BETWEEN JUDICIAL REVIEW AND THE EXECUTIVE - THE PROBLEM OF THE SEPARATION OF POWERS IN COMPARATIVE PERSPECTIVE

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Abstract

Judicial review of the executive is an essential element of democracy. It ensures the legality of administration. It is obvious that for adequate protection of rights of individuals, judicial review should be effective. There are two models of judicial review: the cassation and the merit one. The first of them is based on assumptions derived from the Austro-Hungarian regulations dating back to the nineteenth century. It assumes that the competence of the administrative court is only to issue two types of rulings. Some European countries uses the merit review elements were introducted into the proceeding before the administrative court. This model of judicial review, which is characteristic for French solutions, gives to administrative courts the possibility to ingeration in administrative action. It seems interesting to consider which of these models of judicial review is more effective when it comes to protecting the rights ensured by the proper fulfilment of judgements and what are the advantages and disadvantages of both systems in the light of separation of powers.

Keywords: *separation of powers, judicial review, administrative law, Polish system of law.*

JEL Classification: K23, K41

1. Introduction

The content of individual rights in public law is closely related to the nature and scope of the powers and duties entrusted to public officials and agencies. Judicial review of administrative action exists to safeguard legality. The institution of judicial review is an important mechanism of holding the government legally accountable, nevertheless questions remain about its proper role in a separation of powers system. Judicial review of the executive is an essential element of democracy, because it ensures the legality of administration. Fundamental condition of the rule of law requires that public authority bodies may act only within the limits of their powers, on the basis of properly understood legal grounds. Moreover, the court cannot interfere with action lawfully taken within the jurisdiction of a public authority, because role of the court is to examine the lawfulness of administrative decisions, but not their merits[2].

Nevertheless, it is obvious that for adequate protection of rights of individuals, judicial review should be effective. The crucial difference between an appeal in administrative way handled by another public body (or official) and judicial review of administrative actions handled by court is resulting from traditional distinction between executive and judicial power. This perspective shows cassation as a first model of judicial review. In continental Europe cassation model is based on assumptions derived from the Austro-Hungarian regulations dating back to the 19th century. In effect it assumes that the competence of the administrative court is limited to issue only two types of rulings.

The court may dismiss the complaint, which is equivalent to finding out that the contested act or activity does not violate the existing law to the extent that obliges the court to annul them. If so, the judgment ends the proceedings. It may also grant the complaint, having determined there was a violation of the applicable law. The court set aside the decision or order, annuls the act, declares that the action is with no legal effect, declares that they have been issued in violation of law or declares there has been lack of action or excessive length of proceedings. The case goes back to the administrative body again. In such a model it sometimes happens that the case "circulates" by this way several times from the authority to the court, because the authority fails to render a proper decision. This is why in some European countries the merit review elements were introduced into the proceeding before the administrative court. The second model of judicial review is characteristic for French solutions. It gives to administrative courts the possibility to integration in administrative

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[2] Tiberiu Dragu and Oliver Board, *On Judicial Review in a Separation of Powers System*, „Political Science Research and Methods", Volume 3, Issue 3, pp. 473-492 (2015).

action.

Depending on the formula of the remedy afforded, the judgement may be a full remedy action, which finally decide the case by awarding the plaintiff compensation, acknowledging the existence of a right or obligation, or by injunction stopping the administrative authority from a specified act. It may, otherwise, create premises only for the case to be resolved by the relevant administrative authority[3]. It seems interesting to consider which of these models of judicial review is more effective when it comes to protecting the rights ensured by the proper fulfilment of judgements and what are the advantages and disadvantages of both systems in the light of separation of powers.

2. European standards of judicial review in administrative matters

Pursuant to the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR) and the EU acts, the effectiveness of the administrative court protection (affording an effective remedy) is a component of the right to the judicial control of public administration. The efficiency standard is, according to the European Committee for Legal Cooperation of the Council of Europe, one of the essential elements of the judicial review. Another one is the independence together with the impartiality of the court constituted pursuant to the law.

What is more, the court should execute control at least from the point of view of the legality of action, accuracy (justice) and the reasonableness of the main proceedings, integrity and public the nature of the hearing, during which a dispute between an individual and the administration is looked into.[4]

Principles derived by the European Court of Human Rights in Strasbourg (hereinafter: ECHR) from Article 6.1 of the ECHR, has taken shape through the provisions of the Council of Europe recommendation Rec(2004)20 on the judicial review of administrative acts[5]. The effectiveness of judicial review is linked with the standards of providing the court with appropriate measures of redress, including the quashing of the disputed administrative act and referring it back to the administrative authority to take a new decision that complies with the judgement and, where appropriate, decide about compensation and ensure effective execution of the court's judgement, in compliance with the Committee's recommendation Rec(2003)16 on the execution of administrative and judicial decisions in the field of administrative law.

According to the second of the abovementioned recommendations, the efficiency of judicial review is identified with both, achieving the appropriate result of the review of the act (omission) of an administrative authority and getting to a lawful state of affairs, following a court judgement arising from the lodged plaint. The review is efficient if the court, respecting the procedural rules, applies a remedy that is proportionate to the breach of law that has occurred, or – if no such breach has been found – dismisses the complaint as ungrounded. Depending on the formula of the remedy, the judgement may finally decide the case or create premises only for the case to be resolved by the relevant administrative authority[6].

2.1. Two models of judicial review

The cassation model, derived from the Austro-Hungarian type of jurisdiction, still predominant in many European systems. According to the classical model assumptions of cassation, the administrative courts' effectiveness shall be considered in terms of making two kinds of decisions. First one is dismissing the complaint, which is equivalent to finding out that the contested act or

[3] See A.W. Bradley and K.D. Ewing *Constitutional and Administrative Law*, Pearson, pp.764-771(2011), and Alex Carroll, *Constitutional and Administrative Law*, Pearson, pp. 321-327 (2011).

[4] Handbook on European law relating to access to justice (2016), European Union Agency for Fundamental Rights and Council of Europe: Luxembourg, p. 16-17.

[5] Recommendation Rec(2004)20 of the Committee of Ministers to Member States on judicial review of administrative acts, adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies.

[6] Mariolina Eliantonio, *Europeanisation of Administrative Justice. The Influence of the ECJ's Case Law in Italy, Germany and England*, Europa Law Publishing: Groningen - Amsterdam, p. 16-23 (2008).

activity does not violate the existing law to the extent that obliges the court to annul them. A final judgment ends the proceedings. Second one is granting the complaint, having determined there was a violation of the applicable law. The court sets aside the decision or order, annuls the act, declares that the action is with no legal effect, declares that they have been issued in violation of law or declares there has been lack of action or excessive length of proceedings. In the latter case, it is necessary to execute the judgment by the authority. It causes serious complications and makes it difficult to obtain the correct result. In the situation which is typical of the Polish system of judicial review, the judgment granting the complaint creates an intermediate legal status (realization of the purpose of the judgement requires a secondary administration activity). Correct and full implementation turns out to be significant in such cases.

Moreover, in Polish system of administrative justice a judgment acknowledging the legitimacy of the plaint creates an interim legal situation lead to that the purpose of the review requires a new administrative act. Regarding that the basic problem is prompt and full execution of the judgment. We can capture and measure the external efficiency of the review by use of this condition.

Furthermore, external efficiency should be distinguished from the internal one, associated with satisfying a number of standards of court proceedings, set out by the constitution and binding provisions of international law. With regard to this, it will be possible to come to general conclusions regarding the science of law on administrative procedure and administrative court proceedings and possibly indicate the prospects for the development of these fields. Due to the study, it will be possible to find out what is the optimum formula for the judicial review is in the context of the contemporary understanding of the principle of separation of powers.

The concept of the judicial review of administration is combined with the evaluation of the correctness of fulfilling the tasks assigned to administrative courts. The basic point of view taken into account includes the results of judicial activity (the legality of the contested acts and activities together with examining whether there has been lack of action or excessive length of proceedings).

This means that efficiency boils down to the measure - the effect relation (result of action).

In some studies, it is assumed that the principle of separation of powers excludes the adoption of merit measures in administrative adjudication. Other doctrine representatives suggest a modern understanding of that principle which does not preclude the breaking of the cassation formula in order to introduce the merit measures. From that point of view, we should try to determine what factors affect the proper fulfilment of the cassation judgement: whether they should be found in the court's actions (misdiagnosis of factual or legal issues, formulating defective legal appraisal and instructions on further proceedings, etc.) or in the administrative organ's action, especially improper discharge of the obligation to comply with the judgment. Then we should compare the two types of administrative courts judgements (the cassation and merit one), based on the standard of effectiveness in the context of the principle of separation of powers and create basis to formulate general conclusions regarding the effectiveness of current legal structures in relation to the competence of the administrative court, arising from the modern understanding of the principle of separation of powers as well as the desired directions of changes in the administrative procedure and administrative courts proceedings.

With regard to this, it will be possible to come to general conclusions regarding the science of law on administrative procedure and administrative court proceedings and possibly indicate the prospects for the development of these fields. Due to the study, it will be possible to find out what is the optimum formula for the judicial review is in the context of the contemporary understanding of the principle of separation of powers. On this basis, it will be possible to place appropriate proposals with regard to the assessment of the current legal regulation.

The differences in the effectiveness of individual rights protection exercised by administrative courts, according to the cassation and merit model are clearly visible. Finding out whether and to what extent the administrative courts use the new legal structures will show whether legislative changes have proved adequate to the needs of individuals and the administrative courts' adjudication abilities. Identifying the problems which emerge in connection with launching the new judicial review measures will allow us to place proposals concerning their elimination in the process of applying the law. At the same time, it will be possible to formulate suggestions for domestic legislators.

When specifying those issues, it should be noted that establishing whether the administrative courts state to discontinue the administrative procedure will justify a conclusion concerning the relevance of the new judgement's basis. Indicating the category of cases in which such judgements are made will allow the researchers to identify the violations of settlement of the dispute which oblige the court to discontinue the proceedings. As a result, it will be possible to find out whether the observed violations would show any regularity, and whether it is possible to eliminate them in the future by providing guidelines how to avoid them.

Determining whether the administrative courts formulate the legal appraisal and instructions (recommendations) on further proceedings before an administrative authority to render a decision or order within the specified time limit together with indicating the manner in which the case should be handled or determined will make it possible to put a proposal as to whether the newly introduced regulation is used in practice and about its operability. It will therefore be possible to reflect on the practical functioning of this institution, disclose concerns regarding the interpretation of the new procedural rules and make suggestions concerning the ways of eliminating them.

What is more, identifying cases in which the administrative courts recognize that the authority's obligation to render a decision or an order with indicating the manner in which the case should be handled or determined is justified by the case circumstances, will allow to define the criteria formulated in the administrative courts' adjudication in this field.

The distinction between the grounds specified in Article 145 § 1 point 1 and Article 145 § 1 point 2 of Law on Proceedings Before Administrative Courts (hereinafter: LPAC)[7], justifying the judgement of obliging the authority to render a decision or order with indicating the manner in which the case should be handled or determined will allow the researchers to establish the conditions on which such judgements are made and indicate the cases in which the administrative courts make them more often. It will be therefore possible to state for which types of violation the merit formula is more suitable. Consequently, it will be possible to indicate the cases in which the merit formula is more effective.

2.2. The coexistence of two models - more questions than answers

Finding out whether the authorities fulfil their obligation to notify the court about rendering their decision or order, in accordance with the court's judgement will allow to state the direct relationship between the statement and the final decision. It will be therefore possible to analyse whether the expected effect of the administrative court proceedings, which is leading to the final and proper administrative decision, really occurs. Establishing whether and to what extent the administrative courts exercise the competence to impose fines on authorities which fail to render a decision or order within the specified time limit will allow the researchers to learn about the practical meaning of the merit judicial review (which leads to rendering the final decision). Failure to act in this field resulting in a judgement of imposing a fine may prove that the judgement was not executed properly, so that the adjudication formula was not effective.

A similar research goal is associated with investigating whether and to what extent the parties exercise the right to lodge complaint against not rendering the decision or order within the time limit specified by the court. The complaint itself does not mean that the party properly justifies procedural situation. On the other hand, it proves the negative public perception of the administration activity, which also must be taken into account when considering the issue of effectiveness.

Dissatisfaction with the functioning of the public administration does not prove the unlawfulness of its actions, but it certainly evokes concerns whether the legal result of the proceedings has been achieved in an effective way. The same issues will be the subject taken into account while analyzing the issue of whether the administrative courts recognize in their judgments the rights or obligations arising from the provisions of law in cases of complaints against the lack of action within the time limit specified by the court.

[7] Act of 30th August 2002 - Law on Proceedings Before Administrative Courts (*prawo o postępowaniu przed sądami administracyjnymi*), consolidated text published in Journal of Laws of 2018, item 1302.

The aim of studying the judgement legal structure as regards recognizing the rights or obligations arising from the provisions of law in cases of complaints against the lack of action within the time limit specified by the court is to analyse the fulfilment of the judgement. The way of preparing the court's statement affects the possibility of its proper implementation. The experience gained from the application of Article 153 LPAC by the administrative courts proves that the recommendations for the authority for further proceedings may be difficult to implement in practice.

It may therefore turn out that the formulation of judgements recognizing the rights or obligations arising from the provisions of law will also create some problems. Their identification will help to formulate proposals for eliminating them in the future, and - to determine the proper ways of recognizing such rights or obligations. As a consequence, the research can reveal barriers to the effective usage of the abovementioned adjudication formula.

The indication of these categories of cases, in which administrative courts treat as circumstances cases allowing to issue a judgment recognizing the rights or obligations arising from the provisions of law in cases of complaints against the failure to render a decision or order within the time limit specified by the court, will make it possible to assess whether the interpretation of Article 145a § 3 LPAC is wide or a narrow. As a result, it will be possible to determine whether the merit judicial review turned out to be a common or rare practice.

Finding out whether the administrative courts exercise the competencies of recognizing that the failure to issue a decision or an order has taken place in flagrant breach of law will allow the researchers to examine the scope of cases in which the authorities flagrantly fail to fulfil the judgment of the administrative court. In this way, it will be directly possible to indicate the scope of cases in which the inefficiency of the judgement becomes difficult to eliminate, as a result of the administration's persistent failure. If the number of such cases is high, the research aim will also be to formulate suggestions of ways to solve the problem, at the level of law application and regulation.

Finding out whether the administrative courts ex officio or on request use of the competence to impose the fine for failure to render a decision or order within the time limit specified by the court will make it possible to state whether the parties are active in fighting against authorities' omissions or rely on the court judgement. Confirming the latter may justify the suggestions to adopt the measures providing information about the new regulation. Similar research aims are related to finding out whether and possibly in what circumstances the parties request, judgement imposing a fine on the administration.

Finding out whether the administrative courts order the authorities to pay the complainant a sum of money because of the failure to render a decision or order within the time limit specified by the court will make it possible to formulate a conclusion about the real possibility to obtain any compensation as a result of a malfunction of administration. It is obvious that the sum granted by the administrative court does not replace the full compensation; its compensatory function is insignificant. Nevertheless, it plays a role of redress because of the inconveniences caused by the violation of law committed by the authority. The effectiveness of adjudication may be expressed with repairing - to some extent - the damage caused to the complainant as a result of violations of the law committed by the administration.

Finding out whether the complainant obtained the sum of money on request or ex officio may indicate the existing level of legal awareness and the scope of information about the party rights. Based on that, it will be possible to put some proposals to consider launching appropriate information campaigns.

3. Transformation of cassation formula - convergence towards a mix-model?

The pure cassation formula in the modern European systems often breaks down into elements belonging to the merit model. The Dutch regulation, for example, has introduced additional powers to the administrative courts, which allow the court to eliminate the state of illegality (additional powers of redress), remaining, however, in connection with the action for the annulment of the administrative act. These are based on the provisions of Article 8:72, Article 8:73 § 4 and Article 8:86

in force since 1 January 1994. Law - General administrative law (General Administrative Law, *Algemene wet bestuursrecht*), authorizing the court in certain cases, where the decision is set aside with *ex tunc* effect, to issue: 1) decisions replacing the administrative decisions (substitute decisions), 2) the so-called accessory decisions concerning compensation in connection with the challenged administrative action which caused damages (accessory judgments), and 3) immediate decisions to resolve the matter on the merit of the case under the protection of the right to the urgent procedures (immediate judgments on the merit of the case).

Quite another issue is that the lawmakers of many states have allowed courts reviewing administrative acts to hear and examine evidence to supplement the factual information in the files or to establish relevant facts "from scratch". Evidence from the testimony of the parties, witnesses and expert witnesses and from visual inspection is provided for, by among others, the legislation of Germany, Finland, Sweden and the Netherlands. Another instrument used in the course of the review to provide the court with necessary knowledge is additional clarification that the court requires from the administrative authority or an entity independent from the administration, for instance in the form of an expert's report. The latter, as a form of unbiased position on the case, may be a motive for the parties to seek an amicable resolution of their dispute (alternative dispute resolution measures) – a fact observed in many countries.

In the context of the observations above, the proposition that it is possible to maintain a uniform (pure) cassation–type jurisdiction model in Europe, like the classic Austro–Hungarian model of the late 19th century, cannot hold up to criticism. Even in Austria itself, the idea seemed to be contradicted first by the establishment of independent administrative tribunals (*Unabhängige Verwaltungssenate in den Ländern*), which in a form that was typical of administration, performed some of the judicial review tasks. At the same time, the Administrative Court (*Verwaltungsgerichtshof*) might decide a complaint about the omission to act by an administrative authority on its merits. As a result of the reform of May 2012 the Austrian lawmaker introduced a two–tier system of administrative judiciary and empowered the courts to adjudicate on the merits of a case. Besides Verwaltungsgerichtshof which has existed since 1876, administrative courts of first instance on the states (Länder) level and two administrative courts of first instance on federal level: Federal Administrative Court (*Bundesverwaltungsgericht*) and Federal Finance Court (*Bundesfinanzgericht*) have been established (so called 9+2 model).

The discussion highlights the need for some of the views on the function of judicial review of administrative acts, well–established in the tradition of the system, to be revised. This is now given the name of *Überprüfung* and is gaining significance. Judicial control of the administration of today – if it is to be efficient – should, apart from removing the unlawful act and giving the administrative authority a binding instruction on further action to be taken (a clear formulation of the necessary and methodologically appropriate instructions), offer a greater range of remedies that are suitable for the circumstances of the specific case. The shortcomings of the cassation–type model of administrative jurisdiction were already seen in Poland many years ago and various proposals for its improvement were made. The concept of the right to have one's case heard by an independent court, which has for years been developing in European case law, provides not only for the appropriate proceedings before a judicial body with "full jurisdiction", but also for the proper execution of the delivered judgment.

This gives rise to understandable questions about the institution of judicial control of administration. If we assume that the fulfilment of the latter obligation is but a phase of a process that has only seemingly been concluded, the problems of securing the protection envisaged in the legislation still remain, not to mention the legal consequences of defaulting on the directive of "reasonable time" within which the case should be decided, should a plaint be lodged with the ECHR.

Sporadic opinions expressing doubts about the wisdom of granting administrative courts the powers (very limited indeed) to decide the case on its merits seem to be evidence of a rigid clinging to the idea that the judiciary and the administration are separate powers. The balance between the two would actually be upset if the judiciary were deprived of a greater influence on the other power. In order to afford full protection to those who need it, the administrative courts must get more involved in administrative action and engage in effective and conclusive dispute settlement.

While appreciating the importance of the additional, multi–function remedies outlined above, we must remember that the external effectiveness of the judicial control of administration exercised as an action for annulment mainly depends on the mode adopted to settle the dispute, including the formula of judgements and instructions for further action, provided in the written justification of the judgment allowing the complaint. The solutions presented in section (2) above, shaped by the Dutch General Administrative Law, undoubtedly indicate the efforts to harmonise the requirements of cassation–type judgements made by administrative courts with the need to afford an effective remedy to the plaintiff, devoid of excessive burden and respecting the directive on "reasonable time" of the settlement of the dispute, derived from Article 6 section 1 of ECHR.

The Dutch lawmaker, for a long time trying hard to greatly reform the rather complex system of administrative courts, gave the competences to the courts to apply the construction of "administrative loop" (*bestuurlijke lus*) in some types of disputes. Technically speaking, the use of this construction means that the court issues an interlocutory judgment. It has its equivalents in other legal systems, e.g. in France (*jugement d'avant dire droit*) and in Germany (*Zwischenurteil*). The issue of an "administrative loop", or the power to rectify the legality of an administrative decision was considered in detail in the seminar organised by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union with the collaboration of the Council of State of Belgium (Brussels, 1–2 March 2012). The two following issues were the subject of the seminar as well: 1) power to award compensation and action for annulment, 2) the effectiveness of enforcement of the rulings of administrative courts (power of injunction).

Without going into details of individual varieties of "administrative loop", we can say that using this measure assumes the suspension of judicial procedure until a competent administrative body submits a modified draft decision taken with due regard to the findings of the court thus far. The interlocutory judgment indicates insofar as possible how to rectify the infringement. In this case, the administrative body must inform the court as soon as possible whether it intends to take up the option, offered by the court, of rectifying the infringement or having it rectified. Where the administrative body accedes to the request to rectify the infringement, it shall indicate in writing as soon as possible how it is going to rectify it. The parties may, within a set period following said written notification being sent, indicate their attitude to rectification of the infringement. A final judgment shall be handed down upon the first appeal against the flawed administrative decision that has been (or has not been) rectified. The prerequisite for starting the procedure in question, giving greater certainty about the result of the proceedings and speeding up the settlement of the case, is the court's statement that the disputed decision is voidable. It is useful when there is no possibility of making factual findings within judicial procedure (e.g. making calculations relevant for the content of future settlement), as well as the fact that courts are reluctant to interfere with administrative policies.

The main advantage of the solution under discussion is the fact that the interlocutory judgment contains "specific instructions" which in a sense determine the scope of lawful acts of an administrative authority, which must take into account the inevitable verification of the draft decision in further judicial review. In the present regulatory environment, an administrative authority can remove any shortcomings of the act in the course of procedures initiated by an appeal (on general terms) lodged with an administrative court only under the institution autorevision provided for in Article 6:18 of the General Administrative Law. The institution of autorevision would be more effective if the impulse for "repair" procedures were instructions given by the court as a result of commencing an "administrative loop". The right to introduce the construct of interlocutory judgment into the legislation, as leading to a more simple, is intelligible and accessible formula for the protection of the plaintiff's interests.[8]

[8] A. J. Bok, *Judicial Review of Administrative Decisions by the Dutch Administrative Courts: Recours Objectif or Recours Subjectif? A Survey Including French and German Law*, [in] Frits Stroink and Eveline Van der Linden (eds.), *Judicial Lawmaking and Administrative Law, Ius Commune Europaeum,* Vol. 52, Antwerp: Intersentia, p. 153-179 (2005).

4. Transformation of cassation model - casus of Poland

Solutions based on the idea of an "administrative loop" (allowing – in circumstances of appropriate factual and legal status of the case – the issue of interlocutory judgments) could probably be applicable in Poland, too. Using this kind of tool should be taken into consideration, particularly in cases whose settlement by public administrative authorities takes a very long time, thus exposing the plaintiffs to inconvenience and hardship, disproportionate to the scale of the problem. Obviously, the question arises whether the legislators (if they appreciate the value of the institution) will dare to give the courts enough discretion to use it. The alternative to this construction would be a court order for the competent administrative authority to issue an administrative act of a predefined content (giving specific rights or imposing specific obligations), or even the court's decision "on the merits" replacing the annulled act.

According to the legal situation in Poland until 15 August 2015, it was assumed that the national system of administrative justice, based on the principle of the cassation model, provided the court with only a few legal institutions allowing the court to issue rulings with some characteristics of the merit model. These include those that are issued pursuant to Article 149 § 1 point 2 LPAC (obliging the authority to ascertain or recognize the right or obligation arising from the provisions of law), in accordance with Article 146 § 2 LPAC (recognizing in the court's judgment the right or obligation arising from the provisions of law), Article 149 § 1b LPAC (allowing the court to declare whether or not the right or obligation exists if the nature of the case as well as the facts and legal framework of the case that do not raise reasonable doubts permit) and Article 154 § 2 of the LPAC (allowing the court to adjudicate on whether there exist or not a right or obligation and in the situation of failure to act or excessive length of proceedings by the authority and on the request to impose a fine on the authority).

It is worth noting that the rulings pursuant to Article 146 § 2 LPAC are used in particular in the matters of the written interpretations of tax law provided on individual cases (Article 3 § 2 point 4 a LPAC). The doctrine noted that the ruling of the court exercising the function of legality against the written interpretation in the case of granting the complaint could be identified with the activity of the administration. It should be added that assuming the rulings under Article 154 § 2 LPAC to be merit ones is sometimes questioned. What is indicated is their continuous character in relation to the original infringement. What is more, the scope of the merit adjudication is quite narrow.

The abovementioned exceptions to the principle of the cassation model are not numerous. They provide the court with narrow legitimacy to make alternative protection measures. The introduction of the Act of 9 April 2015 amending the Act - Law on proceedings before administrative courts (Journal of Law, Item 658) was an important step reforming the proceedings before administrative courts. It is a step towards the merit judicial review. The amendment significantly expanded the scope of permissible grounds of the merit review. Consequently, it made the question about the effectiveness of merit review a current issue. The amendment introduced several new bases for the application of merit review. They are regulated with Article 145 § 3 LPAC, Article 145 § 1, 2 and 3 LPAC. It is worth mentioning that the application of the new legal institutions, if they meet the conditions for doing so, is obligatory.

According to Article 145 § 3 LPAC, the court shall discontinue the administrative proceedings on two kinds of grounds. Firstly – having granted the complaint against a decision or order, when the court sets aside the decision or order in whole or in part having found that there has been a violation of substantive law, which has affected the outcome of the case, a violation of law which provides the basis to reopen administrative proceedings, or other breach of procedural provisions, if it could have substantially affected the outcome of the case. Secondly - by annulling the decision or order in whole or in part, if there are reasons specified in Article 156 of the Code of Administrative Proceedings or in other legislation.

Article 145a § 1 LPAC regulates the duty of the court to oblige the authority to render a decision or order within a specified time limit indicating the way of settling the case or its outcome, if it is justified by the circumstances of the case, unless a decision is left to the discretion of the

authority. This kind of ruling is admissible if the complaint against a decision or order is granted because of a violation of substantive law or violation of administrative proceedings.
Pursuant to Article 145a § 2 LPAC, the authority is obliged to notify the court of rendering a decision or an order within 7 days of this fact. In case of failure of this obligation, the court may rule on the authority imposing a fine. Moreover, according to Article 145a § 3 LPAC, if the decision or order is not rendered within the time limit specified by the court, the party may lodge a complaint, requesting that a decision be rendered whereby it is declared whether or not the right or obligation exists.

The court is obliged to render a decision on this matter if the circumstances of the case allow the court to do so. As a result of the examination of a complaint, the court shall state whether or not the failure to issue a decision or order took place in blatant violation of law and may also, on its own authority or at the request of the party, impose a fine on the authority or order the authority to pay the complainant a sum of up to half the amount of the fine. The ruling in the latter matter is issued on demand of the complainant or *ex officio*.

5. Conclusion

It is obvious that for adequate protection of rights of individuals, judicial review should be effective. Second model of judicial review, alongside cassation, is the merit one. Nevertheless, it is obvious that for adequate protection of rights of individuals, judicial review should be effective. There are two aspects of the effectiveness of judicial review. The external one refers to the final results in the sphere of rights or obligations of individuals in relation to the public administration. The internal aspect deals with the constitutional and statutory procedural rules, including those relating to the creation of the procedures which enable the effective compliance with the judgment. The second aspect of the effectiveness of judicial review occurs when it comes to the lawful state of affairs as a result of a judgment arising from the lodged plaint. In the cassation–type model of administrative jurisdiction, administrative courts in principle only investigate the administrative body's compliance with the law. The main weakness of this adjudication model is that the same case is consecutively heard by administrative authorities and administrative courts (of various instances), without a final decision being issued. The discussion above makes us aware of the need to debunk certain myths that still persist in some European countries and result from an erroneous understanding of the concept of judicial review of administrative acts (or omissions), and the principle of separation of powers in a Democratic State of Law. The stereotype of a court coined in another epoch as a purely cassation–type body must not obscure the challenges of our times. A lot has changed in the world since then, and the ever–growing dependence of an individual on administration (public service) is its visible symptom. Effective protection of the interests of the former now requires the use of more diversified control tools affording a remedy sooner and at a lower cost, and, in specific situations, also allowing administrative courts to decide cases on their merits. In this context we should look for an answer to the big question on choice between cassation and reformation.

In the Polish system of law, the administrative courts do not possess the means to rectify a flawed decision similar to the "administrative loop" concept prescribed by Dutch law. The power to quash a decision which gives doubts to its legality is generally considered a sufficient measure of judicial review. Many scholars point out that the present system applicable in Poland is incomplete. Undoubtedly, for the complainant, being granted a sum of money has a greater value than the imposition of a fine, which does not go to his/her property. Therefore, it can be argued that from the point of view of protecting the rights of the complainant, the cash benefit seems to be a more effective measure. It does not mean that imposing a fine on the administration is pointless. In some cases, the fine can play an important role for the complainant as well, for example when they consciously do not request benefits for themselves. It seems also that introduction of a means similar to an "administrative loop" would be beneficial in improving the effectiveness of judicial review, especially in "hard cases".

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