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The administrative justice in the Czech Republic – changes and expectations

This passage can start with a question: What is the purpose of administrative justice and administrative courts? It is undoubtedly possible to answer that courts are responsible for the provision of protection of (subjective) rights as referred to in Article 90 of the Constitution of the Czech Republic.[1] Administrative justice, being a part of the judiciary, must be based on this "protective" doctrine. Specifics of administrative justice are shown by the type of (subjective) rights to which judicial protection is provided. In the environment and under the conditions prevailing in the Czech Republic, we use the so-called legal dualism and division of law into private (*ius privatum*) and public (*ius publicum*) as the basis. The purpose of administrative justice is clearly defined in Section 2 of Act No. 150/2002 Coll., the Code of Administrative Justice, as amended (hereinafter referred to as the "Code of Administrative Justice"). According to this provision, courts provide protection in administrative justice to public subjective rights. A similar solution can be found in the new Slovak legislation in force since 1 July 2016.[2]

Administrative justice protects (subjective) rights of natural and legal persons. These rights, which are – as mentioned above – of public nature, were affected by previous activity or inactivity of the public administration, which is a part of the executive power. Thus a relationship between the ad-

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[1] According to this provision, "courts are primarily required to provide, in the manner prescribed by law, protection to rights."

[2] Pursuant to Section 2(1) of Act No. 162/2015 Coll., the Code of Administrative Justice, "In administrative justice, the administrative court provides protection to the legally protected natural or legal person's rights or interests in the area of public administration."

ministrative justice and the public administration is established, the former performing *ex post* control of the latter. The administrative justice is authorized to review previous activity or inactivity of the public administration and to remedy the situation in cases where the latter interfered with the rights of natural and legal persons. This is the basis for the public-law character of the administrative justice and for the fact that the administrative justice follows or more precisely comes after[3] the public administration.

In this context, questions sometimes arise whether the primary task of the administrative justice is to protect (subjective) rights affected by the public administration or rather to perform (concrete, not abstract) control of the public administration as such.

Also on the basis of the indicated legal framework, I am of the opinion that the protective or instrumental function of administrative justice prevails over its control function. Therefore, the control of public administration is rather a logical consequence or a tool to provide protection to subjective rights affected by public administration than a primary purpose of administrative justice.[4] This is due to the fact that administrative justice is empowered to control public administration only in the extent of the action or motion filed to initiate proceedings and only with respect to the issues specified therein. Administrative justice is not based on the possibility to initiate proceedings ex officio. Another reason is the fact that protection by administrative courts cannot be provided in all cases of activity (but also inactivity) of public administration but solely in cases where it is allowed by law and where, simultaneously, the case is about an interference with (subjective) rights and obligations or a negative interference which has an impact on the legal situation of a natural or legal person.[5] Also, the legisla-

[3] The follow-up or subsidiary nature of administrative justice is provided for in Section 5 of the Code of Administrative Justice. According to this provision, "Unless this Code or a special law provides otherwise, protection of rights can be sought in administrative justice only on the basis of a motion and following the exhaustion of regular legal remedies if they are permitted by a special law."

[4] But it is clear, e.g. from the legislation in Poland that it is rather the control character of administrative justice which is emphasized (cf. Section 1, or Section 3 of PPSA of 30 August 2002, Dz.U. Nr 153, note 1270).

[5] Cf. ruling of the extended panel of judges of the Supreme Administrative Court of 23 March 2005, file ref. 6 A 25/2002–42, published under No. 906/2006 in the Collection of Decisions of the Supreme Administrative Court. According to this ruling, "the provision of Section 65(1) of the Code of Administrative Justice cannot be interpreted by a verbatim textual interpretation but according to its meaning and purpose so that the standing to bring an action exists in all cases where an act of an administrative authority related to a specific matter and to specific addressees affects the legal sphere of the plaintiff." Also the current German legislation is based on similar premises (cf. Section 42(2) of the German Federal Code of Administrative Justice – VwGO). In the German doctrine, there is a consensus that the claimed infringement of rights must concern a (subjective) right in the fields of activity of public administration. The fact whether the (subjective) right exists is inferred using the "theory of protective rule" (Schutznormtheorie), cf. Eyermann, E. (ed.) *Verwaltungsgerichtsordnung. Kommentar*. 11th edition, Munich: C.H. Beck, 2000, p. 277

tor and the case law tend to extend the access to judicial protection rather than to limit it; in terms of access to administrative courts for the purpose of provision of judicial protection, the approach of legislation is relatively extensive.

The aforementioned approach of the administrative justice, which is primarily a protective and not a control one, is also confirmed by case law of the Supreme Administrative Court which dealt with the nature of the Code of Administrative Justice. The Supreme Administrative Court[6] stated that "the Code of Administrative Justice is by its nature a 'defensive' act. It is not a 'control' standard that would allow anyone to initiate, by bringing an action in the administrative justice, to control any act of the public administration. It is only intended to ensure legal protection in cases where the public administration enters into the legal sphere of natural or legal persons. The limitation criterion for prominence is the alleged interference with public subjective rights. Not all the activity (or any misconduct) of the public administration is subjected to judicial control [...], but only when the activity of the administration exceeds their public subjective rights."

Let us now focus on the issue of outputs of the administrative justice through which the judicial protection and control of the public administration is implemented, or more precisely on the nature of these outputs. Is a judicial ruling a resolution of one particular case or do its effects establish a model for other similar cases and their assessment? Is the nature of a judicial ruling really individual or can the ruling become a precedent or take on the normative nature? Guidance for an answer can be, in my opinion, found in a brief explanation of the history and development of administrative justice.

Foundations or beginnings of the administrative justice on the territory of the today's Czech Republic were laid as early as in the 19th century. In addition to the so-called December Constitution of 1867, they were based particularly on the Austrian Act No. 36/1876 of Imperial Law Gazette, on establishment of the administrative court.[7] This legal act was cancelled only by Act No. 65/1952 Coll., on public prosecution, which introduced on our territory a model of public prosecution and its supervision of the public administration, or rather the state administration, according to the then approach, and this model survived until the beginning of the 1990s.

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et seq. We can also find the same solution in the new legislation in Slovakia (cf. Sections 2, 177(1) and 178(1) of Act No. 162/2015 Coll., the Code of Administrative Justice, or Hanzelová, I. et al., *Správny súdny poriadok. Komentár.* Bratislava: WoltersKluwer, 2016, pp. 34-36, 283-285).

[6] Cf. ruling of the extended panel of judges of 21 October 2008, file ref. 8 As 47/2005–86, published under No. 1764/2009 in the Collection of Decisions of the Supreme Administrative Court.

[7] According to its Section 2(1), "the administrative court is to decide each case where one claims that their rights were injured by an illegal decision or measure of an administrative authority."

Act No. 36/1876 of the Imperial Law Gazette was followed by other legal acts which, following the emergence of independent Czechoslovakia in 1918, adopted the established and functional model of administrative justice. They specifically included primarily[8] Act No. 3/1918 Coll., on the Supreme Administrative Court and on resolution of conflicts of jurisdiction. The administrative justice had one instance then and proceedings were initiated by a (cassation) complaint filed with the Supreme Administrative Court. The complaints were filed against (final) decisions of the administrative authorities.

It was typical of the period of the Austrian and later Czechoslovak administrative justice that its decisions (judicial acts) were in many respects replacing legislation that had been missing and closing legal loopholes. Adoption of the first Czechoslovak administrative procedure code (in the form of a governmental decree) No. 8/1928 is a prime example. The contents of this administrative procedure code was strongly influenced by case law of administrative courts, the code building on the case law ideologically.

It appears that it was a notional side task of the administrative justice to close legal loopholes or replace legislation where it was absent. Let us ask in this context whether it is surprising that the case law of administrative courts is still so important nowadays. The importance of case law is undoubtedly reinforced by the fact that the public administration is one of the addressees of administrative courts' decisions and it is confronted in its activities with the decisions and has to respect them. In my opinion, this is another factor reinforcing the role of administrative courts and their case law.

In the light of the social, economic and, last but not least – legal system prevailing in the years from 1948 to 1990, it is not surprising that there was no room for administrative justice, protection of rights and control of the public administration (or more precisely the state administration according to the then approach) as we indicated above.

Administrative justice was restored in 1992,[9] still the then legislation had many weaknesses, the main one being the non-existence of the Supreme Administrative Court which had been envisaged in the Constitution of the Czech Republic[10] but was established in 2003. The absence of the supreme body of administrative justice resulted, inter alia, in the fact that the case law of 8 regional administrative courts was not uniform and, therefore, it was unpredictable.[11] This was reflected in the lesser signifi-

[8] This act was later considerably amended by Act No. 164/1937 of Collection of Laws and Decrees, on the Supreme Administrative Court.

[9] By Act No. 519/1991 Coll., which amended the Civil Procedure Code No. 99/1963 Coll. and included therein the then legal framework of the administrative justice.

[10] Cf. especially Article 91(1) of the Constitution No. 1/1993 Coll.

[11] It is also for these reasons that the Constitutional Court eventually cancelled the legal framework of the administrative justice (cf. the judgment of 27 June 2001, 276/2001 Coll.), thereby calling on the legislator to adopt a new legal framework of the administrative justice.

cance of the then case law which, nevertheless, started to slowly but surely restore its previous "limits" and hence the cultivation of the public administration through the case law began.

The new system of administrative justice in terms of organization and functions entered into force on 1 January 2003 and it was further amended in the course of time. The system is represented by the aforementioned Act No. 150/2002 Coll., the Code of Administrative Justice, which has been subject to many amendments since then.[12]

In terms of organization, the administrative justice is composed of 8 regional courts which are a part of general justice but fulfill the functions of administrative courts and include specialized panels of judges and single judges for administrative justice cases. Administrative proceedings usually start with these courts by filing a motion (action). At the top of the organizational system, there is the absolutely independent Supreme Administrative Court. Its task is to decide on cassation complaints filed against decisions of the regional courts and thereby ensure unity and legality of the decision-making process in the administrative justice. A cassation complaint has the character of an extraordinary remedial measure as it is directed against a final decision of the regional court and it has no suspensory effect in itself.

In terms of functions, the core of activities of the administrative justice lies in the proceedings in respect of actions against decisions of the administrative authorities. But it is also possible to file an action in the case of (qualified) inactivity of the administrative authorities, actual interferences by the administrative authorities or against the so-called measures of general nature.[13] It follows from the above that administrative courts have a rather wide range of activities and the possibility of each individual to seek judicial protection is equally wide. This is further emphasized by the fact that administrative justice is not based on specialization. Courts in administrative justice are required to assess all cases where public (subjective) rights are affected. Therefore, they deal with cases in the field of administrative law, law of finance and tax law, law of social security, environmental law, law of services, etc.

The so-called inadmissibility is a relatively interesting concept which is, in my opinion, not used sufficiently. This concept allows the court not to deal with the merits of the case if it concerns a matter which has been repeatedly addressed by the court and the resolution of which is therefore predictable. The concept of inadmissibility was introduced in Czech adminis-

[12] Probably the most important amendment was made by Act No. 303/2011 Coll. with effect from 1 January 2012.

[13] Under the conditions prevailing in the Czech Republic, it is an analogue of Allgemeineverfügung under the German Code of Administrative Justice – VwVfG.

trative justice additionally in 2005 as a fully purposive reaction to the then overload with asylum cases. But inadmissibility was applied exclusively to cassation complaints and related proceedings and, moreover, only to the field of the so-called international protection or more precisely asylum issues.[14] Inadmissibility is applied in such a way that the Supreme Administrative Court rejects the cassation complaint for this reason and on the ground of its decision, it specifies the reasons for rejection, i.e. that the particular matter was resolved in the past with a specific result and, therefore, the present cassation complaint would add nothing new.

Let us now focus on the nature and purpose of administrative justice and its outputs in the form of judicial decisions.

Under the conditions prevailing in the Czech Republic, the case law of administrative courts is of considerable importance and it has a good basis to build on. Its importance is also proven by the extensive commentary literature on the key laws which are often based on application of the case law.

The case law is not only able to close a legal loophole but even to modify explicit provisions of law. In many respects, the case law surpasses legislation. It not only supplements, but actually reshapes the law.[15] What is the reaction of the law-making sovereign, i.e. the Parliament? It usually tacitly accepts the solution chosen by the case law.[16] Only in a few cases related to case law did the Parliament in the end adopt a solution different from or directly denying the one chosen by the case law.[17] Can any changes be ex-

[14] Pursuant to Section 104a(1) of the Code of Administrative Justice, "If the importance of a cassation complaint concerning international protection does not significantly transcend the complainant's own interests, the Supreme Administrative Court shall reject it on the grounds of inadmissibility."

[15] On these issues, cf. e.g. Mates, P. *Dotváření práva v judikatuře Nejvyššího správního soudu*. Právní rozhledy No. 3/2016, p. 82 et seq. Let us add that in this way, the case law effectively reshaped the already cancelled Tax Code No. 337/1992 Coll. or substantially supplemented Asylum Act No. 325/1999 Coll. The case law has also frequently commented on some provisions of Code of Administrative Justice No. 500/2004 Coll. In this respect, cf. Potěšil, L. *Správní řád z pohledu legislativy a judikatury po 10 letech své účinnosti*. Právní rozhledy, No. 12/2016, p. 426 et seq.

[16] In the context of the relatively recent amendment of the Code of Administrative Justice No. 500/2004 Coll., performed by Act No. 183/2017 Coll. with effect from 1 July 2017, the legislator changed the concept and rules for legal non-existence (nullity) of decisions. At present, they draw no distinction among the reasons for non-existence (nullity) and they allow administrative authorities to declare non-existence (nullity) on all possible grounds whereas formerly this power was considerably limited. Although the legislator could do so, it did not oppose the former conclusion of case law (cf. judgment of the extended panel of judges of the Supreme Administrative Court of 12 March 2013, file ref. 7 As 100/2010-65, published under No. 2837/2013 in the Collection of Decisions of the Supreme Administrative Court) that a non-existent (null) administrative decision can be cancelled, which is inconsistent with the concept and purpose of non-existence (nullity) as such.

[17] We can mention, e.g., Act No. 7/2009 Coll., amending Code of Administrative Justice No. 500/2004 Coll. so that it denies the conclusions of case law presented in the judgment of the Supreme Administrative Court of 31 December 2007, file ref. Komp 1/2007-54, published under No. 1518/2008 in the Collection of Decisions of the Supreme Administrative Court. The case law

pected in this area? I do not think so and I believe that in this respect, the case law will maintain its important position. After all, this is also due to the notional legislative inflation and the quantity of laws which frequently contradict each other. This is one more reason to expect that the case law will preserve this role.

As far as changes in the administrative justice are concerned, it is impossible to ignore another relatively considerable shift which is currently beginning. It is the shift from *ex post* review of and decision in a matter which has been subject to examination by the administrative authorities to the direct deciding by administrative courts. In other words, administrative courts can replace decisions of administrative authorities and their decision closes the case *de facto* but also *de iure*. This solution has been gradually permeating from the European Union law as it is encouraged, e.g., by Article 46(3) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection.[18] Courts are moving from their review and subsequent role into the position of a direct continuator of administrative proceedings and the administrative authorities.

What are the possible expectations in the administrative judiciary? I believe that one of them is the possible specialization within the administrative judiciary. The existing universality of the administrative justice places relatively heavy demands (not only) on the judge who has to have good knowledge of all areas of public law as it is not possible to rule out that he/she would not be assessing such a case. However, this results in a greater degree of contradiction in the case law, or probable contradiction therein. It may be an advantage that some characteristic cases are not reserved only to a few judges and that the matters or areas at issue are open to new lines of thought. In this respect, it would be suitable to consider the positives and negatives of universality and specialization. The other possible expectation concerns the extent of judicial review by the Supreme Administrative Court and the nature of the cassation complaint itself. I believe that the concept of inadmissibility of the cassation complaint could be ap-

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eventually accepted the amendment of law. The judiciary assessment of the nature of a contract is another example (cf. ruling of the special panel of judges established under Act No. 131/2002 Coll., on resolution of some conflicts of jurisdiction, of 21 May 2008, file ref. Konf 31/2007-82, published under No. 1675/2008 in the Collection of Decisions of the Supreme Administrative Court, according to which "a contract on public service in regular public transport… is a public-law contract as it creates rights and obligations in the field of public law …; at the same time, it is a subordination contract"; an express reaction to this is contained in Section 8(5) of Act No. 194/2010 Coll., on public passenger transport services and amending other acts, according to which "a contract on public passenger transport services is not a public-law contract.").

[18] This provision stipulates that "In order to comply with Paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of the first instance."

plied to a much greater extent to areas other than those to which it is applied today (asylum cases). This would reduce the load[19] on the Supreme Administrative Court represented by recurring cases which bring no new solutions and views.

The overall conclusion is that the administrative justice has been developing and it is currently changing simultaneously with changes in the law and society. But these changes have not been numerous or of major importance, even though some progress in this respect can be seen and expected.

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THE ADMINISTRATIVE JUSTICE IN THE CZECH REPUBLIC – CHANGES AND EXPECTATIONS

Abstract: This article deals with the changes that were made and with possible expectations in the field of administrative justice which can be observed on the example of (not only) the Czech Republic. To this end, the contribution focuses, first, on the purpose of the administrative justice as such and on its history and development. Then it gives consideration to the current state

[19] In 2016, the Supreme Administrative Court had to decide 4376 cassation complaints – 1130 complaints pending from previous years and 3246 new complaints from 2016. But in 2016, it decided "only" 2954 cassation complaints and, therefore, the Supreme Administrative Court entered 2017 with 1422 cassation complaints still pending. Given the current number of 32 judges of the Supreme Administrative Court, it means that in 2016, each of them had to decide the total of 92 cassation complaints, i.e. 7 cassation complaints a month on the average. But we should add that in addition to the so-called cassation agenda, the Supreme Administrative Courts exercises other important powers, e.g., in the field of elections, disciplinary proceedings against judges, public prosecutors and enforcement agents, which accounted for the total of 526 additional cases to be dealt with in 2016.

and form of the legal framework of the administrative justice in the Czech Republic. On this basis, the last part of the contribution deals with the changes which have been made in the administrative justice as well as with possible expectations that may be placed on the administrative justice, going hand in hand with its possible changes in the future.

Keywords: ADMINISTRATIVE JUSTICE, CODE OF ADMINISTRATIVE JUSTICE, CASSATION COMPLAINT, SUPREME ADMINISTRATIVE COURT