronic signatures and forms of electronic transmission of documents. In fact, only Estonia requires the use of an Estonian electronic signature, even though it has been indicated that common practice allows the absence of this signature[65].

A slightly more complex problem arises with regard to the presumption of credibility of electronic evidence. Such a presumption exists in England and Wales, however it is subject to criticism. In Estonia, there is a presumption that all evidence is considered credible, with the proviso that if the evidence is contested by the opposing party, then it must be certified. In Hungary, the position will depend on the methods used to sign the document. In the Russian Federation, there is a presumption that electronic data are obtained in the manner provided for by the law. In Portugal and Spain, the presumption will apply depending on whether the digital data are signed with an advanced electronic signature[66].

[63] *Ibidem*, pp. 52–56.
[64] *Ibidem*, pp. 10–11.
[65] *Ibidem*, p. 13.
[66] *Ibidem*, p. 19.

The above-mentioned development reveals that in most countries associated with the Council of Europe, the vast majority of issues related to electronic evidence in administrative or court-administrative proceedings are not regulated by legal norms.

This does not change the fact that the preparation of international standards for electronic evidence, which would also apply to administrative judiciary, is still under discussion[67]. Such endeavours resulted in the fact that in 2019 the Council of Europe published guidelines for member states regarding the use of electronic evidence:

- Courts should not refuse the use of electronic evidence and should not deny its legal effect only because it is collected and/or submitted in electronic form.
- In principle, courts should not deny the legal effect of electronic evidence only because it lacks an advanced, qualified (or similarly secured) electronic signature.
- Courts should be aware of the probative value of metadata and of the potential consequences of not using them.
- Parties should be permitted to submit electronic evidence in its original electronic format, without the need to supply printouts.
- Electronic evidence should be collected in an appropriate and secure manner, and submitted to the courts using reliable services, such as trust services.
- Having regard to the higher risk of the potential destruction or loss of electronic evidence compared to non-electronic evidence, Member States should establish procedures for the secure seizure and collection of electronic evidence.
- Courts should be aware of the specific issues that arise when dealing with the seizure and collection of electronic evidence abroad, including in cross-border cases.
- Courts should co-operate in the cross-border taking of evidence. The court receiving the request should inform the

[67] See: S. Mason, *Towards a Global Law of Electronic Evidence? An Exploratory Essay*, "Amicus Curiae" 2015, Issue 103, pp. 19–28.

requesting court of all the conditions, including restrictions, under which evidence can be taken by the requested court.
- Electronic evidence should be collected, structured, and managed in a manner that facilitates its transmission to other courts, in particular to an appellate court.
- Transmission of electronic evidence by electronic means should be encouraged and expedited in order to improve efficiency in court proceedings.
- Systems and devices used for transmitting electronic evidence should be capable of maintaining its integrity[68].

Apart from the above-mentioned problem of the lack of regulation of issues related to electronic evidence in the legal systems of individual countries, as well as under international law, cases related to a broader approach to electronic evidence seem to be imperative. Its wider and wider use in administrative matters before the court does not raise any doubts, although, as we know from the previous considerations, under Polish legal regulations, administrative courts have very limited possibilities of taking evidence. This state of affairs seems inconsistent with the growing importance of electronic evidence. Yet, attention is drawn to the fact that electronic means of communication allow for interrogation of the parties, and at the same time there are problems with verifying the authenticity of electronic evidence, as, for instance, the Lithuanian Court of Appeal noted that the screenshots do not give full confidence[69] therefore, there may be a need for a wider use of experts in administrative court proceedings.

Certainly, the awareness and expertise of lawyers with regard to dealing with electronic evidence is rising, but there is still a lack of specific standards. The collection and processing of electronic evidence may require countries to adopt legal regulations to endeavour to ensure the integrity, confidentiality, and security of such data. The lines of inquiry around the digital world and evidence

[68] Council of Europe, *Electronic Evidence in Civil and Administrative Proceedings. Guidelines and Explanatory Memorandum*, Council of Europe, Strasbourg 2019, pp. 8–9.

[69] Court of Appeal of Lithuania, 27 April 2018, Case No. e2A-226-516/2018.

in administrative judiciary will keep growing as the social reality changes. Already at this stage, it can be noticed that in relation to the previously discussed guidelines, science presents its own desiderata – on the basis of international standards being developed – in order to take into account issues such as human rights, inadmissibility of evidence obtained illegally (e.g. resulting from data theft), as well as technological achievements in the form of cloud computing, blockchain or the application of artificial intelligence[70]. These and other interesting ideas for using new technologies in administrative judiciary are presented in another chapter of this book.

6. Conclusions

In view of the research problems presented in the introduction, many conclusions can be drawn, which stem from the deliberations. Seemingly, at present, the limited competences of the administrative judiciary pose a major problem in Poland. These, in turn – due to the inability to take a substantive decision – become the cause of low effectiveness of administrative proceedings in the form of excessive lengthiness carried out cases, and the victory of a party before an administrative court does not have to mean that the party's problem will be resolved as expected. Nonetheless, it should be borne in mind that the doctrine includes both supporters of maintaining a fully cassatory model of administrative procedure and many enthusiasts of implementing the reformatory model. Maintaining the current cassatory model may, of course, be tantamount to changes and one of the solutions used in different countries is the imposition by administrative courts of fines on administrative bodies that do not comply with court decisions. This solution may, however, raise doubts because *de facto* this means that the taxpayer, owing to whom these administration bodies function, will pay for errors of administrative bodies anyway.

[70] R. Jokubauskas, M. Świerczyński, *Is Revision of the Council of Europe Guidelines on Electronic Evidence Already Needed?*, "Utrecht Law Review" 2020, vol. 16, No. 1, p. 17.

The variety of means of evidence in administrative proceedings, as well as their often-complicated nature, may be a hindrance for administrative bodies, which do not necessarily have to be competent to consider the strength of particular pieces of evidence. For these reasons, it seems that, in highly complex cases, administrative courts should be able to take evidence and make their own factual findings, instead of being bound by findings made by an administrative body. But this does not have to mean a departure from the general cassatory model of administrative judiciary however, the legislator should strive to increase the powers of administrative courts in taking evidence. The catalogue of evidence specified in article 106 of LPAC should be extended, in particular, to the possibility of hearing witnesses and admitting evidence from an expert opinion, when it is relevant in relation to the circumstances of the case and justified by the interest of one of the parties.

As the case study referring to the analysis of selected decisions of administrative courts has shown, public administration bodies often struggle with complicated, multi-faceted cases that collide with new technologies or scientific achievements. Often, comprehending the essence of the case may require gathering special information, which neither the administration authority nor the court must hold at its disposal. This means that it is necessary to resort to the opinions of experts. Unfortunately, due to the lack of legal regulations, criminal, civil and administrative procedures have to combat the problem of low-quality expert opinions, and the issues related to remuneration and assessing the competences of individual people are not sufficiently regulated. This provides justification to formulate the conclusion that an Act on experts needs to be drafted urgently, because despite numerous attempts over the last thirty years, it has not been possible to introduce such a regulation into Polish law so far.

A considerable challenge for the Polish, Hungarian and international legislators is the issue of electronic evidence, which will inevitably have a special meaning, and one can even be convinced that it will become popular. The specificity of such evidence is that it is copyable, but also susceptible to manipulation. Furthermore, justified concerns may occur as to their authenticity when presented

by a party in administrative proceedings, which additionally reinforces the need to establish general rules for the work of experts for the judiciary and administrative bodies. It seems that under international law, and perhaps also under European Union law, it is crucial to strive to regulate the issue of electronic evidence, in particular with regard to their integrity and archiving methods. Many administrative matters can now be dealt with electronically, and the party has the option of attaching or signing electronic documents, still it seems that in many European countries these issues are considered on the basis of emerging customs rather than legal norms. Their standardization will become critical in the context of administrative matters of a cross-border character.

The author hopes that the deliberations included in this research paper will allow for a more extensive reflection on the subject of evidence law in administrative judiciary and will become the basis for detailed proposals *de lege ferenda* presented in this chapter. Owing to the fact that the shape of administrative judiciary is closely associated with systemic issues, the presented problems require thorough discussions in the legal world, as well as the involvement of various groups of specialists not only in the field of administrative law, but also constitutional and system law, and scientists.

REFERENCES

Adamiak B., *Dowody i postępowanie wyjaśniające*, [in:] *Postępowanie administracyjne i sądowoadministracyjne*, B. Adamiak, J. Borkowski (eds.), Wolters Kluwer, Warszawa 2019.

Anderson T., Schum D., Twining W., *Analysis of Evidence*, Cambridge University Press, Cambridge 2005.

Banaszak B., Wygoda K., *Funkcjonowanie sądownictwa administracyjnego w Polsce w zderzeniu z problemami współczesności – wybrane zagadnienia*, "Studia Iuridica Lublinensia" 2014, No. 22.

Bentham J., *Rationale*, [in:] *Evidence, Proof, and Facts: A Book of Source*, P. Murphy (ed.), Oxford University Press, Oxford 2003.

Bex F.J., *Arguments, Stories and Criminal Evidence. A Formal hybrid Theory*, Springer, Dordrecht 2011.

Biasiotti M.A., Cannataci J.A., Mifsud Bonnici J.P., Turchi F., *Introduction: Opportunities and Challenges for Electronic Evidence*, [in:] *Handling and Exchanging Eectronic Evidence Across Europe*, M.A. Biasiotti, J.P. Mifsud Bonnici, J. Cannataci, F. Turchi (eds.), Springer, Cham 2018.

Binder D.A., Bergman P., *Fact Investigation: From Hypothesis to Proof*, West Group Publishing, St. Paul 1984.

Chlebny J., Piątek W., *Ewolucja ustrojowa i kompetencyjna sądownictwa administracyjnego*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2021, vol. 94–95, No. 1.

Chmielewski J., *Ciekawe środki dowodowe w postępowaniu administracyjnym – uwagi na tle orzecznictwa sądów administracyjnych*, "Palestra" 2016.

Dawidowicz W., *Ogólne postępowanie administracyjne. Zarys systemu*, PWN, Warsaw 1962, p. 108.

Grzeszczuk M., *Zasada prawdy obiektywnej jako zasada stosowania prawa*, "Studia Iuridica Lublinensia" 2016, vol. XXV, No. 1.

Flisek K., *Główne modele orzecznictwa sądów administracyjnych*, "Studia Prawnicze. Rozprawy i Materiały" 2018, vol. 23, No. 2.

Gut D., *Austria*, [in:] *Elementy ustrojowo-funkcjonalne sądownictwa administracyjnego w wybranych państwach europejskich*, B. Majchrzak (ed.), Institute of Justice, Warsaw 2020.

Haack S., *Evidence Matters: Science, Proof, and Truth in the Law*, Cambridge University Press, Cambridge 2014.

Hoffman I., *Application of Administrative Law in the Time of Reforms in the Light of the Scope of Judicial Review in Hungary*, "Studia Iuridica Lublinensia" 2020, vol. XXIX, No. 3.

Izdebski H., *Sądownictwo administracyjne w Europie*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2007, vol. 3, No. 4.

Jannsen S., *Towards and Adjustment of the Trias Politica: The Administrative Courts As* (*Procedural*) *Lawmaker; A Study of the Influence of the European Human Rights Convention and the Case Law by the European Court of Human Rights on the Trias Politica, in Particular the Position of Dutch Administrative Courts in Relation to the Administration*, [in:] F. Stroink, E van

der Linden (eds.), *Judicial Lawmaking and Administrative Law*, Intersentia, Antwerpen–Oxford 2005.

Johnstone D., Hutton G., *Blackstone's Police Manual. Evidence & Procedure*, Oxford University Press, Oxford 2009.

Jokubauskas R., Świerczyński M., *Is Revision of the Council of Europe Guidelines on Electronic Evidence Already Needed?*, "Utrecht Law Review" 2020, vol. 16, No. 1.

Kamiński M., *Efektywność kontroli sądowo-administracyjnej rozstrzygnięć wydawanych w procedurach administracyjnych trzeciej generacji. Rozważania na tle wybranych rozwiązań normatywnych w prawie polskim*, "Opolskie Studia Administracyjno-Prawne" 2019, vol. XVIII, No. 1.

Kamiński M., *Mechanizm i granice weryfikacji sądowoadministracyjnej a normy prawa administracyjnego i ich konkretyzacja*, C.H. Beck, Warsaw 2016.

Kłopocka-Jasińska M., *Kilka uwag o poszerzaniu zakresu merytorycznych kompetencji sądów administracyjnych w świetle art. 184 Konstytucji i konstytucyjnej zasady podziału władz*, "Przegląd Prawa i Administracji" 2020, vol. CXX, No. 1.

Kmieciak Z., *Efektywność sądowej kontroli administracji publicznej*, "Państwo i Prawo" 2010, No. 11.

Konieczny J., *Z zagadnień teorii dowodzenia w procesie karnym*, Dom Wydawniczy Elipsa, Warszawa 2020.

Łaszczyca G., Wartenberg-Kempka B., *Środki dowodowe nienazwane w ogólnym postępowaniu administracyjnym*, "Roczniki Administracji i Prawa: Teoria i praktyka" 2000, No. 1.

Mason S., *The Use of Electronic Evidence in Civil and Administrative Law Proceedings and Its Effect on the Rules of Evidence and Modes of Proof. A Comparative Study and Analysis*, European Committee on Legal Co-Operation (CDCJ), Council of Europe, Strasbourg 2016.

Mason S., *Towards a Global Law of Electronic Evidence? An Exploratory Essay*, "Amicus Curiae" 2015, Issue 103.

Ostojski P., *Standardy postępowania administracyjnego według ReNEUAL Modelu kodeksu postępowania administracyjnego Unii Europejskiej*, "Roczniki Administracji Publicznej" 2019, vol. 5.

Piątek W., *Nowe kompetencje do merytorycznego orzekania przez sądy administracyjne*, "Państwo i Prawo" 2017, No. 1.

Przybysz P., *Kodeks postępowania administracyjnego. Komentarz*, Wolters Kluwer, Warsaw 2021.

Roberts P., Aitken C., *The Logic of Forensic Proof: Inferential Reasoning in Criminal Evidence and Forensic Science: Guidance for Judges, Lawyers, Forensic Scientists and Expert Witnesses*, Royal Statistical Society, London 2014.

Rudnicki M., *Zagadnienie otwartości katalogu środków dowodowych w ogólnym postępowaniu administracyjnym*, "Studia Prawnicze i Administracyjne" 2013, No. 2.

Schafer B., *Twelve Angry Men or One Good Woman? Asymmetric Relations in Evidentiary Reasoning*, [in:] *Legal Evidence and Proof: Statistics, Stories, Logic*, H. Kaptein, H. Prakken, B. Verheij (eds.), Ashgate, Farnham 2009.

Skoczylas A., *Modele uprawnień orzeczniczych sądów administracyjnych w Europie*, "Państwo i Prawo" 2012, No. 10.

Stein A., *Foundations of Evidence Law*, Oxford University Press, Oxford 2005.

Szuster S., *Koncepcja merytorycznych kompetencji orzeczniczych sądów administracyjnych*, Unpublished PhD Thesis, Kraków 2009.

Twining W., *Rethinking Evidence. Exploratory Essays*, Cambridge University Press, Cambridge 2006.

Wigmore J.H., *The Problem of Proof*, "Illinois Law Review" 1913, vol. VIII, No. 2.

Wilbrandt-Gotowicz M., *Francja*, [in:] *Elementy ustrojowo-funkcjonalne sądownictwa administracyjnego w wybranych państwach europejskich*, B. Majchrzak (ed.), Institute of Justice, Warsaw 2020.

Wróbel L., *Art. 7*, [in:] *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, M. Jaśkowska, M. Wilbrandt-Gotowicz, A. Wróbel (eds.), LEX/el. 2021.