Administrative judiciary is looking for a balance in a crisis

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Abstract

The article focuses on actual challenges of administrative justice in the Slovak Republic and Poland. The legal crisis and the crisis in law in both countries have common signs and necessarily differences. The authors analyze selected problems of administrative justice, which are connected by the current state of society marked by the crisis. In the part dedicated to the Slovak Republic and Poland, emphasis is placed on the crisis associated with changes in the judicial system and - additionally - in Poland it is the crisis associated with changes in the law caused by the COVID-19 pandemic. Due to the nature of the researched topic, we have applied analysis, synthesis as well as comparison of legal regulations in the processing of this issue. However, in addition to the mentioned scientific methods of research, we also used scientific literature, case law and analogy of the law. The article can be beneficial by researching the development of problems associated with administrative justice in states with a similar historical development of society.

Keywords: *administrative courts, Supreme Administrative Court, court map, selection of judges, judicial self – government, the crisis of administrative justice.*

JEL Classification: K23, K33, K38

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1. Introduction

The subject of the article are some considerations from the field of administrative justice, located on the border of law, political science and politics. No one seems to doubt that administrative judiciary as a separate division is a guarantee of a democratic and law - abiding state.

The understanding of administrative justice is not uniform within the European administrative area. The differences mainly result from the main historical models of the so-called French, Anglo-Saxon and Austro-German types.

This is not the case even in geographically close states. In the Slovak Republic, administrative justice is understood primarily as part of the external control of public administration and a guarantee of the legality of its activities,

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historically influenced first by Hungarian and later Austrian law.[4] According to Sládeček et al. In Poland, administrative justice was formed under the influence of French (XIX C.), and – finally – Austrian concepts (XX C.)[5], and in legal doctrine, in connection with administrative justice, we usually encounter views that express it as administrative proceedings, as a legally regulated course of procedural acts of the administrative court or other subjects of this proceeding to decide the dispute as to whether the act, conduct or failure of the public administration body was in accordance with the law.[6]

Historical differences do not exclude the possibilities of influencing and enriching these different systems. Actually, several aspects of the development of society have been affected by the COVID-19 pandemic. Its impact on individual countries varies. We can also see differences in its influence on the development of law and the activities of courts, or the creation of judicial authorities.

In the part of the article devoted to the Slovak Republic, the main problem will be the creation of judicial authorities. In the part of the article devoted to Poland, we will also focus on the actual state of administrative justice in Poland, which although not directly involved in the deepening crisis of the common courts, have been 'infected' with the constitutional crisis. The aim of this article is also to evaluate the Anti-COVID-19 crisis acts introduced into the Polish legal order which restricted the right of the parties to an open hearing of a case that is pending before administrative courts as well as an attempt to answer the question whether the way judges of administrative courts apply the anti-COVID-19 regulations in the era of the epidemic conforms to the principles of a democratic state of law[7].

The problems they face the administrative justice in both countries, which we are analyzing, are therefore not identical. The reason is the fact that in Poland, in contrast to the Slovak Republic, has organized administrative justice for a long time within a separate judicial system. Despite the long tradition of administrative judiciary in Poland, it has been sinking into ever graver legal chaos since the end of 2017.

The article is the result of Polish-Slovak cooperation. Its reason is several points of contact in the history of our states and also in the actual vectors of the development of social events, which is also a material basis for the direction of law. Our focus is primarily on the administrative justice and selected issues of its actual social development from an institutional and functional point of view.

2. Reform of the judiciary in the Slovak Republic

The actual stage of the judicial reform in the Slovak Republic[8] takes place in a difficult period of pandemic and several political changes. As it is usual with

[4] Vrabko. *Správne*. p. 168.
[5] Piatek and Skoczylas. *Geneza,* vol. 10, p. 17.
[6] Sládeček et al. *Správní,* pp. 27 – 28; Niczyporuk, *Evolution,* p. 477.
[7] Čajkova et al. *The Covid-19*, 2021.
[8] Ministry of Justice of Slovak Republic.

important milestones in the development of society, it is more significantly influenced by political actors. We could start with two statements:

1. in a modern democratic society, public policy makers are political parties and are entitled to formulate current problems and prepare appropriate solutions;

2. experience with the development of public administration points to the extraordinary importance of self-government for the proper functioning of the state.

Even thought that none of these statements mentions the administrative judiciary, respectively the judiciary as a whole is one of the indicators of current social developments.

The article is the result of Polish-Slovak cooperation. Its reason is several points of contact in the history of our states and also in the current vectors of the development of social events, which is also a material basis for the direction of law. Our main focus is on the administrative judiciary and related issues whether problems such as the crisis of the administrative judiciary associated with the judicial map, judicial self-government, the creation of the Supreme Administrative Court or the selection of judges. It is obvious that these topics resonate at present, especially in Slovak conditions. The more stable current situation and the results of the solutions adopted in connection with the administrative judiciary in Poland currently represent a valuable reference point for the situation in the Slovak Republic.

In the first part of the article, we will focus on the outlined problem areas, especially in connection with the issue of real respect for the element of self-government in the Slovak Republic and its second part then the corresponding topics in the conditions of the Republic of Poland.[9]

The basis of the current changes in the administrative judiciary is the Government Program Statement 2020-2024 (hereinafter referred to as the "Program Statement") in which the government has set itself the goal of enforcing the constitutional law in the field of justice, the content of which is the reform of the composition of the Judicial Council of the Slovak Republic and the reform of the judicial map[10]. This document is concretized by the Ministry of Justice of the Slovak Republic by announcing the basic goals of the new court map[11]. One of them is to implement the specialization of judges and judges, in addition to other agendas for the administrative agenda in a separate administrative judiciary. From the new judicial map is expected to provide adequate accessibility, faster court proceedings, better decisions, transparency leading to increased judicial credibility and efficiency. The map of administrative courts is to be solved separately from the general judiciary in three districts with the seats of the first-instance administrative courts in Nitra, Žilina and Košice.[12] The seat of the Supreme Administrative Court

[9] Politowski. *Court*. 2021.
[10] Lalik. The European, 328-343.
[11] Vrabko. *Správne súdnictvo*, 2012.
[12] https://www.legalis.sk/sk/aktuality/sudnu-mapu-doplnia-spravne-sudy.a-262.html.

of the Slovak Republic is to be Bratislava. Implementation is limited by the creation of a legislative framework until 2022, except for the Supreme Administrative Court, with implementation already in 2021.[13]

In connection with the forthcoming new judicial map, as well as the administrative judiciary, the challenge bordering on the crisis has become the issue of communicating their concepts and legislation, especially with entities that should participate ex lege in the event of such major changes.[14] There is no doubt that public confidence in the justice system is very low. Nor do we doubt that the public does not distinguish between the various agendas of the courts and speaks out at the level of the judiciary *en bloc*. He therefore considers the judges' efforts to participate in the further development of the administrative judiciary to be unfounded. The other side of the coin, however, is the fact that in legislative changes concerning justice, the Association of Judges of Slovakia must be present, as a judicial organization of 650 judges. The Judicial Council of the Slovak Republic will be mentioned in the next part of the text in connection with the issue of appointing judges. According to Jelínková (2021) in addition to the cooperation agreement, this follows from § 38 par. 3 of Act no. 575/2001 Coll. on the organization of government activities and the organization of the central state administration, as amended, according to which ministries and other central state administration bodies use the knowledge of public institutions, scientific institutions, research institutes and professional and professional organizations. They mainly involve them in solving issues of a conceptual and legislative nature.[15]

This development could be attributed, inter alia, to the problematic communication following the Covid-19 pandemic. From our point of view, however, it bears some common features with other areas of society.

In connection with the management of the pandemic crisis, the Association of Towns and Municipalities of Slovakia stated that some members of the government cabinet do not accept even after a year in the executive branch that local territorial government is not a rival of the government but wants to be a partner of the state. Apart from several unfair statements, ZMOS, as the largest association of local governments, was not invited as a mandatory commenting entity to discuss comments in the legislative process regulated in the legislative rules of the government.[16]

At the beginning of this year, many of us also asked ourselves whether the goal of the legislative efforts of the Ministry of Education of the Slovak Republic is not to politicize higher education institutions and thus to limit academic autonomy in higher education.[17] From our point of view, the given examples indicate the trend of solving problems at first sight without any problems, so

[13] Ministry of justice of Slovak Republic.
[14] Commission staff working dokument, 2021.
[15] Jelinková Dudzíková. *Justícia*, 2021.
[16] Peráček, *Selected*, 2017.
[17] Kočišová et al. Importance, 90-96.

without the need for state authorities to discuss fundamental social changes. On this topic, we were interested in the relatively recently adopted decision of the Court of Justice of the European Union, according to which the amendment to the Hungarian Higher Education Act from the year 2017 introduces unacceptable conditions for university business. Brussels has also been drawing attention for some time to the restrictions on the independence of the judiciary and academic freedoms in Hungary and also in Poland.[18]

If we return to our assessment of the situation in Slovakia, it is necessary to emphasize that we see mistakes in the functioning of justice and higher education. However, we can also unequivocally claim that "simple" centralization of decision-making is not a successful solution based on historical knowledge.[19]

3. Judicial Council and the establishment of judges in crisis

One of the important points of the program statement is the reform of the Judicial Council of the Slovak Republic (hereinafter referred to as the "Judicial Council"). Doctrinally, the Judicial Council is referred to as the body of the autonomous (non-state) administration of courts. Even though there is controversy about the self-governing nature of the Judicial Council,[20] it should be noted that thanks to the creation of some of its members and the current regulation of the decision-making process, it also has a real decision-making potential of non-state bodies. This is despite the fact that all its members are appointed by state authorities.

At present, its staffing is in line with the spirit of the European Charter on the Status of Judges. Of its eighteen members, eight are representatives of the courts, which means judges of courts of all levels. The other members are relatively appointed by the government, parliament and president. During the existence of the Judicial Council, its connection to the Supreme Court of the Slovak Republic has abolished in the sense that the President of the Supreme Court of the Slovak Republic was also the Chairman of the Judicial Council.[21] For the topic of our contribution, it is important to mention what according to the Constitutional Act no. 90/2001 Coll. falls within the competence of the Judicial Council. It mainly concerns the submission of proposals for candidates for the appointment and removal of judges, as well as the President and Vice-President of the Supreme Court of the Slovak Republic to the President.[22]

An important point of the program statement is also the change of the constitutional regulation in the field of justice in relation to the Judicial Council. The news should be:

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[18] Bessa Vilela and Brezovnik. *Europe*, 65-82.
[19] Brestovanská et al. *Selected*, 273-282.
[20] Other definition of the Judicial Council is included in decision of the Constitutional Court of the Slovak Republic, PL. ÚS 6/2018.
[21] Škrobák, 2011, p. 19.
[22] Tóthová, K. *Správa*. p. 255.

- the introduction of a regional principle in the election of its members by judges in order to increase their representativeness,
- the introduction of a rule that legal and executive power will always be nominated only by non - judges and also by
- the introduction of an obligation for the Judicial Council to carry out in the new composition a review of the property of all judges and their family members, including the performance of general reliability checks on those judges whose property review has left reasonable doubts on members of the Judicial Council.

It is questionable to what extent these proposed changes will contribute to the long-criticized phenomenon, which is the decision-making of the Judicial Council of the Slovak Republic on the appointment of judges. As stated by Škrobák (2021), a considerable influence and share in the appointment of judges of general courts by the Judicial Council, does not meet the constitutional requirement of democratic legitimacy. We agree with his view that citizens should exercise state power either through their elected representatives or directly. With a time lag, it is possible to confirm the partial "looping" of this system, which results from its closedness and subsequently deepens it. Together with Škrobák perceives the problem of the competence of the Judicial Council in personnel matters as the most serious.

We agree with the opinion of Tóthová (2017), that in the rule of law the development of the administration of the judiciary should have tend to strengthen judicial self-government[23] with the elimination of the possibility of the influence of the executive power on the judiciary. Regardless of whether the Judicial Council[24] is a state or self-governing body, its reform should focus primarily on moving towards greater transparency. Examples of such positive changes in 2011 were:

- changing the composition of the selection board for a judge to replace judges from outside, and
- the establishment of a publicly accessible database of candidates for the selection board.

From our point of view, the formal establishment of the Supreme Administrative Court as a part of the reform[25] of the judicial map and the opening of a selection procedure for Supreme Administrative Court judges to applicants with a legal practice other than that of a judge is a positive sign.

4. The National Judicial Council and the appointment of judges in the light of the judiciary crisis in Poland

One will not exaggerate saying that the Polish judicature has been sinking into ever graver legal chaos since the end of 2017. The crisis in the administrative judiciary comes as an effect of unprecedented and probably already unsolvable

[23] Funta and Ondria, *Data*, 148-166.
[24] Drgonec, J. Ústava, pp. 1659-1689.
[25] Rajňák. Kritické, 2021.

crisis which has hit the Polish Supreme Court (*Sąd Najwyższy*). On 8 December 2017, the Polish Parliament (*Sejm*) adopted a new Act on the Supreme Court[26], which introduced new solutions to the court's proceedings, some of them highly controversial, e.g.: a change in the procedure of nominating candidates to the position of a judge of the Supreme Court, or reduced retirement age for judges (65 years). The most of its regulations came into effect as of 3 April 2018. The act, as well as the amendments thereto introduced in 2018-2020, have triggered numerous public protests and interventions of the European Commission and EU Court of Justice: f.e. order of the Court (Grand Chamber) from 17.12.2018 (C-619/18 R, European Commission *v.* Republic of Poland for interim measures of Art. 19(1) TEU and Art. 47 Charter of Fundamental Rights of the European Union, concerning the lowering of the retirement age for judges of the Supreme Court and the application of that lowering of the retirement age to judges serving on the date of entry into force of the Law on the Supreme Court[27]; judgement of the Court of Justice from 24.062019 (C-619/18, European Commission *v.* Republic of Poland concerning the lowering of the retirement age for judges of the Supreme Court[28]; judgement of the Court of Justice from 2.03.2021 (C-824/18; A.B., C.D, E.F, G.H, I.J v. *Krajowa Rada Sądownictwa*) concerning the lack of effectiveness of the judicial remedy available against some resolutions of National Council of Judiciary (a procedure for appointment to a position as judge at the Supreme Court)[29].

The regulations which forced retirement of the judges of the Supreme Court who have reached the age of 65 also applied to the judges of the Supreme Administrative Court (*Naczelny Sąd Administracyjny*) of the same age. In reaction to the order of the EU Court of Justice on implementation of protective measures, on 10 November 2018 the President of the Supreme Administrative Court notified the EU Court of Justice that 14 judges whom the act on the Supreme Court adopted by Parliament and its allies affected had been reinstated and resumed adjudication at the Supreme Administrative Court (7 judges did not express their will to do so). Meanwhile, on 21 November 2018, in the process of considering appeals from the resolutions of the National Council of the Judiciary to refuse its recommendations in the procedure of presenting candidates to the Supreme Court to the President of the Republic of Poland, the Supreme Administrative Court addressed the EU Court of Justice with five prejudicial questions on the legality of the election of judges to the National Council of the Judiciary[30]. In consequence of the actions, on 26 April 2019 the Parliament adopted an amendment to the Act on the National Council of the Judiciary which eliminated the option of appealing from the Council's

[26] Journal of Laws, consolidated text 2021 item 154 as amended. Original version see: form 2018 item 5.

[27] ECLI identifier: ECLI:EU:C:2018:1021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A 2018%3A1021.

[28] ECLI:EU:C:2019:531, https://curia.europa.eu/juris/document/document.jsf; jsessionid=9DE8FCCD62EA527DD20028527A9F25 EE?text=&docid=215341&pageIndex=0&doclang=PL&mode=req&dir=&occ=first&part=1&cid=16597849.

[29] ECLI:EU:C:2021:153, https://curia.europa.eu/juris/liste.jsf?num=C-824/18&language=PL.

[30] Barcz et al. *Problem*, p. 798.

resolutions concerning candidate judges.[31] The new regulations were further aimed at discontinuing the proceedings initiated on appeals from the Council resolutions filed with the Supreme Administrative Court and making the preliminary questions of the Supreme Administrative Court filed with the EU Court of Justice concerning legality of the actions taken by the National Council of the Judiciary pointless.

Hence, the crisis involving the National Council of the Judiciary is far graver than that in Slovakia and already impossible to overcome because of the subsequent and mutually exclusive actions of the Polish Parliament, the Constitutional Tribunal[32], and the European Commission. The situation is unreconcilable considering that even the judgments of the EU Court of Justice are ignored in Poland.

On 25 March 2019, the Polish Constitutional Tribunal ruled that the regulation adopted by the Polish Parliament and concerning the election of 15 judges to the Council was consistent with the Constitution[33]. Alongside the above, the Tribunal ruled that the regulation which enabled lodging an appeal (with the Supreme Administrative Court) from resolutions adopted by the National Council of the Judiciary in the matter of applications for the appointment of judges to the Supreme Court was inconsistent with Article 184 of the Constitution of the Republic of Poland. At that, the then Ombudsman and some representatives of the legal communities claimed that the ruling of the Tribunal in the matter was invalid, since the judicial panel included a judge who had been elected in 2017 by the Parliament to join the Constitutional Tribunal and replace another candidate already elected to the position, and that the date for the pronouncement of the judgment had been set before the lapse of the statutory term reserved for the Ombudsman to declare his participation and voice his position[34].

5. Discussion on the reform of the administrative judiciary and crisis caused by Covid-19 in Poland

Worse, in the current Polish reality where ‘everyone fights everyone else’ there is no chance for a reasonable discussion on the reform of the administrative judiciary. The need of the reform has been voiced for several years now in the context of reservations about organisational efficiency, especially of the Supreme Administrative Court. The objections raised against the Court (and corroborated by

[31] Ustawa z dnia 26 kwietnia 2019 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz ustawy – Prawo o ustroju sądów administracyjnych, Journal of Laws form 2019, item 914.

[32] I.e. the judgement of the Constitutional Tribunal from 7.10.2021, K 3/21, Journal of Laws 2021, item 1852, https://trybunal. gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europe jskiej; the judgement of the Constitutional Tribunal from 14.07.2021, K 7/20, Journal of Laws 2021, item 1309, https://trybunal.gov. pl/postepowanie-i-orzeczenia/wyroki/art/11589-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-na-wykonywaniu-srodkow-tymc zasowych-odnoszacych-sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa.

[33] K 12/18, Journal of Laws 2019 ite, 609.

[34] Łukowniak. *Glosa*, 2019.

the court statistics) came down to dragging out the proceedings[35]. The ideas for overcoming the lengthiness included e.g. introduction of the substantive (instead of cassation) mode for some cases and amendments to the regulations which overformalise the proceedings before the Supreme Administrative Court[36].

Organisational inefficiency of the Supreme Administrative Court, as well as its backwardness in civilisation terms, the latter reflected in avoidance of new technologies in administrative court proceedings, have 'added' to its diminished authority both in the society, and in the legal community the moment the COVID-19 pandemic broke out. Unlike the common courts in Poland, which moved swiftly to make use of the regulations enabling the holding of trials in the remote mode, the administrative courts began holding their proceedings remotely only several weeks ago.[37]

In practice, on the beginning of pandemic, from mid-March to mid-May of 2020, most hearings were postponed at all; only so called "urgent cases" were dealt with a closed hearing[38]. The urgent cases are those which up to now had to be examined by a court within a prescribed time limit (these concerns, among other things, the complaints being examined in cases concerning the disclosure of public information). According to the Law on proceedings before administrative courts from 2002[39], the President of the competent regional administrative court may order that any case be examined as urgent, if the failure to do so could result in a threat to the life or health of humans or animals, serious damage to public interest, or possible irreparable material damage, and also when the welfare of the justice system so requires. It must be emphasized that examination of the case in closed hearing is a right, not an obligation of the court[40].

In general, on March 31th, 2020, the Anti-COVID-19 crisis Act has entered into force. This Act has introduced amendments to several dozen acts of law, including those relating to the judiciary and public administration, applicable during the state of epidemic[41]. The introduction of new provisions of the Anti-COVID-19 crisis Act, meant potential changes in the examination of cases both before regional administrative courts and the Supreme Administrative Court. Art. 15 zzs4 the Anti-COVID-19 crisis Act on March 20th, 2020 made possible for the courts to refer each case to a closed hearing. The practical consequence of the regulation was therefore a kind of evolution of the purpose of handling cases in closed hearing - under normal circumstances, such are caused by the desire to ensure the speed of proceedings, while in the COVID-19 realities, the need to ensure social distance and limitation of interpersonal contacts comes to the fore. In

[35] Gut. *Merytorycne*. 2019.
[36] Michalak. *Naczelny Sąd,* p. 25.
[37] Bogusz, *Charakter*, 2014.
[38] Gazeta Prawna. *Naczelny Sąd*. 2021.
[39] Law on on proceedings before administrative courts of 30.08.2002 [Ustawa z dnia 30.08.2002 - Prawo o postępowaniu przed sądami administracyjnymi], Journal of Laws consolidated text Dz. U. 2019, item 2325, as amended.
[40] Szafranska. *Zasada jawności* …, p. 81.
[41] Chmielnicki, Minich, Rybkowski, Stachura and Szocik, *The COVID-19 Pandemic…*, p. 92.

both cases, openness (principle of open court) is a potential value at risk. From mid-May to the end of October 2020, while maintaining the appropriate sanitary regime, administrative courts "resumed" their activities, considering cases also at oral "traditional" hearings. However, a significant part of the cases was directed to closed session: pursuant to Art. 15zzs4ust. 3 of the covid act or on the basis of an application for simplified proceedings.

One should mention here the order No. 39 of the President of the Supreme Administrative Court of October 16, 2020 on the cancellation of hearings and the implementation of preventive measures in the Supreme Administrative Court to counter the potential threat of SARS-CoV-2 infection in connection with the inclusion for the Capital City of Warsaw in the 'red area'[42]. The President of the Supreme Administrative Court provided the basis for Art. 34 § 2 of the Law on the system of administrative Courts. Some no governmental organizations and many lawyers noticed the President of the Supreme Administrative Court that it could be a violation of constitutional and statutory principle of the openness[43]. In his name, one of judges replied that examination cases in closed hearing it is not a violation of the constitutional and statutory principle of the openness. He told that courts were also able to pass judgement that did not require a public hearing to be held. It should be emphasized that similar orders were issued by the presidents of regional administrative courts. So, in addition to the abovementioned problems related to the violation of the rule of law, there occurred also legal controversies between the principle of open court and the regulations of presidents of the administrative courts, which limited access to public hearings and sessions to persons summoned and notified without the public and the media.

Pursuant to Polish law, the orders of the courts' presidents have only a procedural meaning, but many judges decided that such a "direction" - a closed hearing as a rule - is what they should be headed[44]. The consent of the courts themselves to limit the public is saddening. Unfortunately, in Poland in the COVID-19 crisis the principle of openness has few active supporters. So, it could easily be removed (like the guarantees I wrote about above) or restricted without anyone much noticing.

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[42] Order No. 39 of the President of the Supreme Administrative Court of October 16, 2020 on the cancellation of hearings and the implementation of preventive measures in the Supreme Administrative Court to counter the potential threat of SARS-CoV-2 infection in connection with the inclusion of the Capital City of Warsaw in the red area [Zarządzenie nr 39 Prezesa Naczelnego Sądu Administracyjnego z dnia 16 października 2020 r. w sprawie odwołania rozpraw oraz wdrożenia w Naczelnym Sądzie Administracyjnym działań profilaktycznych służących przeciwdziałaniu potencjalnemu zagrożeniu zakażenia wirusem SARS-CoV-2 w związku z objęciem Miasta Stołecznego Warszawy obszarem czerwonym], https://siecobywatelska.pl/wystapienie-do-nsa-i-wsa-w-sprawie-kierowania-spraw-na-posiedzenia-niejawne/.

[43] Kubicka-Żach and Sewastianowicz. *Niejawne rozprawy*.

[44] See i.e. resolution (*uchwała*) of the Supreme Administrative Court from 30.11.2020, OPS 6/19; decisions (*postanowienia*) of the Supreme Administrative Court: from 22.10.2020, II FSK 1389/18; from 1.12.2020, II FSK 2207/18, CBOSA: https://orzeczenia.nsa. gov.pl/cbo/

6. Closed hearings, open court hearing and virtual hearing in the court administrative procedure

Generally, "closed hearings" ("in-camera") describes court proceedings where the public (and the press and other media) are not allowed to observe the procedure. Closed hearing is the opposite of trial in open court where the parties testify in a public courtroom, and party representatives publicly present their arguments to the trier of fact. Public access includes the ability to attend courtroom proceedings, as well as access to court records and press access and – and in my opinion: during pandemic time – to online hearing.[45] On the other hand, open court allows the public to inspect the case and make an opinion.[46]

This principle of open court is regarded today as one of the fundamental attributes of a fair trial in every country. Further, it tends to maintain confidence in the integrity and independence of the courts. Public access to the courts guarantees the integrity of judicial processes by demonstrating that justice is administered in a non-arbitrary manner, according to the rule of law. Openness is necessary to maintain the independence and impartiality of courts[47].

It can be easily agreed that the principle of open court is regarded as a part of the right to fair trial – the one of the fundamental guarantees of human rights and rule of law, aimed at ensuring administration of justice (see inter alia Art. 14 Sec.1 of the International Covenant on Civil and Political Rights, the Article 10 of the Universal Declaration of Human Rights Art. 6 of European Convention for the Protection of Human Rights and Fundamental Freedoms). [48]

According to Art. 45 of the Constitution of Poland and Art. 10 of the Law on proceedings before administrative courts, the usual course of a proceeding is an open court unless a special provision provides otherwise. Closed hearings are done rarely, in exceptional cases when the court deems fit.[49] It means that the law is that all hearings are in open court, unless statute law says something different[50]. As stated by Szafrańska, statutory regulations limiting publicity must be constructed in a way that does not allow arbitrary limitation of this principle by entities applying them, which, in the light of the following considerations, puts into question the actions of administrative courts in limiting the publicity of hearings in a pandemic era.[51]

According to Art. 94 Sec. 1 of the Law on on proceedings before administrative courts, court hearings shall be held in the courthouse, and outside it only when, after meeting the security requirements, court actions must be carried out in the other place or when holding of hearings outside the courthouse facilitates the conduct of the case or contributes considerably to cost saving. This provision

[45] Kmieciak. *Postępowanie administracyjne*, p. 141.
[46] Szafranka. *Zasada jawności* …, p. 82.
[47] Zimmerman. *Prawo do sądu*, p. 312.
[48] Gregušová et al. *Exeution*, 611-618.
[49] Kulak-Krzysiak. *Prawo do sądu. 2013.*
[50] Szafranska. *Zasada*, 71.
[51] Kulikovska-Kulesza. *Polskie*, p. 45.

has been changed by the Law on Electronic Service dated 18th November 2020[52]: the Section 2. has been added to this Article. According to new Art. 94 Sec. 2, the presiding judge may order a public hearing to be conducted with the use of technical devices enabling it to be held remotely. In this case, participants may participate in the court hearing when they are in the building of another court and perform procedural activities there, and the course of procedural activities is transmitted from the court room of the court conducting the proceedings to the place of stay of the participants in the proceedings and from the place of stay of the participants in the proceedings to the court room the trial court. In the face of the epidemic outbreak, this requirement destroyed the sense of using online hearing (videoconferences) as a measure to reduce the risk of spreading COVID-19, because in order to conduct a hearing remotely, the parties and other participants had to be in the building of one of the courts. Online hearings were not held, and the right to a fair trial was thus violated.[53]

The Polish legislator noticed this problem 14 months after the outbreak of the pandemic and 14 months of limiting the right to an open court. The Art. 15 zzs4 the Anti-COVID-19 crisis Act on March 20th, 2020, was changed by Art. 4 Sec. 3 of the Act amending the act - Code of Civil Procedure and some other acts (May 28th, 2021)[54]. According to this provision, during the period of an epidemic threat or an epidemic announced due to COVID-19 and within one year of the appeal of the last of them regional administrative courts and the Supreme Administrative Court conduct a hearing using technical devices that enable it to be conducted remotely with simultaneous direct transmission of image and sound, except that the persons participating in it do not have to be in the court building. It is an episodic[55], exceptional, extraordinary provision of law. However, it allows the right to an open court to be respected.

Today, more strongly than before the pandemic, the existing legal and technical solutions are being verified which should provide an actual implementation of the fundamental principle of open court and make it possible for all the interested parties to access the court. One should also remember that online hearings bring a legal presumption that that participant of the proceedings in technical terms, they have been well prepared for initiating and carrying on with the proceedings (i.e. are furnished with proper IT equipment, the right software and access to the network) and possess the required skills for the service of the devices. Á propos the well-known legal maxim *ignorantia iuris nocet*, one may conclude that the fact of an electronic proceedings and online hearings cause for the participant a new, unknown until that moment, presumption: "ignorance of the technics is no excuse" (*ignorantia technicae artis technicae nocet*). If a participant initiates the electronic proceedings, they must be aware of the challenges and

[52] Journal of Laws 2020 item 2320 as amended.
[53] Żackiewicz-Zborska et al. *W NSA,* 2021.
[54] Ustawa z 28.05.2021 o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw, Journal of laws, consolidated text 2021 item 1090.
[55] Dauter. *Prawo*, 2021.

technical problems resulting from this type of communication. It is likely that in a post-Covid era there will be pressure for more interactions to occur electronically rather than in person. This could easily lead to administrative court proceedings that no-one other than the parties will see or hear or study.[56]

7. Conclusion

The administrative justice in actual time faces a pandemic, the same as other aspects of social life, face in front of several open problems. These vary and depend on several factors. One of them is the quality of the legal regulation of its institutional and functional side. Another is, for example, the ability of legislation to respond to changing conditions.

In the article, we pointed out the fact that despite the fact that the form of administrative justice varies from state to state, it is also possible to find points of contact between its various types and developmental forms of administrative justice. In the part of the article devoted to the actual problems of administrative justice in the Slovak Republic, we focused in a broader scope on changes in the court map with a special focus on the process of creating its institutional framework.

In the part of the article which was focused on the actual state of administrative justice in Poland, one can say that administrative justice, although not directly involved in the deepening crisis of the common courts, have been 'infected' with the crisis. This inflicts serious damages, to mention but the fact that the authority of a judge of the administrative court is gradually diminishing in the Polish society. One of the causes thereof comes down to the fact that appointed to sit on the administrative court have been individuals who, whilst holding positions in the executive authorities, would mob other judges. The Polish legal community is further divided in the views on the actions taken by the he politicians, professors of law, other lawyers and judges during the 'war for the Supreme Court'. A very important challenge for Poland was to maintain the principle of open justice based on the use of electronic forms of communication, which, despite scientific advances in digitization and modern technologies, has not prevailed.

The aim of our article was not a comprehensive grasp and a comprehensive examination of the issue of administrative justice. We have come to the conclusion that, despite the different problems facing the administrative justice in the Slovak Republic and Poland, they can inspire each other in resolving similar issues in other time coordinates. However, we have tried to analyze them in a way that can be beneficial for overcoming them already at present.

[56] Woś. *Postępowanie,* 2021.

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