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Improving Administrative Proceedings[1]

Abstract: The paper is an English translation of "Uwagi o doskonaleniu postępowania administracyjnego" by Zbigniew Janowicz published originally in *Państwo i Prawo* in 1978. The text is published as a part of a section of the Adam Mickiewicz University devoted to the achievements of the Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

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1. The Code of Administrative Procedure[2] is no doubt one of our most important statutes regulating the mutual and diverse relations between state organs and citizens, and their organisations. What is more, CAP paves the way for making the relations as good as they can be, not only in the domain of law, but also that of politics. It suffices to mention in this context one of the CAP general principles, proclaiming that state administration organs should conduct proceedings in such a manner as to boost citizens' confidence in state organs.

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2 Hereinafter: CAP.

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The CAP, being the work of outstanding representatives of Polish administrative studies and practice,[3] as well as the result, in no mean measure, of a very fruitful public discussion,[4] has been highly and deservedly praised at home and abroad; it is no doubt one of the best codifications of administrative proceedings in Europe. This overall assessment of the CAP as a whole does not entail the approval of all its provisions;[5] even less does it mean (apart from the obvious necessity of taking into account changes following from the local administration reform) giving up an attempt to take a new view of the CAP after 17 years of its application, to consider the usability of its various institutions and further improve its procedures and—more sweepingly—the entire system of our administrative proceedings.

The ongoing discussion correctly proceeds in this direction, encompassing the issues of the judicial protection of citizens' rights (and other parties to administrative proceedings). The discussion has focused on issues such as the full adjustment of CAP provisions to the structure of general-purpose local administration put in place in 1972–1975 (or more precisely, a complete mutual harmonisation of the legislation on people's councils and local state administration organs with appropriate CAP provisions) and the extension of the CAP's range of application. It has also dealt with streamlining proceedings (especially quickening their pace) and further strengthening the position of a party and other participants in proceedings who enjoy the rights of a party (usually related to making our administrative proceedings still more democratic and law-abiding). Finally, discussion has also centred around ensuring remedies to

3 The CAP was drafted, besides the members of the Codification Commission (Especially its Chairman, Stefan Rozmaryn, and both rapporteurs, Emanuel Iserzon and Jerzy Starościak), by many people, who worked on it only indirectly, for instance Tadeusz Bigo, Wacław Brzeziński, Franciszek Longchamps and Marian Zimmermann.

4 For more on this topic view Stefan Rozmaryn, "Projekt kodeksu postępowania administracyjnego – w nowej postaci", *Państwo i Prawo*, no. 4–5. 1960; and Zbigniew Janowicz, *Ogólne postępowanie administracyjne*. Warszawa, and Poznań, 1976, 28 ff.

5 It is a well-known fact that some of them were heatedly disputed when CAP was being drafted and that certain provisions adopted as a result of compromises have not always proven felicitous (e.g. Article 25).

a party also after administrative means are exhausted, i.e. a recourse to courts of law (the introduction of the general judicial review of the legality of administrative decisions). The last-mentioned issue is, as a matter of fact, an important condition for improving our administrative proceedings.

2. The complete harmonisation of the legislation on people's councils and local state administration organs with the CAP is one of the most urgent legislative tasks. It must provide a direct stimulus for starting work in the Sejm on assessing the CAP's strengths and weaknesses and bringing it up to date. The harmonisation involves making mostly obvious amendments to provisions defining organs of a higher tier and supreme organs (Articles 13–14), organs deciding disputes on competence (Article 18) and ones competent to hear complaints (Article 159).[6] Certain reservations arise, however, due to the introduction of single-instance proceedings on the provincial level at Stage II of the reform of local state administration and authority organs.

This option could have been justified to an extent, since commune and district heads (and other same-rank officials) were first-instance organs in most individual cases falling within the purview of state administration, while provincial governors (*wojewodowie*) (and other same-rank officials) dealt in this instance with relatively few cases. The situation changed, however, at Stage III of the reform when provincial governors took over a considerable portion of the powers of district heads.[7]

In the discussions, an unanimous opinion prevails that a party should be able to file an ordinary appeal against a decision issued by a provincial governor in the first instance[8] (besides the right a party enjoys today to avail itself of extraordinary remedies: a demand to institute proceedings de novo and a de-

6 View for instance Janowicz, Ogólne (1976), 80 ff, 84 ff and 211.
7 The current legislation expands these powers.
8 Practically, however, faced with widespread granting of authority (which is only natural), appeals are filed against decisions of over a hundred officials of his/her office. In addition, there is a considerable number of directors of state enterprises and other state institutions who are authorised to act in the name of provincial governors.

mand to set a decision aside as null and void). Proposed legislative solutions vary.

Some views hold that it would be advisable, on account of the tendency to relieve supreme administration organs of having to deal with individual cases, to set up collegial appellate organs in the same instance with the participation of lay members of the public.[9] This solution, however, would have certain serious faults. First of all, it seems inadvisable to exclude even further supreme state administration organs from the course of proceedings through instances, because this would weaken their supervision over provincial-tier organs (and of first-tier organs, too) and the uniformity of decisions, especially as the number of provincial-tier organs has almost tripled. Furthermore, if this solution were adopted, an appeal would be heard all the same (i.e. in spite of setting up 'special' appellate organs) in the milieu of the same office. This could compromise the objectivity of a decision.[10]

Another possible option is to keep the single-instance system in place with respect to a provincial governor's decisions, but at the same time give a party the right to file a complaint directly with a court of law.[11] This solution, too,

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9 View for instance Ludwik Bar, and Kazimierz Siarkiewicz, "Doskonalenie postępowania administracyjnego", *Państwo i Prawo*, no. 3. 1977: 11; Jan Jendrośka, "Kodeks postępowania administracyjnego a proces doskonalenia funkcjonowania administracji państwowej", *Państwo i Prawo*, no. 4. 1977: 17.

10 Jerzy Świątkiewicz, however is right to observe that "With … most appeals not alleging a breach of law by appealed decisions, but a breach of the principle of advisability, such an appellate organ, modifying the provincial governor's decisions, would undermine his/her responsibility for policies pursued in the province". Jerzy Świątkiewicz, "O potrzebie i kierunkach nowelizacji k.p.a.", *Państwo i Prawo* no. 6. 1977: 16. Whereas his suggestion to "consider the possibility of adopting the rule that with regard to administrative decisions, and only in this regard, provincial office departments act as state administration organs from the decisions of which appeals lie to the provincial governor", is obviously unacceptable not only because — as Jerzy Świątkiewicz himself writes — "the objectivity of such a verification, with departments reporting to the provincial governor, could prove dubious", but above all for political system reasons. It would require going back in some respects to former relations between the presidium and departments! A similar suggestion (next to the conception of 'setting up an appellate organ on the provincial tier') was made also by Janusz Borkowski, "Redakcyjne spotkanie dyskusyjne. Doświadczenia ze stosowania k.p.a.", *Rada Narodowa, Gospodarka, Administracja*", no. 19. 1977: 22.

11 Cf. also Jendrośka.

contingent on the introduction of the judicial review of administration, would have—next to undeniable advantages—serious faults. Any decision should, prior to being appealed against in a court, move through all administrative instances. This allows for its comprehensive review on its merits (hence, including its advisability). An appellate organ is then in the position to make a decision based on the merits of the case (e.g. a change of the decision, resulting in lowering a benefit). Meanwhile, the competence of the court is limited: it reviews, as we know, whether a decision is legal. In the event it finds that the decision contravenes the law, the court may only set it aside (in whole or in part), but may not reform it.

It would be best, therefore, to restore fully two-instance proceedings, that is, to make a provincial governor's decisions appealable to supreme state administration organs in agreement with the fundamental principle of administrative proceedings, holding that a party and other legitimate participants in proceedings enjoy the right to have their case reviewed and decided on with regard to its merits by a superior organ. The restoration of this principle, which would mean that relevant CAP provisions would stay in force, would only require abrogating the appropriate provision of the People's Council Act (Article 57(2)).

That the question needs to be urgently resolved is also evident in the fact that—as shown by practice—parties cannot now as a rule expect a decision on the merits of the case by supreme state administration organs, even when they demand that a provincial governor's decision be set aside as null and void.[12]

3. The CAP, in the intention of its drafters, was to be only the first stage in the unification of our administrative proceedings. Hence, opting for certain exclusions that were practically unavoidable back in 1960 (in particular the exclusion of tax proceedings, on which the Ministry of Finance strongly insisted), the drafters nevertheless provided in Article 194 for a convenient

12 View Świątkiewicz, *O potrzebie*, 16, 19.

possibility to extend CAP provisions to the proceedings listed there. This possibility has not been used by the Council of Ministers, as we know, even once. This is not to say that administrative proceedings have not been unified to some extent in other ways in the last years. One of them was the extension of CAP provisions to new areas (in particular, service relations). However, the process of decodification was stronger.[13]

Moreover, for a long time, there have been widespread calls for extending the scope of CAP application. However, great care must be exercised in deciding what the scope of such unification is to be and which legislative path is to be followed.

Not all 'excluded proceedings' may, of course, be covered by the CAP; specifically, the so-called separate proceedings that are neither administrative nor judicial procedures that do not lend themselves easily to being subject to CAP provisions. Separate proceedings have only some 'administrative' elements; an example of such proceedings is the work done by employment arbitration and appeal commissions.

Certain difficulties will be encountered by attempts to extend the CAP to cover the other 'excluded proceedings'. In some fields, attempts to apply fully CAP provisions may prove inadvisable or downright impossible, as this would make respective proceedings no longer separate (this applies above all to tax proceedings). However, a flexible extension of CAP provisions to cover these proceedings is made possible in a variety of ways by the delegation included in Article 194(4). On account of some negative experience so far, the proceedings should be integrated into the code itself (thus this should be done by an amending act) by adding a new chapter to it that would contain certain provisions different from general ones ('Special provisions').[14]

13 For more on this question see Janowicz, *Ogólne* (1976), 52 ff.
14 As Jan Jendrośka says. Jendrośka, 29.

Furthermore, some opinions surfaced, suggesting that enforcement proceedings should be incorporated into CAP.[15] It is worth mentioning here that attempts to regulate jointly general administrative proceedings and enforcement proceedings in a single statute were had already been made when the code was being drafted, but to no avail. Later attempts did not succeed either. Provisions on enforcement proceedings could not be drafted to make it possible to incorporate them into the code, or at least bring them closer to proceedings regulated in the code. Finally, the Act of 17 June 1966 on Enforcement Proceedings in Administration largely followed the model set by civil enforcement proceedings. Many institutions were regulated in it almost identically as in the latter proceedings. An argument for such a close similarity involves the fact that administrative enforcement is relied upon to enforce civil-law obligations as well. Similarities between both enforcement proceedings are so substantial that the literature on civil procedure suggested keeping just one common enforcement: judicial enforcement.[16] It must be also kept in mind that the scope of application of the 1966 Enforcement Act does not coincide with that of the CAP: the Act is a complete codification, hence it is universally applicable regardless of the kind of administrative proceedings that produced the decision being enforced. It is for these reasons that the suggestion to incorporate enforcement proceedings into the CAP can hardly be considered feasible now.

The ongoing discussion has also rehashed proposals formulated occasionally in the 1960s to subject matters arising in relations between state enterprises and their superior units and organs to the selected provisions of the CAP.[17] Such proposals are not convincing. These relations are of a special and separate legal nature and it would be difficult to subject them to an administrative regime characteristic of imperious 'external' relations (especially of the typical

15 Among others, in administrative practice. Such opinions are mentioned by Jerzy Świątkiewicz. Świątkiewicz, *O potrzebie*, 12.

16 Edmund Wengerek, *Przeciwegzekucyjne powództwa dłużnika*. Warszawa, 1967, 188 ff. Joining judicial and administrative enforcements is believed to be advisable also by Bar, Siarkiewicz, *Doskonalenie*, 9 but for other reasons.

17 View in particular Bar, Siarkiewicz, *Doskonalenie*, 7; Jendrośka, 26.

'office—citizen' relation). What's more, requisite high flexibility in business matters argues in this case in favour of the search for separate, specific procedural forms.

No lesser objections are raised by the suggestion to incorporate certain provisions into the CAP relating to mutual relations between organs.[18] The CAP, naturally, is not the right place for such provisions. After all, this is a codification of the procedure (except for proceedings in matters of complaints and proposals) that is pending between an organ and a citizen, social organisation, state organisational unit, etc., that is, entities that are 'outside', so to speak, of the administering organ.

The present author does not believe it advisable either, to include provisions on the issuing of certificates into the CAP.[19]Administrative proceedings regulated by the CAP are—except for proceedings in matters of complaints and proposals—jurisdictional proceedings, with their purpose being to determine or establish a legal situation by an individual decision. Provisions on certificates, being generically different, should be collected into a separate piece of legislation (not necessarily of a statutory rank). Furthermore, provisions on certificates would have to apply not only to state administration organs, hence, they would have a much broader scope of application than the CAP and the other administrative provisions.

4. When discussing the question of improvements to administrative proceedings, a proposal was made to introduce 'simplified' proceedings, hitherto unknown, to the CAP. Despite many comments on the proposal, little has been said as to what such simplification constitutes and what matters it should apply to.[20]

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18 Bar, Siarkiewicz, *Doskonalenie*, 7; Jendrośka, 26.

19 Jendrośka, 27.

20 Cf. for instance Bar, Siarkiewicz, *Doskonalenie*, 15; Jendrośka, 25, believes that in this case, use should be made of 'the model adopted in some special proceedings,' and refers to Janusz Borkowski, who gives 'the example of proceedings in matters of damage to the property of armed forces'. I do not believe this to be a convincing model Janusz Borkowski, "Questions of Improvements to Administration in the Light of the Resolutions of the 7th

It appears that this issue has been surrounded by a lot of controversy lately. Contrary to some rare views, the CAP proceedings are by no means complex, let alone convoluted.[21] Moreover, in respect of many more difficult types of cases, more complex in terms of facts and law (such as those involving expropriation law and law on the use and conservation of inland waters), relevant statutes and other legislation lays down additional procedural provisions. Nonetheless, CAP provisions and other similar codifications must be sufficiently complex to be able to serve the principal purposes of administrative proceedings. It has been rightly stressed for a long time that:

> The more developed the procedural provisions in a given system of administrative law are, the less leeway and randomness there is in the operation of individual state administration organs or their officials, the more efficient the administration is and the better the protection ensured to the rights and interests of citizens.[22]

It is also obvious (but sometimes forgotten) that not all CAP provisions need to be applied to every case. If a case is simple and clear, there is no need to hear evidence (interview witnesses, consult expert witnesses, carry out an inspection, etc.) and hold a hearing. Incidentally, holding a hearing may present difficulties every now and then, especially for officials on a 'lower tier'. The CAP leaves the need for a hearing in principle to the discretion of an

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Congress of the Party", *Państwo i Prawo*, no. 12. 1976: 71.For what is meant here, as the quoted author explains elsewhere, is a special 'indemnification procedure' where liability is borne by soldiers and civil employees working for the armed forces and where, as a matter of fact, 'intention of the drafters of the provisions is… to have as a rule simplified explanatory proceedings conducted' (Janusz Borkowski, *Postępowanieadministracyjne. Zarys systemu*. Warszawa, 1976, 132).

21 See Bar, Siarkiewicz, *Doskonalenie*, 15 and Siarkiewicz *Potrzeba doskonalenia k.p.a.*, 29.

22 Wacław Dawidowicz in the paper *Rola kodyfikacji postępowania administracyjnego w zabezpieczaniu praworządności socjalistycznej*; Zbigniew Janowicz, Konferencja naukowa poświęcona zagadnieniom postępowania administracyjnego, *Ruch Prawniczy, Socjologiczny i Ekonomiczny* 31, no. 4. 1961: 329.

administration body and treats this form of explanatory proceedings—characteristically enough—as a means of accelerating or simplifying proceedings.

CAP provisions allow for or even prescribe, where there is a need for it, ‘simplified’ proceedings in the correct sense of this word. Article 10, laying down one of the fundamental principles of our procedure—one of swiftness and simplicity, leaves no doubt:

> § 1. State administration organs shall act thoroughly and quickly on a case, making use of possibly the simplest means to dispose of the case properly.
> § 2. Cases that do not require the collection of evidence, information or explanations shall be disposed of forthwith.

What else do you need here? To complicate swiftness and simplicity? Any further simplification of administrative proceedings (if only, for instance, by ‘deformalizing’ provisions on summons)[23] would above all leave a party in a much weaker position, thus undermining the fundamental underpinnings of the CAP, given expression in its general principles (in particular the principles of searching for the objective truth and active participation of parties in proceedings). It must be remembered that administrative organs, as seen in the application of ‘Code’ proceedings (or even better, of some other, less developed proceedings) often conduct proceedings in a simplified manner, ignoring if not breaching certain procedural provisions.[24] Hence, there are reasonable concerns that once simplified administrative proceedings are in place, proceedings will be falsely simplified further still.

It does not seem to be advisable either to introduce a new institution into the CAP, namely a settlement between parties approved by an administrative

23 Provisions on summons are one of the crucial guarantees of procedural due process or its fragment. Parties or other participants in proceedings (e.g. witnesses) must know what they are summoned for so as to have the means to give explanations or depositions and collect necessary documents, etc. (An organ must not catch participants in proceedings unawares).

24 This comment concerns, among other things, the hearing of evidence.

organ replacing a decision.[25] This involves, after all, rare cases in our law, provided for in relevant legislation, concerning individual segments of administration (e.g. Article 35, Law on the use and conservation of inland waters). The CAP would have to refer to such legislation anyway. In turn, it is absolutely out of the question to introduce settlements between organs and parties as to the simplification of proceedings. This apparently attractive proposal entails serious risks: a party unfamiliar with procedural provisions could be misled (deliberately or not) by an administration official. Worse still, it could not be ruled out that sui generis 'extortions' of simplification of proceedings would take place.

Our proceedings could be made more efficient, no doubt—in agreement with the principle of efficiency and simplicity, and the practice hitherto followed by many organs—by shortening certain CAP time limits. In particular, the time limit for dealing with a case in the first instance is certainly too long for today's pace of life and the requirements faced by modern administration. It should be shortened to one month and a stipulation should be made (applicable also to the time limit for dealing with cases in appellate proceedings) that it is a maximum time limit ('An organ […] shall dispose of a case within […] at the latest').

The discussion of 'simplifications' of proceedings brings to mind a reflection of a more general nature. While constructing the system of our general administrative proceedings, we adopted a trial model exactly 50 years ago. It involved the 'formalisation' of proceedings (in the good sense of this word), being modelled on the 1925 Austrian codification. It is in this 'trial' direction that general administrative proceedings evolved on the whole in Europe, especially after World War II. The evolution reached its heights in our 1960 Code and the codifications of some other socialist countries. The Code, thus, ensures a stronger position in proceedings to a party than before, without 'detriment' to the position of organs in administrative proceedings (which by the

25 This proposal has been made by Jendrośka for one, 27.

nature of things entail certain inequality). The intended amendment, in the desire to democratise further 'office–citizen' relations, strengthens the position of a party even more by appropriately improving trial institutions. 'Assaults' on 'formalised' proceedings appear especially strange, since at least until recently no complaints were heard about protracted proceedings, for which specific CAP provisions would be to blame (except for the aforementioned excessive time limit for dealing with cases in the first instance).[26]

5. A lot more can be done to strengthen still further the position of a party and other participants in proceedings who enjoy the rights of a party. First, the conception of a party should be reconsidered. Article 25, resulting from a drafting compromise, may be variously interpreted, sometimes to the detriment of parties. The present author believes that, in agreement with the overall intention of the Code and the general evolutionary tendencies of contemporary administrative procedure (which in this regard have left their strong mark on Yugoslav and Czechoslovak codifications), the trial concept of a party should be unambiguously adopted ('A party to proceedings is any person whose legal interest or responsibility is the object of the proceedings or who demands the intervention of an organ on account of his/her legal interest or responsibility').[27]

It would advisable, too, as the observation of practice attests, to supplement the provisions on the participation of a social organisation, having been granted the rights of a party, in proceedings concerning another person. To increase the chances for such participation, it would be necessary to introduce a duty to notify relevant organisations of the institution of proceedings 'if

26 A completely isolated proposal to consider the possibility of establishing 'non-formalised' proceedings as a rule may, as it seems, be suggested by the recent West-German codification. This, however, has grown out of a quite different legal life and tradition, and distanced itself clearly from the Austrian model of trial administrative proceedings. For the history of this codification view Zbigniew Janowicz, "O kodyfikacji postępowania administracyjnego. Kilka uwag i refleksji na tle porównawczym" in S*tudia z zakresu prawa administracyjnego ku czci Prof. dra M. Zimmermanna*, Warszawa, and Poznań, 1973, 21 ff.

27 A different proposal for defining the concept of a party, based on the 'criteria of procedural law' as well, is made by Jendrośka, 19 ff.

such participation is justified by the constitutional objectives of the organisation, and the interest of the community calls for it' (Article 28). It seems it would be necessary to make a revision of the provision making the admission of an organisation to participate in proceedings dependent on the discretion of the organ conducting the proceedings. Instead, it should be made to admit an organisation to participate in proceedings whenever it demands to be admitted, relying on the reasons given above.[28]

Next, it would be desirable to abolish any restrictions—and this has been demanded for a long time – on the Public Prosecutor General lodging appeals against the decisions of supreme state administration organs (Article 150).

Furthermore, it is believed that provisions on the hearing of evidence are in need of supplementation. The omission of provisions on 'public' (i.e. 'official') and 'private' documents from the CAP, criticised already in the discussions of the draft code back in 1959, provides grounds for treating such documents in administrative proceedings on an equal footing. This is harmful to both parties and the legal order in general. In the absence of special provisions, which grant the status of 'conclusive evidence' to official documents (e.g. Birth, Death & Marriage Registration Act), such documents are subject to the discretion of an organ hearing evidence as are private documents and other types of evidence. Besides, it is hardly feasible to maintain the state of law where official documents in administrative proceedings are treated differently than in judicial or other proceedings.[29]

It would be also desirable to make the duty to hold a hearing in administrative proceedings extend to more cases by introducing a rule to Article 82 stipulating that an organ must hold a hearing if this will accelerate or simplify proceedings. The current provision of Article 82(1) (modelled on, as a matter

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28 A. Maksymiuk, *Redakcyjne spotkanie dyskusyjne…*, 23. A. Maksymiuk observes, however, that 'the expansion of the participation of social organisations in administrative proceedings and imposition of the duty to summon their representatives to take part in proceedings will greatly delay the final disposition of cases'.

29 It would be an easy thing to do legislatively: it would be enough to transfer the content of the Code of Civil Procedure, Articles 244–245, to CAP (following Article 75).

of fact, the respective provision of the 1928 Decree), leaving the holding of a hearing in principle to the discretion of an organ ('organ […] may'), is quite rarely used in practice. Meanwhile, a hearing is the most thorough form of explanatory proceedings and is advantageous to parties as well. In addition, it no doubt improves social supervision over proceedings and has of course a certain educational aspect. Besides, it would be necessary to consider the need to re-draft Article 82(2)(1) of the CAP, which gives rise to interpretative doubts.[30]

Certain amendments and improvements need to be made to provisions on the reasons for a decision. Thus, it would be advisable—especially as the practice leaves much to be desired in this respect—to supplement Article 99 by specifying what the findings of fact and law in a decision are (one can avail oneself here of judicial models, in particular the Code of Civil Procedure, Article 328(2)). It is also necessary to amend Article 99(4), which presents considerable interpretation difficulties. Besides, this is an obsolete provision, whose raison d'être was former substantive legislation in connection with the 1928 Decree on Administrative Proceedings, Article 75(3).[31]

Certain suggestions of amendments have been made with respect to appellate proceedings. First of all, owing to the liberal use of—what are after all—the exceptional cassation powers provided for in Article 120(2) by second-instance organs, it is necessary to consider the advisability of redrafting this provision to underscore the duty of second-instance organs to hear and decide a case on its merits. In satisfaction of the demands that have been made for a long time now, it would be also necessary to limit the powers of an appellate organ to reverse a decision to the disadvantage of the appealing party. The power to use *reformationis in peius* should be limited solely to the cases

30 Cf. Wacław Dawidowicz, *Ogólne postępowanie administracyjne, Zarys systemu*. Warszawa, 1962, 157; Emanuel Iserzon, and Jerzy Starościak, eds., *Kodeks postępowania administracyjnego. Komentarz*, 4th ed. Warszawa, 1970, 183.

31 View Rozmaryn, 613 ff.

of ‘gross contravention of the law’ (or more precisely: ‘of the statute or legislation enacted in pursuance thereof’).[32]

Many comments have been made on provisions on the reversal or setting aside a decision otherwise than on appeal, which by their nature are the most difficult. It is no doubt reasonable to suggest a certain reorganisation of Chapter 12 while amending the CAP; this should involve, in particular, the separation of provisions on defective decisions from those on non-defective ones.[33] However, there is no doubt that issues related to the setting aside of a decision as null and void come to the fore in this context, considering the experience accumulated so far. Hence, Article 137(1)(1) should be amended so that it also applies clearly to a mistake in venue (lack of territorial jurisdiction—until now, this deficiency has been made up for by extensive interpretation). A consensus was achieved a long time ago that sub-paragraph 2 of this paragraph needed to be amended; attempts were also made put limits on the usually very broad interpretation of this provision. Its new wording could adopt the criterion of ‘gross contravention of the law’ (or more precisely: ‘of the statute or legislation enacted in pursuance thereof’) or follow the well-known opinion of the Central Commission for the Systematisation of Administrative Legislation of 1 July 1970.[34] An ideal solution, as shown by fifty years of decisions (the provision in question is a verbatim repetition of Article 101(1)(b) of the 1928 Decree), is unlikely to be found. In this respect, a very positive role could be played by judicial decisions. Amending Article 138(2) & (3) is also necessary so that there is no doubt that in the event of a refusal to set aside a decision as null and void, the body should issue a decision which of course can be appealed (the position of the literature on this issue has been consistent for a long time).[35]

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32 The criterion of ‘contravention of statute’ proposed by Jan Jendrośka seems to be too narrow.

33 Eugeniusz Ochendowski, “Propozycje udoskonalenia niektórych instytucji postępowania administracyjnego”, *Państwo i Prawo*, no. 12. 1977: 55.

34 *GiAT*, no. 9. 1970: 3.

35 The paragraphs would be worded as follows: ‘§ 2. A competent organ shall issue a decision on setting aside or refusing to set aside a decision as null and void on request of a party or

A thought should be also given to other issues connected to the setting aside of a decision as null and void. One of them is the time limits involved (at least in the case of setting aside such a decision to the disadvantage of a party). Related issues are the date from which the set-aside decisions lapse (obviously *ex tunc*)[36] and the duty of the organ in question to revoke the legal effects of such decisions. The parties who suffered a loss due to the setting aside of a decision as null and void should be given the right to claim damages, similarly as in the case of setting aside a decision pursuant to Article 141, also through the courts (provided of course that they availed themselves in good faith of the rights granted to them by the decision).[37] It is believed that the CAP ought to be amended to settle such issues unambiguously.

6. The question of the judicial review of the legality of administrative decisions has long occupied the pages of our juristic journals. The misunderstandings that accumulated around this institution mainly in the 1940s and early 1950s were for the most part cleared up later. Judicial review, or rather its extension (because some judicial review is found in our country, mainly in the field of social insurance) was supported by almost all the authors of the publications that have come out since the work on 'the assessment and updating of the Code of Administrative Procedure' started;[38] hence, it would be a moot point to de-

on its own motion. § 3. Against such a decision a party can appeal, unless the decision has been issued by a supreme state administration organ'.

36 Ochendowski, 56 believes that 'a stance should be taken on the reasons of nullity of administrative acts resulting in the acts not producing any legal effects whatsoever (act that is null and void *ex tunc*) and on the reasons the occurrence of which will nullify only the act itself with the legal result *ex nunc*, i.e. from the moment the decision nullifying the previous administrative act is issued'.

37 View Jendrośka, 23; Świątkiewicz, *O potrzebie*, 17 ff. who rightly observes that 'There is […] a concern should the prospect of paying damages make administration supervision organs less willing to set aside defective decisions' which is seen in practice with respect to the nullification of decisions under Article 141. Only the simultaneous introduction of the judicial review of administration would make—in the present author's opinion – such a provision fully effective.

38 Separate articles were devoted to judicial review by Janusz Łętowski, "Kontrola sądowa — dlaczego i jaka?", *Gazeta Prawnicza*, no. 16. 1977; Mirosław Wyrzykowski, "Sądowa

scribe yet again its many and indisputable advantages. Incidentally, work on the statutory regulation of judicial review has been covered by the government programme of law improvement for 1974–1980.

The search for right solutions is greatly assisted today by ample opportunity for comparison with foreign legislation and our past legislative attempts. Above all, Romanian (1967) and Bulgarian (1970) statues,[39] both enacted in the last decade, and our two draft bills on the judicial review of administration of 1958 and 1972 must be mentioned in this context, with a special focus on the former bill whose form is mature – as it has gone through almost all the drafting stages in the Codification Commission.

What follows are a few comments on possible legislative solutions. Today, two basic types of the judicial review of administration are encountered: one where reviewing is performed by separate administrative courts and the other where this is done by common courts of law. In the countries of Western Europe, the separate administrative judiciary dominates; next to administrative courts of general jurisdiction (the Polish Supreme Administrative Tribunal before WWII was one such court), there are diverse special tribunals, e.g. social security tribunals (we have them too, lately – courts of labour and social insurance). Socialist countries, in turn, show a tendency to keep judicial review within the framework of common courts of law. Each of the two types of judicial review has its advantages. In view of our tendency to keep the judiciary uniform, in particular on its highest tier, it seems that it would be most appropriate to entrust the review of the legality of administrative decisions to ordinary courts of law, specifically provincial courts (administrative divisions) and the Supreme Court (Administrative Chamber).

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kontrola legalności decyzji administracyjnych. Europejskie państwa socjalistyczne", *Gazeta Prawnicza*, no. 19. 1977. Earlier above all Ludwik Bar, "Sądowa kontrola decyzji administracyjnych", *Państwo i Prawo*, no. 3. 1973; Jerzy Świątkiewicz, "Sądowa kontrola działalności administracji w PRL", *Państwo i Prawo*, no. 8–9. 1976.

39 The texts of both statutes can be found in Jerzy Starościak, Marek Wierzbowski, eds., *Ustawodawstwo o postępowaniu administracyjnym europejskich krajów socjalistycznych*. Kraków, 1974.

When setting the range of matters subject to judicial review, use is usually made of the method of a general clause limited by a negative enumeration. This method was employed in both our draft bills and the Romanian and Bulgarian statutes. The scope of a negative enumeration, rather limited in the nature of things (otherwise, the use of a general clause would have no sense, would it?), varies of course from system to system. For instance, disciplinary, penal-fiscal and national defence matters are excepted, making the question of the scope of judicial review a stumbling block to be considered in the course of the legislative process.

Besides reviewing the legality of a decision (illegality criteria should of course be made as precise as possible), the court should have power to rule on the so-called ‘silence of the authorities’. A complaint about the ‘silence of authorities’ is the most effective remedy for a delay or the silence of an organ in a given case, known for example, to the Romanian and Bulgarian statutes.

The procedure before the courts would have a single instance: the Supreme Court would hear complaints against the decisions of supreme state administration organs, while provincial courts would rule in principle on the decisions of the other organs. If, however, a case heard by a provincial court posed a legal question giving rise to serious doubts, the court would be able to refer it for a decision to the Supreme Court. The latter would be able to then take over the case altogether and give a ruling on it on its own. A provincial court would have to transfer a case to the Supreme Court for a ruling if it believed that a legal provision issued by a supreme state administration organ, on which the appealed decision has relied, was illegal.[40]

An appeal to a court would only ensue (except for the ‘silence of authorities’) from a final administrative decision. The right to lodge an appeal would be enjoyed by any person who claimed that the decision infringed his/her

40 This is what Article 8 of the 1958 draft bill said. For more on the draft bill view Zbigniew Janowicz, *Ogólne postępowanie administracyjne*. Warszawa, and Poznań, 1978, 237 ff.

rights and/or imposed a duty on him/her without legal grounds[41] and a public prosecutor if he/she claimed that a decision contravened the law. It would be thinkable to give the right to lodge appeals to a social organisation as well, one that participates in proceedings, having been granted the rights of a party.

A court judgment should have the nature of a cassation. If there is a need for a new decision, the administration body whose decision has been set aside should issue one promptly (in principle within a month of the date of the reception of a certified copy of the judgment). The legal position taken by the court in the opinion to a judgment binds the respective organ. A certified copy of the judgment quashing a decision is sent to the supreme state administration organs; if, however, a decision has been set aside because it was based on a provision contravening the law, the Supreme Court notifies the President of the Council of Ministers of the fact (the mechanism of 'whistle-blowing').

The Supreme Court, besides hearing complaints against the decisions of supreme state administration organs, would hear extraordinary appeals against final sentences and above all, resolve legal questions and explain legal provisions, giving rise to doubts in practice or causing discrepancies in judicial decisions (through 'guidelines on the administration of justice').[42] This last-mentioned function is much needed by decisions taken in our administrative law and decisions applying other branches of law used in administrative jurisdiction. Such resolutions and explanations, entered into the book of legal principles, would of course bind the courts, and indirectly state administration organs as well.

As far as the choice of a legislative form is concerned, two solutions are possible: a separate statute or the introduction of suitable provisions into the administrative proceedings act. The former is adopted by most contemporary jurisdictions (among socialist countries by Yugoslavia and Romania, and both our draft

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41 However, the court considers on its own motion whether there are no grounds for setting a decision aside specified in statutes

42 This would no doubt considerably diminish the need for all kinds of interpretative acts such as instructions, circulars, etc.

bills), while the latter by Hungary and Bulgaria. The former seems to be more advisable, because it enables a comprehensive and possibly exhaustive regulation of organisational and procedural matters without referring (at least without too many references) to the law on the structure of common courts and Code of Civil Procedure. Such references involve certain technical difficulties, or worse still, frequent interpretative ones. One must not forget in this context that in the case of the judicial review of administrative decisions we are dealing with matters that are generically different from civil cases. Moreover, this choice of a legislative form is supported by the fact that the scope of the judicial review of administrative decisions may not coincide with the scope of CAP application.

7. Finally, a few general comments. In the course of the current discussion, views are aired, as never before in our juristic literature, suggesting that it would be advisable to extend the CAP to various matters that sometimes go far beyond the 'trial' framework. What clearly looms is a dispute over the conception of codification of general administrative proceedings.[43]

Is the codification to be traditionally limited solely to jurisdictional administrative proceedings, i.e. cover provisions on creating and appealing against external administrative acts, that is decisions, or is it to include provisions on judicial review of such acts and per chance provisions on their enforcement? Perhaps it should also cover certain individual acts concerning relations between state enterprises and their superior units and organs, and possibly even certain acts issued as part of relations between administration bodies. Another question is if it is possible for the codification to cover (possibly in a more distant future) the mode of issuing general acts (for instance, normative ones) by state administration organs.[44] Finally, are we supposed to include provisions on performing other acts in law (e.g. the issuing of certificates) by state ad-

43 Cf. Janowicz, *O kodyfikacji*, 30 ff.

44 Cf. the proposal made by Jendrośka, 29.

ministration organs in the CAP? Or rules governing the giving of opinions and consultations (for instance on legislative matters), etc.[45]

In agreement with the principle of the internal cohesion of law, so rightly emphasised today, a single act should regulate only homogeneous matters or ones that are closely interconnected. Thus, the CAP should be limited to administrative proceedings *sensu stricto*, or the administrative trial, maintaining (at least for the near future) its connection with proceedings in matters of complaints and proposals. After all, the connection has been borne out by some positive tradition. The CAP could also, if reasons of legislative policy argued for such a solution, cover the mode of appealing against administrative decisions to courts.

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45 Which is suggested by Bar, *Sądowa*, 8.

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