DROIT POLONAIS CONTEMPORAIN
POLISH CONTEMPORARY LAW
1995 Nº 1-4(105-108)
PL ISSN 0070-7325

FROM THE EXPERIENCE OF ADMINISTRATIVE JUDICATURE IN POLAND

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On 1 September 1995, the High Administrative Court (Polish acronym: NS A) celebrated the 15th anniversary of its existence. It was established on the strength of the 31 January 1980 law on the High Administrative Court endorsed by the Sejm (Parliament) which, at the same time, amended the code of administrative procedure. The establishment of the NSA was an act of extreme importance for stabilisation of the rule of law and the process of de-Stalinisation progressing with difficulty since 1956. It also was an important step forward in laying the foundations for the democratic lawful state, a fact which assumed special importance in the moment of a break-through when the process of transformation of the Republic of Poland was launched in 1989. The analysis of the effects of the establishment of the High Administrative Court merits attention also due to the fact that it is being generally regarded as an extremely successful experiment which emerged from civic initiative. An opinion can sometimes be heard that it is the most efficient and the best court in the entire system of judicature in Poland. The experiences of the 15 years of NSA are so rich that a 300-page book was devoted to them summing up this period in its activity. The report I presented at the 2nd Polish-Japanese conference in Kyoto concentrates exclusively on the selected problems from NSA activity. The attention is focused on the following problems in three chapters:

1. the origin of the High Administrative Court (Naczelny Sąd Administracyjny),
2. the most important experiences of the NSA,
3. amendments introduced in the new law on NSA adopted by the Sejm on 3 June 1995, that is, drawing conclusions from the experiences gathered so far.

I. The Genesis of the NSA

The establishment of the NSA was a result of civic initiative launched by lawyers rallied regardless of party allegiance (mostly non-party people) after the events initiated by the so-called Polish October in 1956. The initiative encountered serious resistance especially on the part of the administration which wanted to be controlled exclusively by the supreme administrative organs rather than judiciary organs independent from the

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administration. The administration justified its negative stance by the poor state of the law in force (which still in 1959 had about 89,000 normative acts) and the danger of excessive lengthening of the administrative procedure connected with the possible establishment of the High Administrative Court. Attention was also drawn to the danger of receiving an excessive amount of cases from citizens fearing that the number of complaints might exceed 400 and even 500 thousand a year.

As far as arguments of ideological and political nature were concerned they concentrated on the thesis that administrative courts were a relic of capitalism impossible to be applied in the opposing socialist system.

Obviously enough, there were many more such arguments and the resistance in their defence was so big (especially so that the then Chairman of the Council of Ministers was the main opponent of the administrative judicature) that the period of lawyers[4] struggle lasted exactly a quarter of the century. The restoration early in 1960 of the code of administrative procedure binding during the inter-war period and not abolished after the war, was a side-effect of that struggle. It was only in 1976 when the jurist community managed to seriously deepen its argumentation and strengthen its position in parliament, that the problems connected with administrative judicature found their way to the Sejm. This came about through the introduction of those problems to the plan of plenary sessions of parliament, preceded by the analysis of the practical functioning of the Code of Administrative Procedure prepared by the Administration and Legislation Committees. This provided grounds for carrying out an in-depth analysis and stating that the regulations in force defend citizens[4] rights in an inadequate way and, consequently lower the prestige of the administration proper therefore requiring court control on the part of an organ independent from the administration. The victory of this stance during the work of Sejm Committees gave a go-ahead for calling by the Sejm of a Committee of Experts entrusted with preparing the draft of the law which, while working on the improvement of administrative proceedings, prepared the draft of calling the administrative judicature into being.

Of considerable importance for carrying out of this work was the fact of the much earlier establishment of administrative judicature in Yugoslavia and also partly in Hungary which allowed for rejecting the thesis that this is an institution appearing exclusively in the capitalist system which can bring nothing but harm to a socialist state.

The work of the Committee of Experts composed of the most outstanding professors of administrative law allowed for precising data concerning the envisaged burdening of courts with people's complaints regarding administrative decisions. In this way panic fears were rejected concerning the number of complaints which, according to the complied data, could amount to maximum 40-50 thousand a year and also that there is a possibility of launching such organisational solutions which would not allow for an excessive lengthening of the time for fixing the complaints.

It should be stated that most controversies during the work of the Committee of Experts arose around the question of the definition of the administrative decision taking into account the much wider scope of activity of state administration in the former socialist countries and, in this connection, the selection of the general clause (i.e. one

allowing every citizen to launch complaints on any decision which - in his opinion - validates the law in force, or an enumerative clause containing a listing of decisions subjected to control). Unfortunately, despite the conviction about the necessity of having a general clause predominating in the lawyer community, both scientists and practitioners, the idea failed to win support of the leading political forces.

It should be stated that controversy over that matter lasted until the plenary session of the Sejm during which the draft of the law concerning the code of administrative procedure and the High Administrative Court were presented in the second reading. Still ten days before the session considerable objections of political nature were raised suggesting dropping the draft law from the agenda of the forthcoming session of the Sejm. The objections, however, were rejected and the draft was adopted by the Sejm almost unanimously.

The introduction of administrative judicature was a major success of the lawyer community and a serious step forward towards the consolidation of the rule of law and deepening démocratisation. After scoring this success it was possible to speak about ensuring the citizen "the right to efficient and legal administration".

The increased importance of the lawyer community caused that the successive drafts submitted in the 1980s concerning the establishment of the Constitutional Tribunal and the Tribunal of State as well as the Ombudsman encountered a much weaker resistance on the part of the political quarters.

The resistance which the concept of the NS A encountered during its 15 years of functioning until today finds its expression in the absence of a mention about the Court in the Constitution. However, positive is the fact that all the drafts of the new Polish constitution take the High Administrative Court into account.

II. Fifteen Year of NSA Activity

Three main stages can be singled out during the fifteen-year-long activity of the High Administrative Court. The first stage was the Court's initial activity which comprised: solving the main organisational and personnel problems, finding the proper place within the system of legal protection organs and in social opinion. The second stage was characterised by the relatively normal and stabilised work on the effective functioning of the Court and especially shaping the adjudication concepts concerning problems connected with interpretation which arose during the implementation of the law. The third stage was connected with the widening of the NSA competence in effect of the transition from the enumerative to the general clause on the strength of the law of 27 May 1990.

The basic problem, especially during the first stage of functioning was the question of the selection of the adjudicating personnel which was to be shaped not only anew but according to the principles different from those in force in the courts of common law. Two tendencies in approaching the problem manifested themselves clearly. One of them laid the entire stress on the court to be composed exclusively of judges: the point was to

include in this new type of a court the principle of the independence of the judiciary. The other direction in tackling that matter was characterised by the care for expertise, that is, on winning over for the court the best experts in penal, civil and family law but who in their practice, had nothing to do with either administrative law (and its many fields) or with administrative procedures. As far as specialists in administrative law were concerned they, as a rule, had no practice as judges.

Facing that dilemma already while preparing the law on the NSA it was decided that the bench be composed of judges with judicial practice in which they demonstrated impeccable attitude as far as ensuring judicial independence is concerned with specialists in administration law of various specialisations and high professional knowledge having clear adjudicative predispositions.

It turned out that despite the numerous fears whether specialists in administrative law will become judges and the judges will catch up with administrative law - the adopted solution passed the test with flying colours. Moreover, in the light of the 15 year--long practice of the NSA it is regarded that the solutions adopted concerning personnel problems should be recognised as decisive for the success of the High Administrative Court.

A decision on separating the NSA from the structure of courts of common law and subjecting its adjudication to the supervision of the Supreme Court was connected with this solution.

The first stage of NSA activity fully confirmed the incorrectness of fears that he NSA will be flooded with an enormous number of cases.

As I mentioned earlier, fierce controversies concerning the supposed influx of cases to the Court manifested themselves before the High Administrative Court came into being. The followers of the NSA convinced that the annual influx of cases will amount not to 400-500 thousand but to about 35,000 although they occasionally admitted that the envisaged inflow "may turn out to be lowered".

And so, on the 15th anniversary of the High Administrative Court the total inflow of cases (since the moment of the establishment of the NSA on 1 September 1980) amounted to 248,832 cases, nearly a quarter million, that is half of the number envisaged by the NSA opponents within one year.

In order to ensure protection against lengthening the procedure of fixing cases the principle of one instance was retained - in keeping with the law - with the provision that, apart from the Warsaw centre not only cases from five neighbouring voivodships (provinces) but also on decisions of the main organs managed by Ministers of five centres (Krakow, Wroclaw, Lublin, Gdansk and Katowice), that is, towns in which Law and Administration Departments existed offering better personnel back-up. This structure, supported by a strong interpretation centre in the form of an Adjudication Bureau situated in the Warsaw Court allowed for an efficient operation of the NSA and for ensuring a considerably homogeneous character of that type of adjudication.

The justification of the adopted NSA structure is confirmed by the duration of the court procedure counting from the date the case was brought to Court until passing the verdict. On the average, the time varied from 2.5 months in 1990 to 8.5 months in 1994.

Although the vehement rise in the number of cases which came to the Court in 1991 deteriorated the efficiency index (up to eight months and nine days in 1994) the index looks quite good and it places the High Administrative Court among Europe's and the world's best Courts of this type.[1]

Reaching the efficiency index of four to five months would surely be a materialisation of the right of the citizen not only to an objective and independent judgement but also his right to an effectively functioning court.

The years 1992-94 witnessed not only a major growth of the number of cases but their proportions also changed dramatically.

The following types of cases predominated during that period of time:

1) from the field of tax obligations and other pecuniary allowances (3,764 cases in 1992; 5,159 cases in 1993; 7,059 cases in 1994),

2) from the field of customs duties (3,301 cases in 1992; 3,746 cases in 1993 and 4,651 cases in 1994),

3) from the field of employment, social assistance and social affairs (2,755 cases in 1992; 4,451 cases in 1993 and 4,009 cases in 1994).

Worth stressing is also the clear tendency (especially visible in recent years) of a gradual decline of the proportion of complaints lodged by citizens and other empowered entities.

Although in 1981 complaints from citizens constituted 93.8 percent of the total number of cases, in 1994, the figure, though still predominating, declined to only 70,4 percent which is connected with the operation of companies, various organisations and other entities.

Characteristically enough, the number of complaints on decisions issued by the main administrative organs kept growing continuously.

2. The adjudication activity was of special importance throughout the entire period of NSA's activity. It was characterised by innovativeness in relation to the interpretation of the law in force and citizen-oriented direction of interpretation of law. [1 2]
A characteristic example of this type of approach was the interpretation of the enumerative clause in the NSA adjudication. From the very beginning the Court aimed at ensuring the broadest possible interpretation of this clause and contrary to those who thought that the clause will lead to a considerable narrowing of NSA's cognition, the adjudication aimed at taking up judicial control of the broadest possible number of cases. This type of approach on the part of the NSA showed that, in practice, 17 points enumerated in article 196b of the law determining the scope of NSA authorisation, meant that the Court took cognition of more than 90 percent of decisions issued by administrative organs. In practice, the application of the enumerative clause was no major obstacle in the operation of the NSA with the provision, however, that less than

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[1] In a number of countries, such duration of the court procedure ranges from 3 up to 5 years on average. The above data are based on the polling research conducted by NSA Judge Z. Mank.

[2] See: A. Zielinski, *Uwagi w związku z 10-leciem NSA* [Looking back over 10 years of the NSA], Warszawa 1990.

ten percent of cases outside the Court's cognition concerned very important problems for citizens, e.g. passport decisions, decisions connected with military service, etc.

The innovative attitude of the NSA manifested itself especially in the approach to taking an administrative decision.[3] The High Administrative Court recognised the hitherto approach to the science of administrative law as too narrow. And so, the numerous decisions concerning citizens taken by entities which are not state administration organs like, for example, concerning admission of students for higher studies decided by managerial organs of the institutions of higher learning, or decisions taken by organs of state-owned enterprises and other organisational entities or social, professional, self-government and co-operative organisations, were regarded by the science of administrative law as outside the NSA cognition. The innovative and citizen-oriented approach of the NSA to this question, in numerous cases, encountered counteraction on the part of the interested organs. And so, for example, the view expressed in NSA adjudication that a refusal of admission for higher studies is an administrative decision subject to NSA control caused that the First President of the Supreme Court launched an extraordinary appeal. A similar objection was raised by the identical stance of the NSA regarding decisions taken by self-government of the Bar on the question of the lack of consent for compiling a list of solicitors or applicants which found its expression in the extraordinary appeal directed to the Supreme Court by the Ministry of Justice.

Of course, not all NSA verdicts in this type of cases were free from controversy, nonetheless, they exerted considerable influence on the administrative practice, on the development of the doctrine of administrative law, deepening of legal problems in discussions in the press and the improvement of legal culture of the society at large.

The differentiation by the NSA of not too clearly defined notions like, for example, social interest, public order, the security of the state, important reasons, etc., was an act of extraordinary importance. The High Administrative Court recognised that these notions are also subject to court control to the same degree as the remaining elements of the legal norm, that is, with the application of various means of procedure like the opinion of experts, for example. On matters pertaining to the administrative approval the NSA recognised that they are subject to special control, that is, with taking into account whether the decision made is within the limits of the approval and whether it is compatible with procedural regulations. The Court adopted the stance that in such a case the administrative organ is obliged to fix the matter in compliance with citizen's interest unless it infringes social interest or exceeds the possibilities of the administration organ resulting from the authorisations and means granted it. This stance was generally approved but criticism was also launched.[4]

Pointing to the audacity which characterised the NSA approach to the hitherto interpretation of the law in force, it should be remarked that the court's "daily bread" was

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[3] The achievements of NSA in this field were thoroughly discussed by J. Świątkiewicz in his article "Decyzje administracyjne w świetle orzecznictwa NSA" [Administrative Decisions in the Light of NSA Adjudication Activity], *Nowe Prawo*, 1985, Nº 9.

[4] See: A. Zielinski, *Uwagi* w *związku z 10-leciem NSA* [Looking back over 10 years of the NSA], as above, p. 8.

to confront the administrative practice with the truths already generally recognised by the doctrine. These problems included the broadly applied practice of violating the law:

1) on the matter of issuance by the administration organs of acts of general character without a clear authorisation and the practice of giving the acts binding force in external legal turnover: the most frequent examples in this case were the so-called self-styled resolutions of the Council of Ministers and ordinances issued by ministers without legal authorisation. After the consolidation of this stance in the adjudication of the Constitutional Tribunal this sort of practice was nearly totally abandoned by the administration organs.

2) NS A was the first out of all courts to start applying in its adjudication the provisions of the constitution regarding them as the foundation for administrative decisions in case of the lack of a clear law regulation or collision between legal acts of lower and higher rank; this practice also concerns the NSA's attitude to the provisions of international agreements.

3) The High Administrative Court laid special emphasis on the overt character of the law in a belief that the generally binding legal regulations must be announced correctly and on time.

4) for the same reasons the NS A opposed the retro-action of legal regulations imposing on their addressees duties.

5) NSA drew special attention to the observance in the administrative law of the principle according to which the administration organ issuing an administrative decision cannot impose a duty on the citizen or reject him authorisation unless it demonstrates that it is empowered to do it on the strength of separate legal regulations NSA recognised this principle as one of the basic in a democratic lawful state.

6) as regards taxation problems NSA on many occasions declared itself against the application of the principle *in dubio pro fisco* in a belief that all ambiguities and doubts cannot be settled to the detriment of the taxpayer. NSA held similar views also in relation to other detailed fields of the material administrative law.

The above examples show clearly that the administration was well aware that after the establishment of the High Administrative Court the time of "milk and roses" will be gone but its outstanding representatives highly valued the place they occupied in the analyses of NSA adjudication in terms of the practical application of the principle of the rule of law.

III. New Law on NSA (of June 1995)

The preparation of the new law on the High Administrative Court was preceded by a number of amendments which were important for elevating the rank of the NSA and improvement of its activity. These, primarily, include:

1) a change of the enumerative clause into the general clause according to which all administrative decisions - except for those clearly enumerated in article 196 para. 4 of the code of administrative procedure in case when a particular law does not state otherwise - are subject to NSA control.

2) introduction of the possibility to launch a legal complaint on the resolutions of local self-government organs.

The parliament concluded work on the new law in May 1995 and, after signing it by the President it became effective on 27 May 1995. The basic changes to which we shall have to limit ourselves in this paper include:

1. a considerable expansion of the scope of cases subjected to NS A control; in the light of the new law it embraces not only administrative decisions but also decisions issued in administrative and execution procedures as well as other acts and activities (which have no civilian-legal character);
2. a considerable expansion of the cognition of NSA occurred also in effect of stating in the new law that public administration organs constitute not only the main, central and local organs of state administration but also local self-government organs as well as other organs within the scope in which they are obliged to deal with public administration matters on the strength of law;
3. in connection with the one-instance character of NSA with the simultaneous widening of its competence and, in this connection, growth up to ten of the number of outside centres, the problem of NSA terminology assumed still greater importance: apart from the hitherto institutions like the bench or the NSA President addressing legal problems to the Supreme Court or addressing legal questions or motions for interpretation to the Constitutional Tribunal - the new law envisages the possibility of making verdicts in concrete cases by enlarged NSA benches and also addressing legal questions to NSA Chambers which would lead to working out stances marking the directions of adjudication in the Court proper;
4. the new law introduced vital changes to the procedure in the NSA concentrating in particular on external relations between the Court and the administration and the procedure applied in the Court proper. In the hitherto adjudication practice especially painful was the lack of detailed regulations for NSA procedure and, in this connection, the necessity to resort to civil procedure rather maladapted to administrative-legal cases and causing numerous troubles connected with interpretation. Introducing a number of new decisions of procedural character, the new law should contribute to take into much greater account the specificity of legal-administrative procedure and to avoid in the adjudication of a number of important adjective doubts;
5. the new law introduces a number of changes in the field of organisational matters, like shifting the competencies from the Minister of Justice to the President of the Republic of Poland.

There is a conviction among lawyers that all the above mentioned changes will contribute to the consolidation of the role of the High Administrative Court within the model of a lawful state, that on the basis of its 15 year-long experience it will operate still more effectively in favour of the protection of citizens' rights, further improvement in relations between the authorities and the citizen and also in relations between legal practice and the doctrine of law. Some scientists treat the establishment and operation of NSA as a new stage in the development of the science of administrative law.