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Model of Adjudicatory Powers of Polish Administrative Courts

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Abstract
The issue of the shape of adjudicatory powers of administrative courts (cassation or substantive) is currently one of the most important research areas of the European doctrine devoted to judicial control of administration. These issues are currently being discussed in Poland, which translates into changes in the legislation regulating judicial-administrative procedure. The purpose of this article is to present, to a foreign reader, what the Polish model of judicial control of public administration currently looks like in terms of adjudicatory competences of administrative courts, with particular emphasis on the power to rule on the merits by administrative courts. In order to synthesise the issue in question, firstly the process of development of these competences is presented against the background of regulations of individual procedural acts. It is followed by a presentation of the reasons why the Polish adjudication model is supplemented with competences which make it possible for administrative courts to adjudicate on the merits. Then practical and doctrinal problems linked to a given adjudication model are dealt with. The conclusion of the article contains a summary of the above considerations, coupled with an attempt to fit the Polish adjudication model into the author's scheme of models currently found in Europe. The discussion ends with a forecast of further development of the presented model.

Keywords
judicial review of public administration; adjudicatory powers of administrative courts; cassation adjudication; substantive adjudication; proceedings before administrative courts

1. Introduction

The judicial review of public administration, developed over the course of the 19th century, was essentially (with a few exceptions) related to cassation rulings by administrative courts. These courts typically issued rulings that rendered administrative acts or administrative-legal actions invalid or ineffective, leaving the final adjudication of administrative matters to public administration bodies.[1]

1 On the systematics of cassation and substantive judgments see in D Gut, *Merytoryczne rozstrzygnięcia sądów administracyjnych jako przejaw ewolucji sądowej ochrony praw człowieka* [Substantive Decisions of Administrative Courts as a Manifestation of the Evolution of Judicial Protection of Human Rights] (CH Beck 2024) 51–53.

Thus, in a system of adjudication of this kind, courts did not adjudicate administrative cases in the sense of applying the law to establish or determine the legal situations of the parties to the administrative court proceedings. Currently, in many European countries, the cassation adjudication model remains predominant, although there is a clear trend towards adjudication on the merits. In the broadest sense, substantive adjudication can be described as any type of adjudication that differs from typical cassation adjudication by containing an element of independent (direct or indirect) settlement of an administrative case by an administrative court.

Most often, this involves either the administrative court resolving the administrative case on the merits, thereby independently shaping the substantive (or procedural) rights or obligations of the applicant (which can be described as a judgment directly on the merits), or the administrative court issuing injunctive judgments in which it obliges the public administration body to make a decision with the content indicated in the judgment, or in accordance with the manner indicated therein (which can be described as an indirect judgment on the merits). A ruling of this kind does not replace an administrative act, which is only issued by the public administration body. However, it does have substantive value in the sense that it limits the scope of discretion of the public administration body more significantly than a cassation ruling. This is particularly evident when the court indicates the resolution of the administrative case, as it is then, in effect, the court, rather than the body, that fixes the rights or obligations of the applicant.

The tendency to move away from a model of purely cassation adjudication is due to several reasons, which are partly specific to the respective legal systems and partly common to all. Among the latter, one can certainly mention the general desire of democratic states to strengthen the protection of individual rights and freedoms. This desire also influences the understanding of the function of administrative courts, which are now primarily seen as guardians of individual rights.[2]

2 B Adamiak, 'Model sądownictwa administracyjnego a funkcje sądownictwa administracyjnego' [The Model of Administrative Justice and the Functions of Administrative Justice] in J Stelmasiak, J Niczyporuk, S Fundowicz (eds), *Polski model sądownictwa administracyjnego* [The Polish Model of Administrative Justice] (Oficyna Wydawnicza VERBA 2003) 21–22; AJ Bok, 'Judicial Review of Administrative Decisions by the Dutch Administrative Courts. Recours Objectif or Recours Subjectif? A Survey, including French and German law' in F Stroink, E van der Linden (eds), *Judicial Lawmaking and Administrative Law* (Intersentia 2005) 153–161; J Trzciński, 'Sądownictwo administracyjne jako gwarant ochrony wolności i praw jednostek' [Administrative Justice as a Guarantor of Protection of Individual Freedoms and Rights] in A Szmyt (ed), *Trzecia władza Sądy i trybunały w Polsce. Materiały Jubileuszowego I Ogólnopolskiego Zjazdu Katedr i Zakładów Prawa Konstytucyjnego. Gdynia, 24–26 kwietnia 2008 r.* [Third Power Courts and Tribunals in Poland. Materials of the 1st Jubilee National Congress of Chairs and Departments of Constitutional Law. Gdynia, April 24–26, 2008] (Wydawnictwo Uniwersytetu Gdańskiego 2008) 127; M Masternak-Kubiak in M Masternak-Kubiak, T Kuczyński (eds), *Prawo o ustroju sądów administracyjnych. Komentarz* [Law on the System of Administrative Courts. Comment] (Wolters Kluwer 2009) 12; W Sawczyn, 'Konstytucyjne podstawy sądownictwa administracyjnego' [Constitutional Foundations of Administrative Justice] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Sądowa kontrola administracji publicznej* System Prawa Administracyjnego [Judicial Control of Public Administration, Administrative Law System] (CH Beck 2016) 84; Ch Backes, M Eliantonio, 'Administrative Law' in J Hage, A Waltermann, B Akkermans (eds), *Intrudiction to Law* (Springer 2017) 217–219; Z Szente, 'Conceptualising the Principle of Effective Legal Protection in Administrative Law' in Z Szente, K Lachmayer (eds), *The Principle of Effective Legal Protection in Administrative Law* (Routledge 2017) 9; L van den Berge, 'The Relational Turn in Dutch Administrative Law' (2017) Utrecht Law Review 13(1), 99; K Wysocka, 'Kompetencje orzecznicze sądów administracyjnych a realizacja funkcji ochronnej praw jednostki w postępowaniu' [Judicial Competences of Administrative Courts and the Implementation of the Protective Function of Individual Rights in Proceedings (2017) Ruch Prawniczy, Ekonomiczny i Socjologiczny 79(1), 151; G Sydow, 'Die deutsche Verwaltungsgerichtsbarkeit im europäischen Recht- svergleich' in A Krawczyk (ed), *Reformen der Verwaltungsgerichtsbark eit in den Ländern der jungen Demokratie* (CH Beck 2022) 15.

Indeed, over the years, there has been a growing realisation that the role of administrative courts as guarantors of individual rights and freedoms can be fulfilled to varying degrees, and that this depends not only on factors such as the scope of cognition of administrative courts, the shape of procedural instruments available to parties, regulations aimed at speeding up and simplifying proceedings, but also on the way in which the adjudicatory powers available to administrative courts are shaped, and therefore on the form – cassation or substantive – in which administrative courts make decisions. It was therefore realised that the form of the judgment has a close bearing on the effectiveness of the implementation of the right to an administrative court and on the performance by these courts of their guarantee functions with respect to individual rights. This was largely due to the fact that the ills of the cassation model, which were increasingly perceptible and difficult to reconcile with the values mentioned above, related in particular to problems with the efficiency of the proceedings in an administrative case and the impossibility of preventing the phenomenon of non-execution or incorrect execution of an administrative court judgment by public administration bodies.[3]

These findings increasingly determine the approach towards judicial review of administration by international human rights organisations (in particular: the Council of Europe and the European Union), which are beginning to link the effectiveness of the right to an administrative court with the adjudicatory competences of these courts. Although none of these systems has, as yet, developed a clear position on the preferred model of the adjudicatory competence of administrative courts, the cassation model is being subjected to increasingly new requirements in order to meet the standards relating to the right to an administrative court. In fact, these requirements often boil down to declaring the need for administrative courts to have, in various cases and forms, the power to decide on the merits. In the Council of Europe system, according to the recommendations of the Committee of Ministers of the Council of Europe, the correct and timely execution of a judgment should be secured by appropriate sanctions, notably in the form of the court's power to impose a coercive fine on the authority and the possibility for the court to take a prescriptive judgment by indicating to the authority the decision it will be obliged to take in post-judgment administrative proceedings.[4] In the European Union system, according to the judgment of the CJEU of 29 July 2019 in the case of Alekshiy Torubarov,[5] a more far-reaching requirement has been introduced, whereby a national administrative court is obliged to take a decision on the merits directly resolving an administrative case in the event that a public administration body has incorrectly implemented a prior judgment of an administrative court (and this obligation remains valid even if national law does not provide for this possibility).[6]

All of the above means that the issue concerning the nature of the adjudicatory powers of administrative courts is becoming one of the most important research areas of the European doctrine dealing with judicial control of administration, which is reflected in the positive law

3 On the efficiency of administrative judiciary in the context of Polish and European regulations see, among other things, Z Kmieciak, 'The Efficiency of Administrative Courts (in the Light of European and Polish Experiences)' (2013) Comparative Law Review vol. 15, 135–150.

4 See in particular: Recommendation R(2003)16 in the execution of administrative and judicial decisions in the field of administrative law and Recommendation Vol. R(2004)20 on judicial review of administrative acts.

5 Judgment CJEU C-556/17 EU:C:2019:626.

6 For more on this judgment and its implications, see: D Gut, 'Merytoryczne orzekanie sądów administracyjnych w systemie unijnym (uwagi na tle wyroku TSUE w sprawie Torubarov)' [Substantive Rulings of Administrative Courts in the EU System (Comments in the Context of the CJEU Judgment in the Torubarov Case)] in M Szewczyk, L Staniszewska, M Kruś (eds), *Kierunki rozwoju jurysdykcji administracyjnej* [Directions of Development of Administrative Jurisdiction] (Wolters Kluwer 2022) 653–684.

of individual European countries. As signalled above, the observation of the European systems of judicial review of administration unambiguously shows that there is currently a tendency to move away from the cassation model of adjudication by administrative courts to adjudication on the merits. The pure cassation model, where these courts have no power to rule on the merits at all, is disappearing altogether.[7] Systems where the law does not provide, more than exceptionally, for situations where administrative courts can rule on the merits[8] also belong to a minority. On the other hand, a numerous group is formed by mixed systems – cassation and substantive – in which the courts, depending on the circumstances, can make both types of judgments.[9] There is also a growing group of predominantly substantive systems, where the rule is that administrative courts decide on the merits.[10]

A similar development trend can also be observed in Poland, where the once exclusively cassation system of adjudication has been gradually supplemented by the possibility for courts to make indirect or direct judgements on the merits. However, the changes in this respect have not taken place without controversy, which has carried over to their reception by administrative courts, which use the new forms of adjudication with a great deal of caution. The processes taking place in this respect are interesting as, in part, they are in line with the phenomena taking place in other European countries, and in part, they are peculiar only to the Polish legal system.

This article aims, firstly, to outline the current shape of the adjudicatory powers of Polish administrative courts, together with showing the reasons why these powers are being supplemented by substantive adjudication powers. Secondly, its aim is to demonstrate the practical and doctrinal problems associated with substantive adjudication by Polish administrative courts.

7 It currently operates in a small number of countries, including Turkey and Malta, see more details: D Gut (2024) 85.

8 Marginal powers to make judgments on the merits are provided for by the English and Welsh, Irish, Norwegian and Estonian systems, for example. Other predominantly cassation systems allow for broader powers in this regard. These include: (1) systems in which substantive rulings are possible in certain statutory categories of cases, for example Cyprus, the Czech Republic, Lithuania, Slovakia, Spain and Italy; (2) systems in which administrative courts may rule on the merits of certain types of action, for example Germany and Portugal, see more details: ibid., 87–96.

9 Among the systems of this type, we can distinguish those where the type of decision is determined by either a) the nature of the dispute, which is the case, for example, in the French system, where the administrative courts decide on the merits in what is known as "contentieux de pleine jurisdiction" and in the Greek and Belgian systems. or b) evaluative factors, depending on the court's decision (which is related to the existence of the "nature of the dispute" premise in the case), which is the case in the Hungarian, Slovenian, Polish and, to some extent, the Serbian and Finnish systems, see more details: ibid., 96–102.

10 Systems of this kind are currently in place in Switzerland, Sweden, Bulgaria and Austria. It seems that the Dutch system, in which the tendency to adjudicate on the merits is more and more visible, and the Croatian system should also be included (albeit only formally, as the administrative courts in that country, despite different statutory regulations, very rarely adjudicate on the merits), see more details: ibid., 102–114.

2. Judicial control of public administration in Poland – general remarks

Judicial control of administration has a long tradition in Poland,[11] and its history is, to some extent, a reflection of the turbulent history of this country.[12] Leaving aside considerations going back further in the past, in a certain simplification, it can be assumed that the first Polish administrative court was the Supreme Administrative Tribunal, established after regaining independence, in 1922.[13] It was a court set up on the model of Austrian solutions at that time, i.e. a single-instance court with jurisdiction defined by a general clause (with some exceptions), ruling on the basis of administrative case files and with cassation powers only. After the Second World War, the administrative judiciary was not reactivated in Poland. This situation changed only in 1980, when the Supreme Administrative Court was established.[14] It was a court created to the extent possible under that political system. The scope of its jurisdiction was defined by the method of positive enumeration and its adjudicatory competence was exclusively cassation. After the collapse of the People's Republic of Poland, a new law on the Supreme Administrative Court was passed in 1995,[15] under which the court continued to be a single-instance special court with jurisdiction defined in an enumerative manner. It ruled on the basis of the administrative case file and in an essentially cassation manner, although the law provided for exceptions in this respect and was subsequently transposed into the act currently in force.

The current model of judicial control of administration in Poland was created on the basis of the Constitution of the Republic of Poland adopted on 2 July 1997[16] and was further shaped by the Law on the System of Administrative Courts of 25 July 2002[17] and the Law

11 Some researchers point out that the beginnings of judicial control of administration on Polish soil can be traced as far back as the 17th century, when general assemblies appointed non-permanent commissions for the control of the state treasury, from their seat, jointly called the Radom Commission, later transformed into the permanent Treasury Tribunal, cf J Borkowski, 'Wykład prof. dr hab. Janusza Borkowskiego – Sądownictwo administracyjne na ziemiach polskich' [Lecture by prof. dr hab. Janusz Borkowski – Administrative Judiciary in Polish Lands] (2006) Zeszyty Naukowe Sądownictwa Administracyjnego vol. 1, 13–14. For more on the history of administrative judiciary in Poland see: S Kasznica, *Polskie Prawo Administracyjne: pojęcie i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 164–181.

12 This is particularly evident in the history of judicial control of administration on Polish territories during the Partitions and in the post-Partition period. At that time, depending on the partitioned area, a judiciary specific to the partitioned state functioned on the Polish lands (in the Prussian partition the North German model functioned, in the Austrian partition the South German model, while in the Russian partition judicial control, in principle, did not exist). In the Duchy of Warsaw, on the other hand, an administrative judiciary on the French model was established. Synthetically, the history of administrative judiciary in Poland is presented by: W Piątek, A Skoczylas, 'Geneza, rozwój i model sądownictwa administracyjnego w Polsce' [Origin, Development and Model of Administrative Justice in Poland] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Sądowa kontrola administracji publicznej* System Prawa Administracyjnego [Judicial Control of Public Administration, Administrative Law System] (CH Beck 2016) 10–11.

13 Ustawa z dnia 3 sierpnia 1922 r. o Najwyższym Trybunale Administracyjnym [Act of 3 August 1922 on the Supreme Administrative Tribunal] [1922] JoL 600 as amended.

14 Ustawa z dnia 31 stycznia 1980 r. o Naczelnym Sądzie Administracyjnym oraz o zmianie ustawy – Kodeks postępowania administracyjnego [Act of 31 January 1980 on the Supreme Administrative Court and amending the Act – Code of Administrative Procedure] [1980] JoL 8 as amended.

15 Ustawa z dnia 11 maja 1995 r. o Naczelnym Sądzie Administracyjnym [Act of 11 May 1995 on the Supreme Administrative Court] [1995] JoL 368 as amended, hereinafter: "NSAU".

16 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Constitution of the Republic of Poland] [1997] JoL 483 as amended, hereinafter: "Constitution of the Republic of Poland".

17 Ustawa z dnia 25 lipca 2002 r. Prawo o ustroju sądów administracyjnych [Law on the System of Administrative Courts] [2002] JoL 2492 as amended, hereinafter: "p.u.s.a.".

on Proceedings before Administrative Courts of 30 August 2002.[18] Pursuant to the provisions of these acts, judicial control of administration in Poland is exercised by special administrative courts, independent from the general judiciary and not remaining in any way within the structures of the executive power. It is supplemented by the control exercised by common courts, which – by virtue of the authorisation resulting from the act – are authorised to rule on certain administrative matters.[19] Adjudication by the ordinary judiciary in administrative disputes is, however, an exception to the rule that administrative courts exercise control in such matters. As it is argued in the doctrine, the broadly defined jurisdiction of administrative courts in Poland means there is a presumption of jurisdiction of administrative courts in every case where the legal form of public activity is subject to control.[20] The following remarks will concern only specialised administrative courts, as the issue taken up does not concern common courts at all, which in the Polish system adjudicate on the merits in administrative cases, as a rule.

The subject-matter scope of judicial-administrative control is defined in positive aspects by Article 3 §§ 2 and 2a of p.p.s.a. and Article 4 of p.p.s.a. and special provisions (pursuant to Article 3 § 2 of p.p.s.a.), and in the negative aspects by Article 5 of p.p.s.a. It covers a number of forms of public administration activity that cannot be discussed in detail here due to the synthetic nature of this publication. It is only worth pointing out that they include various manifestations of public administration activity, in particular decisions in individual cases (decisions, resolutions); acts and actions other than decisions and resolutions taken by public administration bodies, concerning rights arising from the provisions of law; inactivity of public administration bodies and the protraction of proceedings by them; as well as acts passed by bodies of local government units, with acts of local law at the forefront.

The instance structure of the Polish administrative judiciary comprises two instances. The courts of first instance are the voivodship administrative courts functioning in each voivodship and adjudicating all administrative court cases not reserved for the exclusive jurisdiction of the Supreme Administrative Court. The court of second instance, in turn, is the Supreme Administrative Court with its seat in Warsaw, whose cognition includes the recognition of ordinary and extraordinary means of appeal, but also caring for the uniformity of jurisprudence, exercising supervision over the speed of proceedings before administrative courts and resolving disputes over jurisdiction and competence disputes between public administration bodies.

The judicial-administrative control, as a rule, is opened by a complaint being filed to the provincial administrative court. As a rule, the court issues a verdict on the basis of the case file, which includes both administrative files transferred to the court by the public administration body and court files. However, the facts of the case are generally established on the basis of the former, as Polish administrative courts do not generally conduct evidence proceedings on their own. Therefore, apart from taking into account facts that are generally known, administrative courts may only conduct supplementary evidence from documents *ex officio* or upon request, where this is necessary

18 Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi [Act of 25 July 2002, Law on the System of Administrative Courts] [2002] JoL 935, hereinafter: "p.p.s.a.".

19 For example, in cases involving social insurance, competition and consumer protection, rail transport, or cases arising from the Electoral Code (this issue is broadly described by K Małysa-Ptak, *Kontrola działalności administracji publicznej sprawowana przez sądy powszechne* [Control of Public Administration Activities by Common Courts] (Wolters Kluwer 2019) 306–477).

20 M Jaśkowska, 'Właściwość sądów administracyjnych (zagadnienia wybrane)' [Jurisdiction of Administrative Courts (Selected Issues)] in J Zimmermann (ed) *Koncepcja systemu prawa administracyjnego* [The Concept of the Administrative Law System] (Wolters Kluwer 2007) 571.

to clarify significant doubts and will not unduly prolong the proceedings in the case (Article 106 § 3 p.p.s.a.). However, such evidence is not intended to fill gaps in the investigation proceedings, but only to establish the legality of the established facts.

Judicial decisions are made in the form of judgments and orders. The court upholds the complaint or dismisses all or part of it in a judgment. Dismissal occurs, in principle, if the contested act or action does not infringe the law and means that the act or action is upheld. If the action is upheld, this leads to a number of different decisions depending on the subject of the action, as described in more detail below. Orders are issued in all other cases in which the law does not provide for the form of a judgment.

There are two ordinary legal remedies against non-final decisions of administrative courts: a cassation appeal, available against judgments and certain orders, and an appel-against order, available against the orders and ordinances specified in the p.p.s.a. As a result of examining the case, the Supreme Administrative Court may dismiss or uphold the cassation appeal (appel-against order). Dismissal takes place if the appeal has no justified grounds or if the ruling, despite an erroneous justification, is in conformity with the law. If the appeal is upheld, it may in turn result in two rulings – a classic cassation ruling, overturning all or part of the ruling and referring the case for re-examination to the court that issued the ruling, or a reformatory ruling, i.e. one in which the court overturns the appealed ruling and examines the complaint, thus ruling in the same manner as the court of first instance.

3. The jurisprudence model of Polish administrative courts

As can be seen from the above, the Polish model of judicial review of public administration grew out of the assumptions of cassation adjudication by administrative courts. Exceptions in this respect, consisting in the introduction of elements of substantive adjudication, were implemented for the first time only in 1995 in the NSAU. However, they were not significant and were rather a supplementary function of the adjudication system, which still remained decidedly cassation-based. A similar method was originally chosen in the p.p.s.a. currently in force, into which the previously existing powers of substantive adjudication were transposed, leaving cassation adjudication as the rule. It was not until the April 2015 amendment of the p.p.s.a.,[21] which significantly expanded the powers of Polish administrative courts to make substantive rulings, that a major change was made in this respect. As indicated in the explanatory memorandum of the amending act, the purpose of the amendment was to streamline, simplify and speed up proceedings before the administrative court and to guarantee higher standards of civil liberties and rights.[22]

Currently, administrative courts can rule on the merits (directly or indirectly) in many cases and the shape of these powers depends on the subject of the complaint. Indeed, it should be noted that the Polish administrative court system does not provide for a uniform structure of judgments upholding complaints. The decisions contained therein depend on the type of complaint, which in turn is determined by the form of administrative action challenged by the complainant. The operative part of a judgment upholding a complaint thus has a different form depending on the subject of the complaint. For these reasons, the competence of administrative courts to rule on the merits will be discussed precisely from the perspective of the subject of the complaint.

21 Ustawa z dnia 9 kwietnia 2015 r. o zmianie ustawy – Prawo o postępowaniu przed sądami administracyjnymi [Act of 9 April 2015 amending the Act – Law on proceedings before administrative courts] [2015] JoL 658.

22 Seventh Chamber of Parliament, Parliamentary Paper No 166, 2–4.

Firstly, in cases of complaints against decisions and orders, administrative courts can make three types of judgements on the merits, each different by nature and function. To begin with, these powers include the possibility to discontinue administrative proceedings. Namely, pursuant to Article 145 § 3 p.p.s.a., if the court, when revoking all or part of a decision or declaring it invalid, observes that there are grounds to discontinue administrative proceedings in the case, it may discontinue the proceedings. Then the court judgment has the same function as a decision to discontinue proceedings taken by a public administration body. Futhermore, the competence to rule on the merits of complaints against decisions and orders includes two other possibilities. The first is the power to rule indirectly on the merits. Pursuant to Article 145a § 1 p.p.s.a., the administrative court may issue a judgment obliging the body to issue a decision in accordance with the decision indicated by the court,[23] or in accordance with the manner of settling the case indicated by the court.[24] This is possible as long as three conditions are met jointly: a) the decision or decision is overturned due to a violation of substantive law, or is found to be invalid; b) the substantive ruling is justified by the "circumstances of the case"; c) the decision in the case is not left to the discretion of the authority. The second possibility, established in Article 145a § 3 p.p.s.a., includes the competence to issue a direct substantive ruling (which the Polish legislator defines not as "ruling on the merits"[25] but as a "statement on the existence or non-existence of an entitlement or obligation"). This takes place if, in a given case, the following conditions are met jointly: a) an injunction judgment under Article 145a § 1 p.p.s.a. has been issued; b) the public administration body, contrary to its obligation, has not complied with the injunction judgment; c) a party has filed a complaint requesting that the court resolve its case on the merits; d) the "circumstances of the case" allow for the issuance of a judgment on the merits.

Secondly, administrative courts may take substantive judgments in cases concerning complaints against other acts and actions, i.e. acts or actions that are not decisions or rulings, but are taken in individual cases and concern rights or obligations arising from the provisions of law. Namely, pursuant to Article 146 § 2 in conjunction with Article 146 §1 p.p.s.a., when repealing such an act or declaring such an action ineffective, the court may recognise an entitlement or obligation arising from the provisions of law. A judgment of this type fulfils a specific function, as the court indicates in it what right or obligation the applicant is entitled to. However, this does not replace the act or action of the public administration body in the form of a directly substantive judgment under Article 145a § 3 p.p.s.a. and action by the public administration body is always necessary. For example, in a case concerning the return of part of the fee for a vehicle card, the court's ruling that appellant is entitled to the return will only by realized once the authority has made the return.

Thirdly, administrative courts can issue judgments on the merits in cases of complaints for inaction or protracted conduct of proceedings. This matter, largely due to the volume of complaints of this kind, which may concern many forms of action by public administration bodies, the imprecision of the legislator, as well as the multiplicity of views expressed in this respect in the doctrine and case law, is complicated. Thus, applying certain simplifications, it may be assumed that the administrative court may rule on the merits:

23 By which is meant an indication by the court of the content of the decision.

24 By which is meant the indication by the court of a direction to settle the case, without indicating all the elements of the decision.

25 Thus, the term by which many European laws describe judgments of this kind (cf e.g. Article 61(1) of the Swiss Verwaltungsverfahrensgesetz [1968] BBl 1965 II 1348 as amended, and Article 130(4) of the Austrian Verwaltungsgerichtsverfahrensgesetz [2013] BGBl. I Vol. 33/2013 as amended.

(a) in the case of accepting a complaint for inaction or protraction, as long as the "nature of the case" allows it and the factual and legal circumstances do not raise any doubts (Article 149 § 1b p.p.s.a.);
(b) when the court upholds a complaint for a failure to comply with a judgment upholding a omplaint for inaction or protracted conduct of proceedings (from Article 149 § 1 p.p.s.a.), if the nature of the case and its factual and legal circumstances are beyond reasonable doubt. A judgment of this kind, similarly to the judgment under Article 145a § 3 p.p.s.a. directly shapes the legal situation of the complainant[26].

Thus, Polish law extensively delimits the competence of administrative courts to make judgements on the merits and *prima facie* it might seem that the jurisprudential model of administrative courts in this country is in fact cassation and substantive. In practice, however, the administrative courts make judgments on the merits very rarely, to the extent that some of the provisions mentioned above have never been applied in practice.[27]

4. Dilemmas related to substantive adjudication by Polish administrative courts

The reasons behind the scant use by Polish administrative courts of the power to make substantive decisions in adjudicatory practice are varied. They include both momentous dilemmas of a systemic nature as well as, sometimes very nuanced, practical considerations.

The basic issue around which the problem of systemic dilemmas centres concerns the interpretation of the principle of separation of powers. Concerning the judicial control of administration, the Polish doctrine is firmly behind the view that the term "control" used in the first sentence of Article 184 of the Constitution of the Republic of Poland ("the Supreme Administrative Court and other administrative courts shall, within the scope specified by statute, control the activity of public administration") should be understood in a narrow sense. This is based on the conviction that, since administrative courts are to "control" the activity of public administration, it means that they cannot substitute such activity, as no control, including that exercised by administrative courts, should lead to the substitution of the subject to control.[28] This position results in two views as to the admissibility of substantive adjudication in the Polish legal system. Historically, the first one (which is currently difficult to defend in view of the existence in the p.p.s.a. of the competence to adjudicate on the merits by administrative courts), assumes that substantive adjudication by these courts, regardless of its form, would lead to the blurring of the boundary between administration and administration of justice, which would directly contradict the constitutional principle of the division of powers.[29] The second one states, in turn,

26 See more about the adjudicative competence described above: D Gut (2024) 119–239.
27 For example Article 145a § 3 p.p.s.a.
28 R Hauser, M Masternak-Kubiak, 'Konstytucyjne podstawy kontroli działalności administracji publicznej' [Constitutional Bases for Controlling the Activities of Public Administration] in R Hauser, Z Niewiadomski, A Wróbel (eds), *Konstytucyjne podstawy funkcjonowania administracji publicznej* System Prawa Administracyjnego [Constitutional Foundations for the Functioning of Public Administration, Administrative Law System] (CH Beck 2012), 403.
29 See *inter alia* Z Janowicz, 'Głos w dyskusji o reformie sądownictwa administracyjnego' [A Voice in the Discussion on the Reform of Administrative Justice] in J Stelmasiak, J Niczyporuk, S Fundowicz (eds), *Polski model sądownictwa administracyjnego* [The Polish Model of Administrative Justice] (Oficyna Wydawnicza VERBA 2003) 155; W Chróścielewski, JP Tarno, 'Trójszczeblowy model sądownictwa administracyjnego a jednoinstancyjne postępowanie administracyjne' [The Three-tier Model of Administrative Justice and Single-instance

that adjudication on the merits, due to the control framework of the first sentence of Article 184 of the Constitution of the Republic of Poland and the principle of the separation of powers, should be limited by nature. Therefore, it should either include only the possibility of indirect adjudication on the merits,[30] or be exceptional by nature, limited to specific situations strictly defined by the legislator.[31]

Although there are views in the doctrine to the contrary, expressing the conviction of the admissibility of substantive rulings in any form (indirect and direct) on the grounds of the Constitution of the Republic of Poland,[32] the views indicated above about the exceptional nature of these

Administrative Proceedings] (1999) Państwo i Prawo vol. 5, 29; M Bogusz, 'Problem konstytucyjności przepisu art. 145 § 3 i art. 145a prawa o postępowaniu przed sądami administracyjnymi' [The Problem of the Constitutionality of the Provision of Art. 145 § 3 and Art. 145a of the Law on Proceedings before Administrative Courts] (2016) Gdańskie Studia Prawnicze vol. 36, 73–76; B Banaszak, J Michalska, 'Artykuł 145a ustawy – Prawo o postępowaniu przed sądami administracyjnymi w świetle Konstytucji RP' [Article 145a of the Act – Law on Proceedings before Administrative courts in the Light of the Constitution of the Republic of Poland] (2016) Zeszyty Naukowe Sądownictwa Administracyjnego vol. 4, 9–20; M Chmaj, 'Opinia w przedmiocie zgodności z konstytucją i systemem prawnym art. 145a przedstawionego przez Prezydenta RP projektu ustawy o zmianie ustawy – prawo o postępowaniu przez sądami administracyjnymi (druk nr 1633)' [Opinion on Compliance with the Constitution and Legal System of Art. 145a of the Draft Act Presented by the President of the Republic of Poland Amending the Act – Law on Proceedings before Administrative Courts (Form Vol. 1633)] (2013), <https://www.sejm.gov.pl/sejm7.nsf/opinieBAS.xsp?nr=1633> accessed 20 Mar 2023.

30 See *inter alia* B Szmulik, 'Opinia do projektu ustawy o zmianie ustawy – Prawo o postępowaniu przed sądami administracyjnymi (druk nr 1633)' [Opinion on the Draft Act Amending the Act – Law on Proceedings before Administrative Courts (Form Vol. 1633)] (2013) 12, <https://www.sejm.gov.pl/sejm7.nsf/opinieBAS.xsp?nr=1633> accessed 6 Nov 2022.

31 See *inter alia* J Chlebny, W Piątek, 'Ewolucja ustrojowa i kompetencyjna sądownictwa administracyjnego' [The Systemic and Competence Evolution of the Administrative Judiciary] (2021) Zeszyty Naukowe Sądownictwa Administracyjnego vol. 1–2, 24.

32 See *inter alia* M Szydło, 'Opinia prawna na temat projektu ustawy o zmianie ustawy – Prawo o postępowaniu przed sądami administracyjnymi (druk sejmowy nr 1633)' [Legal Opinion on the Draft Act amending the Act – Law on Proceedings before Administrative Courts (Parliament Paper Vol. 1633)] (2013) 1–25, <https://www.sejm.gov.pl/sejm7.nsf/opinieBAS.xsp?nr=1633> accessed 20 Mar 2023; views of Z Kmieciak (including, Z Kmieciak, 'Merytoryczne orzekanie przez sądy administracyjne w świetle konstytucyjnej zasady podziału władz'[Substantive Adjudication by Administrative Courts in the Light of the Constitutional Principle of Separation of Powers] (2015) Przegląd Legislacyjny 2(92), 9–22; J Paśnik, 'O niektórych aspektach nowelizacji prawa o postępowaniu przed sądami administracyjnymi' [On Some Aspects of the Amendment to the Law on Proceedings before Administrative Courts (2016) Przegląd Prawa Publicznego 2016, vol. 2, 31–45; J Jakimowicz, 'O tzw. merytorycznych kompetencjach orzeczniczych sądów administracyjnych określonych w art. 145a § 1 prawa o postępowaniu przed sądami administracyjnymi' [About the so-called Substantive Judicial Competences of Administrative Courts Specified in Art. 145a § 1 of the Law on Proceedings before Administrative Courts (2017) Casus vol. 85, 5–13; K Flisek, 'Merytoryczne orzekanie sądów administracyjnych a zasada trójpodziału władz' [Substantive Rulings of Administrative Courts and the Principle of Separation of Powers] (2018) Przegląd Prawa Publicznego vol. 4, 83–94; D Gut, 'Merytoryczne orzekanie polskich sądów administracyjnych w świetle Konstytucji RP' [Substantive Rulings of Polish Administrative Courts in the Light of the Constitution of the Republic of Poland] in W Piątek (ed), *Aktualne problemy sądowej kontroli administracji publicznej* [Current Problems of Judicial Control of Public Administration] (Wolters Kluwer 2019) 11–25; M Kłopocka-Jasińska, 'Kilka uwag o poszerzaniu zakresu merytorycznych kompetencji sądów administracyjnych w świetle art. 184 Konstytucji i konstytucyjnej zasady podziału władz' [A Few Comments on Expanding the Scope of Substantive Competences of Administrative Courts in the Light of Art. 184 of the Constitution and the Constitutional Principle of Separation of Powers] (2020) Acta Universitatis Wratislaviensis vol. 120, 175–185; R Siuciński, 'Between Judicial Review and the Executive – the Problem of the Separation of Powers in Comparative Perspective' (2020) Perspectives of Law and Public Administration 9(2), 137–146; J Szczepkowski, 'Konstytucyjność zmian wprowadzonych ustawą z dnia 9 kwietnia 2015 r. o zmianie ustawy – Prawo o postępowaniu przed sądami administracyjnymi w zakresie

powers have a much stronger impact on the jurisprudence of administrative courts. This influence is very visible in the narrow and restrictive interpretation adopted by the courts of the provisions authorising them to make substantive judgements, the application of which, in the overwhelming majority, results in constatation of the inability to make a substantive judgement in a given case.[33]

The above points are further supported by practical considerations related primarily to the construction of provisions authorising administrative courts to adjudicate on the merits. The most significant limitations include: the narrow scope dictated by the wording of these provisions (a prime example being Article 145a § 1 p.p.s.a., applicable only when a decision or order is revoked due to substantive law violations or conditions necessitating annulment, which rarely occurs independently); the ambiguity of these provisions, leading to numerous uncertainties regarding their scope and conditions for application (such as the actual extent of competence on the merits in cases of complaints about delays and inactivity); the need for various conditions to be met in order to render judgments on the merits, including evaluative criteria (e.g. "circumstances of the case" in Article 145a § 1 and 3 p.p.s.a.); and the discretionary nature of many provisions authorising judgments on the merits (cf Article 146 § 2, Article 149 § 1b, Article 154 § 2 p.p.s.a.).

Secondly, the practical insignificance of the competence to render judgments on the merits is reinforced by regulations governing the evidence procedure before administrative courts. As previously noted, under Article 106 § 3 p.p.s.a., these courts can only gather supplementary evidence from documents, which effectively prevents them from independently establishing facts in cases where the public administration has failed to do so correctly. Consequently, this often necessitates issuing a cassation judgment.

5. Summary

Grown on the assumption of cassation-only adjudication, the Polish adjudicatory model of administrative courts has, over the years, been supplemented with the ability to make substantive decisions. The most significant amendment in this regard, which took place in April 2015, did not achieve the intended result, despite the legislator's intent. Thus, despite the current p.p.s.a. providing for a relatively broad catalogue of powers to issue substantive judgments by administrative courts, in practice these courts primarily issue cassation judgments. For these reasons, the Polish adjudicatory model of administrative courts can only formally be classified as a mixed (cassation and substantive) model. Poland, therefore, shares this experience with other European countries, including Croatia, where, despite the statutory introduction of the substantive adjudication model as a rule in 2010, courts still typically make cassation judgments.[34]

This peculiarity arises for two reasons. Firstly, it stems from an error by the legislator, who, on one hand, intended to give administrative courts the power to adjudicate on the merits, but, on the other hand, limited this power by setting prerequisites that are rarely fulfilled and did not provide these courts with the competence to conduct more extensive evidentiary proceedings. Secondly, it stems from the still very strong attachment in the Polish judicature and doctrine to the cassation

merytorycznego orzekania przez sądy administracyjne' [Constitutionality of the Changes Introduced by the Act of April 9, 2015 Amending the Act – Law on Proceedings before Administrative Courts in the Scope of Substantive Adjudication by Administrative Courts] (2021) Acta Iuris Stetinensis vol. 36, 117–142; D Gut (2024) 261–293.

33 Which is particularly evident especially in cases concerning inaction or protraction (cf the judgments of the Supreme Administrative Court of: 25 April 2008, I SA/Wa 204/08 [2008]; 8 February 2018, I OSK 1996/17 [2018]; 16 March 2018, I OSK 2742/17 [2018] and others).

34 S Banić, 'Reformy Sądownictwa Administracyjnego w Chorwacji' [Reforms of the Administrative Courts in Croatia] (2011) Acta Universitatis Lodziensis vol. 98, 87.

formula of adjudication in administrative courts. This is a result of the narrow interpretation of the term "control" in Article 184, sentence 1, of the Constitution of the Republic of Poland and the restrictive understanding of the delimitation of competences between the executive and the judiciary.

The intentions of the Polish legislator to extend the competence of administrative courts to rule on the merits have not had the intended result. However, this does not mean that the direction taken by the legislator was not correct. On the contrary, as is clear from the views presented by the Council of Europe and the European Union, as well as from the observation of systems of judicial control of administration in other European countries, adjudication on the merits by administrative courts is, in many situations, able to guarantee a better level of protection of an individual's rights and freedoms. However, changes to the adjudication model are a long drawn-out process that, as the Polish experience shows, must be carried out in a more thoughtful manner in order to be effective.[35] In particular, it requires a new approach to basic constitutional principles, with the principle of the separation of powers at the forefront, along with prudent changes concerning the entire system of judicial and administrative proceedings. Certainly, deeper transformations in the adjudicatory model cannot be achieved by merely introducing unitary powers to adjudicate on the merits in a system designed for cassation adjudication.

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35 As was the case in Austria (see P Chvosta, 'Die "Jahrhundert-Reform" der Verwaltungsgerichtsbarkeit in Österreich – ein <<neues Zeitalter>> auch für die Verwaltungsgerichtsbarkeit in den Ländern der jungen Demokratie in Europa?' in A Krawczyk (ed), *Reformen der Verwaltungsgerichtsbarkeit in den Ländern der jungen Demokratie* (CH Beck 2022) 21.

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