SEVERAL REMARKS TO THE LEGAL BASES OF THE PRINCIPLES OF GOOD ADMINISTRATION WITHIN THE CONDITIONS OF THE CZECH REPUBLIC

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Abstract in original language:
The contribution deals with the roots and legal bases of the principles of Good Administration in the Czech Republic, the complicated way of their establishing and quite slow penetrating into the legal regulations and administrative practice. It stresses the positive role of the Constitutional Court and rather later of the judicature of administrative courts, esp. the Supreme Administrative Court, and also the enlightening role of the Ombudsman in this field.

Key words in original language:
Principles of Good Administration, Public Administration, Judicial Review, Legal Principles, Correctness, Proportionality, Legitimate Expectations, Ombudsman, European Administrative Space.

Dear colleagues, dear guest,

for our panel discussion we have tried to offer the topic that would be general, or better common enough in so called "Visegrad" space, that could be understood as a special, Central European part of the Europe, and European Union as well.

And for such purpose the theme and consequences of the Principles of Good Administration seems o be just perfect – and not only for that general impact on Public Administration systems, their general role and nature, as a means for reaching the commonly recognized values in the society on the national and European levels.

The other reason for our choice has been the specific importance and features of these principles for the Visegrad countries. This is caused by their common and specific traditions, ways of development, conditions and legal environment, with prevailing common and specific roots and patterns of organization and activities of their administrative systems, and also for the concepts of the personal basis of the Public Administration (i.e. rather bureaucratic). And for, last but not least, quite a similar recent history, and changes of the political systems and the society in the broadest sense.

My short contribution could be, in the main points, generelized for the Visegrad space. But still each of its countries has had concrete "story", with different present situation and results, as well.

The approach to the principles of Good Administration, respect for them and their control , esp. judicial review of these principles can distinctly illustrate, generally said, the former situation and some substantial, essential, but differentiating changes, proceeding in post-communist Central and East-European countries, especially in the sphere of public administration – citizens relation from 1990s, and in the sphere of decision-making of Public Administration, as well.

The requirements for Public Administration's decision-making incorporated in the principles of good administration pass through the level of legislative regulation of public administration's activities (in particular as regards determining criteria for *correct* decision making, with different conceptions of this *correctness*), then they include the field of interpreting administrative law standards and their application, and also the problems of judicial reviews of administrative acts.

These dimensions of public administration in the post-communist countries have undergone and undergo fundamental and necessary changes, and this process is far from having been finished. Ways may differ. Nevertheless, we share certain common values and are supposed to achieve certain common standards. This process is significantly influenced by the European Law (EC/EU law, and also COE standards).

1. SOME TERMINOLOGICAL AND CONTEXTUAL NOTES TO THE PRINCIPLES OF GOOD ADMINISTRATION

For the correct application of public administration authority towards individuals – addressees of its competence (and particularly the discretionary powers, where public administration is entrusted with the area for application of its own solutions of specific situations), a certain structure of requirements has profiled as regards the quality, content and range of execution of this authority. Among them, the principles of proportionality and legitimate expectation are especially important.

This is because the above-mentioned principles guarantee, more or less directly or indirectly, relevant constitutional principles (equality principle – in dignity and rights, prohibition of discrimination, principle of basic rights and freedoms protection, their mutual balancing, prohibition of abuse of authority, limited execution of public authority at the level of both material and process rights) for the public administration-individual relationship in a modern legal state. These principles should also mediate reasonable and acceptably flexible connection of the purposes and aims of public administration (state, community, region, and municipality) on the one hand and the rights and interests of citizens on the other hand by using adequate means and in maintaining the necessary rate of certainty.

This fully goes to the principle of proportionality and the principle of legitimate expectations - predictability (or, more general principle of legal certainty) then have the crucial importance for the legal quality of the decisions of public administration authority.

The practice of administrative authorities and administrative courts bring new and new situations and cases that cope with these principles for the first time or in an original manner and that enrich our knowledge or create the basis for future discussions.

But for new or "newer" member states of the European Union, which is also the case of the Czech Republic, the current discussion is not only topical as a certain "added value" in the form of not yet solved administrative areas or some original ideas or thoughts.

In this field, unfortunately, we were, for a while, i.e. for the major part of the second half of the 20th century, "truant" ("absent in the classes"), and therefore we should admit that in the conditions of the Czech Republic, some of the basic battles have not been fought out yet, which we can meet in different cases (e.g. the way of solution the conflict between the freedom of speech on one hand and the protection of privacy on the other hand).

From the view of establishing requirements and guarantees of the *correctness and justice* of public administration's decision making (and maybe also of some administrative courts and administrative law judges), these battles have not been finished triumphantly (or reasonably or proportionally – to remain in the intensions of our principles) – if such simple solutions are just possible.

Now I have touched the neuralgic terms. These are *correctness* and *justice*. I could add, being aware of Anglo-Saxon tradition, the term *reasonableness*. These terms we can meet in several recent decision of the Supreme Administrative Court in relations with proper interpretation and application (e.g. 4 As 12/2007 – 85 or 6 Ads 45/2008 – 50. According to http://www.nssoud.cz).

Public administration should adopt decisions with these qualities, and also this quality of public administration's decisions, if they affect the rights of individuals (particularly their basic rights and freedoms), should be subject to judicial reviews.

In my opinion, the above-mentioned, although certainly rather a simplifying premise, is only applied gradually, but increasingly, in the conditions of public administration and judicial review in the Czech Republic.

In the present time, it is being settled and it tries to find its necessary scope and also understanding by all affected entities.

I suppose the situation in other post-communist countries ion these matters to be quite similar.

To better understand the situation, it is necessary to add a piece of information that since the beginning of the 1990s, the Czech public administration system has been undergoing a reform process in the widest concept, in a rather spontaneous way. Such approach did not create just suitable environment for the concentrated and systematic view of the questions of quality of the public administration legal regulation and creating conditions for establishing the quality standard of decision-making processes.

The effects of Europeisation (including the competence of the European Court for Human Rights and the European Court of Justice), at least in the aspect of establishing certain principles and standards, could and still can therefore have a generally positive and stabilizing potential.

2. TO THE ROOTS AND BASES

Understanding the current situation requires at least a brief view of the roots and major steps of the previous development.

In the case of examining the public administration decision making and judicial review in the Czech Republic, the principle of legal continuity (or at least that of formally legal continuity) and, basically, also the principle of institutional continuity was, in general, applied. Of course, we cannot speak of political and ideological continuity, which, in some breaking points, resulted in a material-legal discontinuity.

In this case, it is a Central European, continental legal tradition with an emphasis on statute law, i.e. with an accent on *legality*, supplemented with a strong influence of internal directives.

This is related to the centralized model of public administration, from the early 1860s supplemented with municipal self-government which, however, also disposed of delegated competence of public administration, also subject (as public administration) to internal instructions.

The principle of legality was and still is (although now with a broader content) the major principle in the structure of requirements placed on public administration. In the conditions of the communist regime everything was given if not by a relatively stable legislation then by detailed internal directives and instructions.

In the first general procedure code of public administration (Administrative Procedure Code) of 1967, which only applied to specific (individual) administrative acts, the main procedure principle was the principle of legality.

In relation to the rights of individuals, the generally determined principle for public administration authorities was to protect rights acquired in good faith; at the same time, however, to protect the general interest of society. The principle of equality was only established for procedural rights of parties in the same procedure.

This law was in force until the end of 2005, without having been, *expressis verbis*, enriched anyhow in the part containing the basic principles of administrative activities.

The term *correctness* was only understood as the so-called objective correctness of decision, i.e. the correct finding and consideration of facts. The selection of a correct decision was left completely on the administrative authority and it was not subjected to judicial cognition (review).

3. TO THE BEGINNINGS OF THE CURRENT PERIOD

After 1990, logically, the paradigm of legislative optimism fully emerged, with an enormous hypertrophy of legal regulations. There was a lot to change and catch up with. However, no conception of legislative reform of public administration as a whole, nor of individual sectors was adopted.

After 1990, **new fundamental factors** entered this much worse arranged legislative environment (at that time the Czechoslovak federative-type and Czech and Slovak republic-type environments), which alone was demanding for administration accustomed to the traditional scope of legality criterion, which, however, ceased to be a traditional stable pillar.

Czechoslovakia (and the Czech Republic after the country split up) became a member of the *Council of Europe* and adopted the European Convention on Human Rights and Fundamental Freedoms (1992, 1993) and a commitment to prepare for joining the *European Communities* (1994). In 1992, the *Charter* of Fundamental Rights and Freedoms, inspired to large extent by the European convention and other international documents on human rights, was adopted and, in 1993, incorporated in the Czech Republic's constitutional order. Also an obligation arose for the Czech government – to push the *soft-law* of the Council of Europe forward to national law.

At the value level, adoption of a new *Constitution* of the Czech Republic (1993) must be emphasized, with incorporating the principle of respect to citizens' rights and freedoms, public authority service to citizens, binding of public authority by law and a reference to the

well-tried principles of legal state and the joint value basis of the family of European and world legal states.

It is the Constitutional Court that has become the first institution in the conditions of the Czech Republic which began to apply argumentation by using *legal principles*, including the principles of proportionality and legitimate expectation (although more frequently in the field of legislative acts – for the first time comprehensively in the case Pl. ÚS, then Pl. ÚS/15/96, Pl. ÚS 16/98, III. ÚS 256/01, and other), including unwritten principles (for their legal liability see grounds of the finding Pl. ÚS 33/97).

The Constitutional Court also applied the paradigm of conform interpretation of ordinary laws and the paradigm of penetrating constitutional principles throughout the entire rule of law – not excluding the public administration sphere (III. ÚS 139/98) .

4. AND TO THE CONTEMPORARY SITUATION

A modern legal state cannot make do with the traditional concept of public administration legality and administration legality review, and the Constitutional Court shows it eloquently.

At the turn of the millennium, it was difficult to argue for the principle of proportionality or legitimate expectation, or even "some" Principles of Good Administration, at an administrative authority or during a judicial review. If one had ever known what these terms meant. However, the high time came to specifically formulate major qualitative standards for the decision-making procedure of administrative authorities. If not for another reason – then for the material one. Citizens were (have been) slowly loosing their diffidence to sue the government for compensation of damage, and also to argue in the matters of public law.

As it can be seen, diffidence to argue by legal principles was (is ?) a deficit from the previous decades shown in both lawyers and numerous judges, solicitors, to say nothing of public administration officers.

The first act in the necessary direction with a general impact was the law on the Public Rights Defender (Czech ombudsman) - Act. No.349/1999 Coll., as amanded). It established as a criterion not only observance of legality, but also observance of the *principles of democratic legal state* and the *principles of good administration*, although without specifying their catalogue or outline. Just the reference to a *principle* in a particular law, in relation to the activities of administrative bodies, was almost a revolutionary act.

Since the beginning of his function, however, the ombudsman, although with weak competences (he can only recommend, notify or propose), has taken his role in an enlightened manner and he started to apply the necessary criteria of good administration of both a legal and ethical nature.

The criteria of *rationality*, *proportionality* of solutions used and also the *predictability* requirement of administrative authorities' behaviour are regularly applied in the ombudsman's reports.

Another specific move may be considered an addition of public administration officers' duty to follow the principle of equal treatment of clients and impartiality to the *Labour Code* in 1993; for territorial self-government's employees this was done in a special law in 2002. In the same year, under the pressure of criticism from the European Commission, a *law on public officer service* was adopted and it contains a set of usual duties ensuring impartiality

and proper decision making. However, its force was postponed repeatedly and before it becomes effective it will probably be replaced with a new regulation.

The Czech Republic is probably the only member state of the EU whose public officers do not have their law on public service. This factor must be considered counterproductive in relation to the action of necessary principles of good administration. *The code of ethics* of public administration officer from 2001, which takes the form of a decree of the government, is not a sufficient instrument in this respect.

The adoption of the *new Code of Administrative Procedure* in 2004 must be welcome; it has been in force since 2006. This law, unlike the general law from 1967 as mentioned before, does not regulate only the procedure for issuing specific (individual) administrative acts, but also other administrative acts (with the exception of generally binding acts) and also public law contracts.

From our "principle" point of view, in particular the first, general part of the law is important as it contains the so-called *basic, general principles of public administration activities* and has a general application for the execution of public administration. Thus the principles are not only of a procedure character, but partly also of a material character (in some aspects they control the content of adopted decisions).

Here we find a certain catalogue of legally binding principles of modern public administration including the principle of proportionality and the principle of legitimate expectation, although not explicitly designated as such.

By expressly incorporating the principles dealt with below in the text of the law, the reason for their binding force need not be looked up in constitutional regulations, international conventions or other documents (of which, in particular, the so-called *soft-law* of the Council of Europe).

A positive shift is the fact that the principle of legality acquires *explicitly* its full content (compliance with *laws and other legal regulations*, as well as with *international conventions* that are part of the legal order.

Act No. 150/2002 Coll. established "classical" administrative justice with the first instance at the level of general regional courts (existing).

Above them there is the Supreme Administrative Court on the nullity (cassation) principle (consideration of legal correctness) and with the role to unify the judicature. These administrative courts provide protection for public subjective rights in classical matters of public law, from the view of legality, and also in the event that the limits of discretion are broken and discretion is abused. The court can alleviate a sanction imposed in an evidently inadequate amount.

Theoretically, the above-mentioned regulation enables review in the case of a breach of the monitored principles. As regards the *principle of adequacy*, such cases may be encountered, and also the principle of *legitimate expectation.* Judicature has also defined the term "abuse of administrative discretion" quite sufficiently (see, for example, decisions No. 905, 906, 950 of the Collection of Decisions of the Supreme Administrative Court).

Summary:
In the Czech Republic, the process of enforcement of the principles of Good Administration is a long-term, sometimes painful, and a little slow process, maybe.

The reasons for that we can find particularly in the fact that, unfortunately, despite of a large amount of information and experience available from abroad and from European institutions, and despite of a strong tradition of the so-called first Czechoslovak Republic, priorities and main target values for the reform of public administration and administrative justice have not been set in time and clearly enough, and these matters did not get a sufficient political priority and support.

Therefore, the procedure to the necessary standards uses a more demanding and painful method, sometimes a trial-and-error method. Both the government and public administration pays and will pay for errors not only with money, but also with confidence. Citizens pay as well.

Literature:

- Dworkin, R.,M.: Taking Rights Seriously, Harvard University Press, 1994
- Galligan, D.J.: Discretionary Powers, A legal Study of Official Discretion, Clarendon Press, Oxford, 1986
- Holländer, P.: Ústavněprávní argumentace, ohlédnutí po deseti letech Ústavního soudu (*Constitutional Law Argumentation, Looking Back after Ten Years of the Constitutional Court*), Linde, Prague, 2003
- Hendrych, D. a kol.: Správní právo, Obecná část (*Administrative Law, General Part*), 7th edition, C.H.Beck, Prague , 2007
- Authors team: Slovník veřejného práva československého (*Vocabulary of the Czechoslovak Public Law*), Všehrd, Prague – Brno 1929 – 1948 (entries: Nejvyšší správní soud, Správní soudnictví, Volné uvážení, Zájmy veřejné (*Supreme Administrative Court, Administrative Justice, Free Discretion, Public Interests*)
- Kadečka, S., et al.: Správní řád, komentář (*Code of Administrative Procedure, Commentary*), ASPI, Wolters Kluwer, Prague, 2006
- Mazanec, M.: Správní soudnictví (*Administrative Justice*), Linde, Prague, 1996
- Pítrová, L., Pomahač, R.: Průvodce judikaturou Evropského soudního dvora (*Judicature Guide to the European Court of Justice*), Volume I., II., III., Linde, Prague, 2001, 2005
- Proceedings from the Conferrence: Principy dobré správy (*The Principles of Good Administration)*, Masaryk University, Public Rights Defender, Brno, 2006

- Skulová, S: Rozhodování ve veřejné správě (*Public Administration Decision-Making*), Masaryk University, Brno, 1995
- Skulová, S.: Správní uvážení, základní charakteristika a souvislosti pojmu (*Administrative Discretion, the Basic Characteristic and Relations of the Term*), Masaryk University, Brno 2003,
- Skulová, S., et al.: Správní právo procesní (*Administrative Procedural Law*), Aleš Čeněk, Pilsen, 2008, ,
- Sudre, F.: Mezinárodní a evropské právo lidských práv (*International and European Law of Human Rights*), Masaryk University and Charles Unversity, Prague, 1997
- Tichý, Arnold, Svoboda, Zemánek, Král: Evropské právo (*European Law*), 2nd edition, C.H.Beck, Prague, 2004
- Tridimas, T.: The General Principles of EC Law, Second edition, Oxford EC Law Library, Oxford University Press, 2006
- Weyr, F.: Teorie práva (*Theory of Law*), Orbis, Brno – Prague, 1936.
- http://www.nssoud.cz (the Supreme Adminsitrative Court)
- http://www.ochrance.cz (the Public Rights Defender)

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