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The Right to Judicial Protection

The right to judicial protection and fair trial belongs to fundamental human rights and as such it is guaranteed on the state constitutional level as well as on international level. Without securing the right to judicial protection the other fundamental human rights would lose sense, redress would be unenforceable in case of violation and sooner or later it would be nothing but "dead imperatives" for desired behavior. Thus the right to judicial protection does not only include certain catalogue of procedural laws which must be secured for the legal persons in the course of the judicial proceedings, but also the specific fundamental right to access to court. The court must then hear the case justly, publicly and within a reasonable time limit.

The right to judicial and other legal protection in the Czech Republic arises from the Article no. 36 of Charter of fundamental rights and basic freedoms, the judicial control of administrative bodies' acts is concretely regulated in paragraph 2 of this article that states: Unless a law provides otherwise, a person who claims that her rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and basic freedoms listed in this Charter may not be removed from the jurisdiction of courts. "On the international level, it is article 6 of the European Convention on Human Rights that regulates the right to a fair trial and is specified by the case-law of the European Court of Human Rights".

The legal regulation of judicial control of administrative bodies' acts in the Czech Republic

The current, two-part, system of the judicial control of the administrative bodies reassumed to the legal regulation valid in the times of so-called „First Republic", which was (together with the jurisprudence of the Supreme administrative court) of an extremely high-quality. After the Second World War and during the period of totality regime, the judicial control of the administrative bodies' acts, especially the part of the administrative justice, slowly declined and finally ceased completely. In these days there was nobody competent to control the proceedings and the decisions of the administrative bodies in public law matters. Obviously, this situation was untenable after the Velvet revolution in 1989 and it was the reason for the enactment of a "new" Chapter Five (called Administrative justice) of the Civil Procedure Code (Act no. 99/1963 Coll.) by the Act no. 519/1991 Coll. The provisions of this Chapter regulated proceedings concerning cases which were decided by an administrative body in both cases, when they concerned private law matters and public law matters. Nevertheless, this regulation had a lot of deficiencies, which were criticized not only by the Constitutional court but also were apparently contrary to the provisions of the European Convention on Human Rights.

The Constitutional Court, influenced by this criticism solved the situation by complete annulment of Chapter Five of the Civil Procedure Code (judgment no. 276/2001 Coll.). Although the Constitutional Court judgement was very important there were also some deficiencies. The Constitutional Court annulled by its judgement the whole Chapter Five of the Civil Procedure Code. It did not contain only unconstitutional provisions, however they were annulled as well. Therefore this attitude of the Constitutional court was obviously contrary to the spirit of the role of the Constitutional court in the society.

The main reasons of the Constitutional court judgement nullifying the existing legal regulation of the control of the administrative bodies' acts was the discordance with the obligations arising from the provisions of the European Convention on Human Rights, in concrete from its article 6 regulating the right to a fair trial (due process) and also the discordance with the jurisprudence of the European Court of Human Rights. To the other deficiencies, which were criticised by the Constitutional court, belonged primary the non-existence of the Supreme Administrative Court, which was guaranteed by the Constitution of the Czech Republic. This court shall ensure the unification of the jurisprudence in the field of the judicial control of the administrative bodies' acts in public law matters. Secondary it were also the absence of the legal regulation concerning the protection against illegal procedure or illegal intervention of the administrative authority, which do not have the character of the decision and the absence of legal regulation concerning the protection from inactiveness of the administrative authority.

In this way the Constitutional court solved the situation of a lot of deficiencies in the legal regulation of the control of the administrative bodies' acts that were contrary to our constitutional system but also contrary to provisions of the European Convention on Human Rights and after the nullification of the whole Chapter Five of the Civil Procedure Code and as a consequence the lawmakers were forced to prepare intensively new legal regulation. The judgment entered into force on the 1st of January 2003.

For economic as well as legal reasons the model of dual judicial control of administrative bodies' acts was eventually found as optimal. The new legal regulation of the control of the administrative bodies' acts is now based on the same principles as the regulation in the period of the First Republic. The decisions of the administrative bodies in public law matters are reviewed by administrative courts (according to Administrative Procedure Code, Act no. 150/2002 Coll.) and the decisions of the administrative bodies in private law matters (e.g. the rights in rem registrations in the Land Register) are reviewed by the civil courts, according to Chapter Five of the Civil Procedure Code (Act no. 99/1963 Coll.).

Legal Regulation of Judicial Control of Administrative Bodies' Acts in the Czech Republic from the Viewpoint of Article 6 of the European Convention on Human Rights

Hearing and ruling in cases concerning civil rights, obligations or justification of any criminal charge in so called full jurisdiction is one of the fundamental guarantees of the right to a fair trial. Even though the requirement for decision-making in full jurisdiction is not explicitly stated in the article 6 of the European Convention on Human Rights it results from a wide case-law of the European Court of Human Rights[1]. Although the judicature of this court is in many respects different, it is possible to infer that in order to meet this requirement it is enough if the court carrying out the control of administrative bodies' decisions is authorized to judge the problem complexly, from the factual as well as legal viewpoint and in this respect it can also carry out evidence. However, double instance proceeding[2] is not required and in the matters of civil rights and obligations the possibility to change the decision is not required either. The cassation system of

[1] According to the judgment of the European Court of Human Rights in the case of Albert and Le Compte (Albert and Le Compte v. Belgium of 10.10.1983. Complaint 7299/75 and 7496/76) it is sufficient if the decision of the administrative body can subsequently be subjected to control conducted by independent and impartial tribunal with full jurisdiction.

[2] Even though the double instance proceeding does not belong to the fundamental elements of the right to a fair trial and is guaranteed by art. 6 sec. 1 of the European Convention on Human Rights and art. 2 sec. 1 of the Protocol no. 7 of the European Convention only in the criminal proceedings, it is obviously desirable if not essential in order to secure proper judicial protection. See F. Matscher, *The right to a fair trial in the case-law of the organs of the European Convention on Human Rights*, [in:] *The right to a fair trial*, Council of Europe Publishing, Strasbourg 2000, p. 18.

control is sufficient if the judgment of the court is binding on the administrative body to which the case was returned[3].

However, this level of protection is only required in the matters of civil rights and obligations and justification of any criminal charge, but not in other cases. At the same time it is necessary to point out that the meaning of the expression civil rights and obligations does not overlap with the meaning of the expression private rights, or in other words with the power of civil courts defined in § 7 sec. 1 and 2 of the Czech Civil Procedure Code. The civil rights and obligations are interpreted by the case-law of the European Court for Human Rights in a broader context, including even those matters which according to our law belong to the category of public affairs.

For this reason certain cases which are considered under the case-law of the European Court of Human Rights as a part of civil rights and obligations and about which the administrative bodies previously decided, are subject to the control of civil courts according to the chapter five of the Civil Procedure Code and the rest of these cases along with other public matters are subject to review by the administrative justice. Thus, full jurisdiction must be provided even by the administrative courts in these matters.

This requirement is fully satisfied in private law cases as the parties to the proceedings are provided with even higher level of protection than is required. If the court, according to sec. 5 of the Civil Procedure Code, reaches a conclusion that the decision of the administrative body was not appropriate, the court will solve the specific case by delivering its own judgment. This judgment shall replace the decision of the administrative body to that extent which fits the importance of the judgment. With respect to the reasonable application of the provision of the first to fourth chapters of the Civil Procedure Code the proceeding concerning cases which were decided by a different body (proceeding according to the chapter five of the Civil Procedure code) is a two-level proceeding. Thus the parties to the administrative proceeding, the subject of which was a private law issue, can seek judicial protection they would have received in case the issue had been covered by the power of civil courts if it was not primarily vested in the power of administrative bodies[4].

[3] See e.g. judgment of the European Court of Human Rights in the case of Zumtobel v. Austria of 21.09.1993, Complaint 12235/86.

[4] As M. Mazanec states mere compliance with the requirement of full jurisdiction for hearing the case by Administrative Court would in fact be a step backwards, meaning that a litigant would be "unlucky" to have his private case entrusted under the jurisdiction of administrative body. He would lose the benefit of being heard by the civil court and he could "only" benefit from full jurisdiction before the Administrative Court, i.e. a certain minimum of guarantees of justice resulting from international legal obligations of the state but not from full and elaborate "standard" civil court procedure. M. Mazanec, *Rozhodování soukromoprávních vìcí správními orgány (Decision-making by administrative bodies in private law matters)*, "Právní rozhledy" 2003, no. 11, pp. 55–57.

However, the above mentioned can have negative consequences as in the future the administrative body obviously is not bound by the decision of the civil court and thus the decisions of courts do not necessarily have to be unified with the decisions of the administrative bodies when they deal with the same issues. As E. Wagnerová states in her dissenting opinion on the judgment of the Constitutional Court Pl. ÚS 26/08, the administrative bodies can on the contrary repeat their mistakes without the cases being returned to them and without any pressure being made on them to accept the opinions delivered by the administrative court in case it was the administrative court which made the decision. On top of that if the administrative bodies insist on their way of legal assessment of certain repeated circumstances or on their interpretation of law and if it is necessary to repeatedly repair their wrong decisions through general (civil) court decisions it is again obvious that the legal regulation itself contributes to predictable prolonging of the proceeding. The parties are endangered by this structural deficiency in this legal regulation as their fundamental right is violated, taking into account the lengthiness of the whole proceeding even though from the formal point of view there are two proceedings – administrative and a court proceeding (before a civil court)[5].

As far as the legal regulation of administrative justice is concerned, the original intention of the reform took into account the fact that the decisions of administrative bodies upon civil rights and obligations or criminal charges will be subject to review in full jurisdiction and rulings of administrative bodies to which the art. 6 sec. 1 of the European Convention on Human Rights does not apply will be reviewed only for their legality. The Administrative Procedure Code finally inclined to the unified concept of evidence. Article 77 sec. 1 of the first clause of the Administrative Procedure Code stated that within the framework of evidence the court can repeat or complete evidence used by the administrative body. After initial difficulties concerning interpretation of this article the Supreme Administrative Court held a clear and stabile view saying that § 77 sec. 2 first clause of the Administrative Procedure Code is a factual transposition of the requirement for so-called "full jurisdiction" as an attribute of the right to a fair trial. When making a decision the court must not be limited in factual matters only by the evidence found by the administrative body and not even by the extent of the used evidence, nor their content and assessment of their seriousness, legality and veracity. Thus the court shall individually and independently assess the correctness of factual findings done by the administrative body and if it comes across factual or procedural legal deficiencies it can react

[5] The judgment of Constitutional Court of 7.04.2009. Pl. ÚS 26/08 (Collection of Jugments and Rulings of the Constitutional Court, vol. 53, judgment no. 82).

either by imposing on the administrative body the duty to remove, replace or complete the deficiencies, or it may do so itself. However, the evidence carried out by the court must aim exclusively at acknowledging the facts of the case during the process of decision-making of the administrative body[6].

The proceeding before the administrative court is based on cassation remedial system, i.e. it is only entitled to cancel the challenged decision and return the case back to administrative body for further proceeding. The administrative body is in the further proceeding bound by the legal opinion delivered by the court at reversal of the judgment. At the same time the administrative body must also include among the other grounds for a new decision the other evidence collected by the administrative court (§ 78 Administrative Procedure Code). The Administrative Procedure Code does not regulate any regular remedial measure, thus the proceeding is a one instance proceeding.

However the administrative judicial proceeding concerning an action against the decision, by which the administrative body imposed a penalty for an administrative delict is different. In case the court does not reverse this decision, but still the punishment was apparently inadequate, the court can refrain from it or it can diminish it within the limits of the law if such a decision can be made on the base of the facts of the case which served as the grounds for the decision of the administrative body and which was possibly completed by the court's own evidence (§ 78 sec. 2 of Administrative Procedure Code). Such legal regulation meets the higher requirements required by the case-law of the European Court of Human Rights in the matters of criminal charge but only in the area of decision making about an imposed punishment[7].

Based on the facts mentioned above we can sum up that even though the administrative courts do not provide such a developed legal protection for the civil rights and obligations as it is in the case of proceedings according to the fifth chapter of the Civil Procedure Code, the current state is still satisfactory. Moreover the contemporary system managed to avoid expected problems with distinguishing of civil rights and obligations and other matters in the administrative judicial proceedings.

However on the other hand the parallel system of the legal regulation of judicial control of the public administrative bodies, based on the dualism of the law brings about a similar problem, which is solved by special senate, established by the Act no. 131/2002 Coll. However, the number of cases solved by this institution is decreasing with respect to the significance and binding nature of its rulings and thus the current state is getting stabilized.

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[6] The judgment of Supreme Administrative Court of 28.03.2007, 1 As 32/2006-99. Also the judgment of Supreme Administrative Court of 31.05.2007, 7 Afs 100/2006-103 or the judgment of Supreme Administrative Court of 22.05.2009, 2 Afs 35/2009-91.

[7] See e.g. the judgment of the European Court of Human Rights in the case of Gradinger v. Austria of 23.10.1995, Complaint 15963/90.

Taking into account the current legal state it can be surprising that certain cases that belong to the category of civil rights and obligations are being solved by the civil courts, others by administrative courts, while in both of these two areas of justice that we have mentioned different level of protection is provided. Under these circumstances the possibility to provide judicial protection by civil courts to all matters connected with civil rights is probably worth considering. With respect to the case-law of the European Court of Human Rights, which interprets this concept extensively, the civil courts would in such a case find themselves in a role when they would provide protection in a large extent even in cases which under our concept belong to the category of public law and thus the powers of the civil courts would be boosted. It is again necessary to point out the fact that the protection provided by the administrative courts even in the matters of civil rights and obligations is sufficient according to the case-law of the European Courts of Human Rights.

Conclusions

Based on the above mentioned facts it is obvious that all models of legal regulation of judicial protection of administrative bodies' acts have to cope with certain problems and deficiencies. The basic requirement is that they should be able to comply with the conditions set by the article 6 of the European Convention on Human Rights, mainly the requirement of the so-called full jurisdiction. Thus if we do not take into account the concrete problems resulting mainly from the legal regulation of judicial control of the public administration bodies' acts in private law cases which deserves overall reenactment, it is possible to state that the current model of the judicial control of the public administration bodies' acts is completely satisfactory, both from the procedural as well as organizational view.

Streszczenie

Analiza modeli kontroli sądowej aktów organów administracyjnych w Czechach

Słowa kluczowe: kontrola sądowa, organy administracyjne, sprawy prywatne i publiczne.

Głównym tematem artykułu jest sądowa kontrola organów administracyjnych w Republice Czeskiej. Prawo do sądowej ochrony prawnej i innej wynika w tym kraju z art. 36 Karty praw podstawowych i podstawowych wolności (ustawy nr 2/1993 Coll.). Jeżeli organ administracji decyduje o kwe-

stiach, które w ramach systemu prawnego należą do spraw z zakresu prawa prywatnego, to decyzja, zgodnie z rozdziałem V Kodeksu postępowania cywilnego (ustawy nr 99/1963 Coll.), jest opiniowana przez sąd cywilny. Natomiast jeśli organ administracyjny rozstrzyga o kwestiach, które należą do prawa publicznego lub gdy organ administracyjny jest nieaktywny (nawet jeśli bezczynność dotyczy zagadnień z zakresu prawa prywatnego), decyzja ta, zgodnie z Kodeksem postępowania administracyjnego (ustawa nr 150/2002 Coll.), jest opiniowana lub sytuacja ta może być rozwiązana przez sądy administracyjne. Kontrolę sądową aktów organów administracji można zatem zaliczyć zarówno do kompetenji sądów cywilnych, jak i sądów administracyjnych. Autorka artykułu koncentruje się głównie na zgodności regulacji prawnej kontroli sądowej aktów organów administracyjnych w Czechach z art. 6 Europejskiej Konwencji Praw Człowieka.