Judicial review of administrative discretion in the Czech Republic in the view of development, including europeisation effects

Soňa Skulová*

1. Introductory note

In the field of judicial review, a specific area is reviews of those decisions of administrative bodies that are issued within their discretionary power (administrative discretion). The above-mentioned specific feature is given by the character of the relative freedom of decision-making, typical of discretionary power, and also by the character and structure of criteria that control administrative discretion.

Other, more generally based specifics of judicial review (compared to internal review inside the public administration system) result from the relation of executive power and judicial power which is supposed to control public administration's decisions from its independent positions. Another factor is the necessity to ensure limitation of the performance of that part of public power that is in the competence of public administration in relation to the rights and interests of individuals.

The aspect of lawfulness of public administration is solved, monitored or controlled within judicial review at the most general level. In the specific area of administrative discretion and its judicial review, this criterion can have more levels, i.e. it can dispose of much different content from a simple conformity with a simple specific rule to convenience with a complicated structure of legal criteria or standards.

The historical development of the judicial review of discretionary power has been based on this screen from about the last quarter of the 19th century until these days and it is not finished yet. In this long-term development, a certain trajectory (although not quite linear) of its individual points can be seen. It results from a certain logic of increasing demands for the legal state quality in the environment of a particular state (states) and, in the last decades, also in the European environment.

In this short essay, I will try to outline the development in this field in the Czech Republic, which resonated, in a specific way, but not always continually, with the above-mentioned more general trends. The influence of europeisation processes for the given development in the recent period at both legislation and application levels is unquestionable.

First of all, I would like to give several notes to the current context of review of administrative decisions in the legal environment of the Czech Republic. We distinguish reviews inside the public administration system, i.e. reviews executed by administrative bodies, usually at hierarchically higher positions. The basis of this regulation is in the Code of Administrative Procedure (Act No. 500/2004 Coll., as amanded). Another stage of review can be judicial review, in which review within administrative justice[1] takes the main role. Some kinds of decisions have been recently entrusted to the review competence of ordinary courts[2]. The Constitutional Court has a specific role in relation to administrative discretion.

2. *About the development of the theoretical bases of judicial review of the administrative discretion*

To understand the current legal regulations and the situation in the judicial review of discretionary power, at least a glimpse at its roots, as well as thought constructions that it was based on cannot be omitted. Then we can watch whether and how they were reflected in the development and the current legal regulation of administrative justice or other fields of judicial review.

The problems of administrative justice are regularly included in the field of legal guarantees (or guarantees of lawfulness) of public administration or, in their broader framework, in the control of public administration. This is also the case of our legal context where we understand the term “administrative justice” as judicial reviews of administrative decisions. The detailed and comprehensive analysis of administrative justice represents an excessive topic[3], of which we will only focus on its advised part or aspect, i.e. the review of administrative discretion.

Enforcement of the idea of administrative justice related to the application of the theory of separation of powers and the principles of a legal state which brought a qualitatively different positions and relations of the executors of public power and the addressees of its operation. It was necessary to guarantee the restriction of public power within legal limits in both the content and the forms of its realization. This requirement was formulated quite intensively for such cases when executive power intervened in the sphere of public subjective rights. [4]

A more complicated problem for determining the limits and rules of judicial review of administrative decisions is the area of discretionary power when the law itself establishes a free discretion for an administrative body, i.e. the possibility to choose its own, according to its opinion the most suitable decision from more possible decisions, i.e. at a certain stage of the decisions-making process (sometime at its beginning) to choose from among different solutions (procedures), and each of them should be within the framework set by law.

And the role of the court that is (was) supposed to review the lawfulness of such decision is then more difficult. At the beginning, it was necessary for each administrative justice system to resolve the question as to whether ever or in what extent and relation to a legal regulation the court should review an administrative decision based on free discretion. This problem was one of the crucial ones in the development of administrative justice, typically in the system of continental law.[5]

Already the classics of Administrative Law have expressed their opinions on the extent of judicial review. For example, Merkl distinguished, in the intentions of the traditional separation of powers and also of the content of the term “legality”, review as regards lawfulness and also review of an administrative body’s discretion (i.e. the purposefullness of administrative acts in the widest sense). According to his opinion, the review of discretion is a step further than the review of legality and it represents a strong span of administrative justice, if not a deviation beyond the framework of the idea of administrative justice, because, among others, it deprives administration of all its freedom and subjects the entire administration not only to criticism, but also to the will of justice.[6] However, he admits a possible determination of certain types of administrative acts, which would be subjected to review, or certain types of a breach of law. Merkl regards the cases of review of exceeding the limits of free discretion (in conformity with our current concept of administrative justice) as a special case of the review of legality, because each excess of free discretion intervenes in the sphere of legal binding of the administrative body and it thus establishes a breach of law.[7]

The above-mentioned case means at the same time an excess of the framework of power of the entity executing public administration set by law.

Already in the conditions of a modern state, Macur formulated a conclusion that discretion is not the opposite to lawfulness and that these terms do not exclude each other. According to him, the positive legal criterion of their differentiation should not be absolutised. For the current situation and conditions, we can agree with his conclusion that *the point reached by the legal binding of administrative discretion may be followed by a judicial review* even if the positive law excludes the review of purposefulness. It means that the possibility of judicial review ends only where the binding of free discretion by law ends.[8]

The determining factor for setting the extent and content of review of administrative discretion is the legal framework by which administrative discretion is *bound* (particularly as regards its *limits*, i.e., with a certain licence, its quantitative aspects) or *controlled* (particularly as regards criteria determining its content, i.e. qualitative aspects).

3. About the development of judicial review of administrative discretion

What was the specific development of solution for this aspect of judicial review?

Originally, the Austrian administrative court was based on the above-mentioned original theory that if courts judged in the matters of administrative discretion, they would not be any different from administrative bodies. [9]

The so-called "October Act" (Act No. 36/1876 of the Empire code of laws), on establishment of an administrative court, as amended, set in its Section 3, letter e) exclusion of administrative discretion from judicial review.

After several amendments, which did not affect our area of interest, and the rich judicature activity of the Austrian administrative court[10], the October Act was incorporated in the Czechoslovak legal order by Act in essence No. 3/1918 Coll., on the supreme administrative court and on solving competence conflicts ("November Act"). In the field of setting the judicial review of discretion, a formulation change was made when the matters in which decision-making was made by free discretion were removed from the review exclusion.

However, this change did not mean a substantial change in conception, i.e. establishment of full review of administrative discretion, because the main purpose of the law – protection against unlawful decisions or measures of administrative bodies was retained. The newly established legal status meant also the possibility of judicial review of administrative acts issued according to free discretion if they were found unlawful. According to M. Mazanec, the purpose was to retain the court's right built by judicature to examine the legal limits of free discretion and to find out if it has any support in files[11]. [12]

The regulation of administrative justice of 1918, cancelled in 1952, continued, almost without replacement, by the legal regulation of 1991 (Act No. 519/1991 Coll.) amending Act No. 99/1963 Coll., Code of Civil Procedure, in its fifth part.

This legal regulation of administrative justice, cancelled in between, was based to large extent, in relation to administrative discretion, as well as the entire restored concept of administrative justice, on the traditional (the first republic's) regulations, including the conceptions of the above-mentioned issues.

A special provision, directly and expressly related to the judicial review of administrative discretion, was Section 245, paragraph 2, Code of Civil Procedure: "In decisions which an administrative body issued based on a free consideration (administrative discretion) permitted by law, the court only reviews whether such decision did not depart from the *limits and criteria* set by law."[13]

Another element limiting the review of free discretion of administrative bodies was the provision of Section 248, paragraph 2, letter c), which excluded decisions on requests for performance to which there is no entitlement or on requests for removal of the rigour of law from judicial reviews.

A large area of cases of decision-making with administrative discretion thus remained outside judicial review.

The then judicature had to cope with not an exceptional absence of *criteria* for the application of administrative discretion[14] in legal texts. Also the Constitutional Court gave its opinion on the question of legal criteria[15].

As regards determining the *limits* of administrative discretion, the situation was always significantly more favourable.

It is clear from what has been stated so far that the legal determination of limits and aspects (criteria) for the application of administrative discretion, for *all* cases of its application in the regulation of administrative law was actually the key question for the relation of administrative decision-making and judicial review.[16]

Even if the current regulation of the extent of cognition of administrative discretion does not use expressly the term "aspects (criteria) of administrative discretion set by law" any more, their existence, in a wider dimension than only particular legal regulations, is indubitable and necessary and they must be taken into account in administrative discretion and judicial review.[17]

However, it is necessary to mention another aspect of the review of administrative discretion in administrative justice. Breaking the legal framework of administrative discretion or non-observance of criteria for its application, to be worth reviewing in administrative justice, must also represent a *violation or threat of the subjective right of the claimant*, i.e. the addressee of the original administrative decision.

The review itself of lawfulness of an administrative act is not the aim of judicature, but its means to find out whether the subjective law was broken by an administrative body's decision or whether the challenged violation of right did not occur.[18] Also the previous legal regulation was based on this. The claimed break of administrative discretion must have meant an intervention in the claimant's subjective rights, and not in another area, for example, in the rights of other persons or in a certain public interest protected by law.

The current legal regulation of administrative justice does not differentiate from this conception in the question of action legitimacy of individuals[19].

However, in a separate provision it gives the possibility of public interest protection based on an action against entities authorized by law, in particular determined public power bodies[20]. It must be pointed out that a breach of public interest could occur, undoubtedly, based on or in connection with an *abuse of administrative discretion* or, more generally, with an *incorrect free consideration*, in this case incorrect in the meaning of a breach of the general obligation to follow, in the performance of public administration, public interest as one of the substantial aspects of administrative discretion, i.e. the principle of administrative bodies' activity as set in the Code of Administrative Procedure as the general code of public administration's operation.[21]

4. *About the current regulation of judicial review of administrative discretion within administrative justice and according to the fifth part of the Code of Civil Procedure*

In the concept of European administrative law, the term "legality", or more correctly "lawfulness", should be understood in wider dimensions than it used to be traditionally. For european context R.Pomahač says that it means conformity with the constitution, general legal principles, written law and secondary legislation, common rules of international law immediately effective in the national law, judge-made law and with internal directives if they can be appealed before the court[22]. [23]

According to the principle of lawfulness, an unlawful act must be cancelled.[24] This implies the current requirement for the extent and depth of judicial review.

The new regulation of administrative justice appears to be a sufficient source for a really active pressure of courts on improvements in administrative proceedings.[25]

According to the diction of the valid Code of Administrative Justice, Act No. 150/2002 Coll., its purpose is the provision of *judicial protection for the public subjective rights of individuals and legal entities* in the way set by this law and under conditions set by this law or a special law[26].

According to this regulation, in connection with administrative discretion, *illegality of an administrative body's decision* may consist, among others, in that the administrative body *has broken the limits of administrative discretion set by law or that it has abused administrative discretion*[27]. As early as the time when the law was adopted, some authors stated that in this provision the sphere of discretionary decision-making of administrative bodies opened, in an almost revolutionary way, to judicial review.[28]

The regulation of review of administrative discretion is expressly related exactly and only to the "decisions" of administrative bodies. It does not mean, however, that the review of administrative discretion in the above-stated intentions could not be applied also in other cases subject to judicial reviews.[29]

The term "illegality", or its desired opposite "legality", as already pointed out, should be interpreted as a more general term "*lawfulness*". The review of lawfulness in the traditional, narrow meaning, can (and already must) be designated as the minimum, although for its importance the basic extent of review proceedings. The Code of Administrative Procedure (Act No. 500/2004 Coll.) establishes the full extent of the term "lawfulness", i.e. conformity with the entire legal order including international conventions which are its part in the meaning of Article 10 of the Constitution.[30]

The breaking element in the setting of judicial review is the effect of the requirement of the so-called full jurisdiction (within the meaning of Section 6, paragraph 1, European Convention of Human Rights and Fundamental Freedoms[31]), which has been introduced as a general principle.[32]

It takes effect in relation to consideration or complementation of the question of facts enabling the court to repeat evidence or complement evidence produced by an administrative body[33].

Another of its effects is not, however, unlimited. Nor does the current regulation of judicial review in administrative justice (according to the Code of Administrative Justice) generally enable a court to take the role of an administrative body and to replace its free discretion with its own discretion, it only reviews it in that direction as already mentioned, i.e. whether it did not break the limits set by law or whether it was not abused.

However, administrative courts have obtained full jurisdiction in the matters of actions filed to punishments imposed for an administrative offence, specifically *to withdraw it or to reduce it* (unless there are reasons for cancellation of the decision) if it was imposed to an apparently disproportionale degree[34]. Here the court may replace an administrative body's discretion with its own discretion. Reviewing, i.e. judicial review of decision-making of administrative bodies on *matters that fall to the area of private law*[35] , has been caught outside the framework of administrative justice. These matters currently fall to the competence of ordinary courts which review them indeed in full jurisdiction, because they may fully hear the same case[36], and the court is not bound by the facts of the case as found by an administrative body[37].

Probably the most interesting and also the most complicated problem within the judicial review of administration discretion appears to be the above-mentioned newly established term *abuse of administrative discretion*.

In examining whether administrative discretion has been abused, the judicial review will not keep to the "mere" aspects set by law, understood in the meaning of aspects of a particular legal regulation of the given case of administrative discretion (which in addition, as has been mentioned, can be sometimes "absent"). Also criteria acting from higher levels of administrative power, of a more general range, disposing of directly "principal" nature must also play the role. [38]

As V. Vopálka stated, the judge would have to consider in a more modern way on the terms of legality, in a wider way on lawfulness, correctness of decisions… [39]

The term "lawfulness" really have started to "overgrow" its traditionally (or rather historically?) understood boards and it starts to be necessary to see its content not only in administrative law regulations, but also in constitutional standards and international agreements, and maybe in other components.

In relation to the activity of public administration, also the term *"good governance (administration)"* has started to be profiled, as we encounter it in the law on Public Rights Defender (if we are looking in the Czech legislation) and what is becoming the standard of the modern European administrative environment.

Constituting the cited term and individual principles and rules, which make up its content, is, among others, the results of effect of standards contained in some international conventions, of which particularly in the European convention, in the judicature of the European Court (former Commission) for Human Rights established on its base. In this field, also the Constitutional Court has profiled significantly. The activity of the Council of Europe in this field is non-negligible. And in the field of particularly economic relations it is also the law of EC/EU including the judicature of the European Court of Justice, and the Court of First Instance, which also applies the general principles within the limits of its jurisdiction.[40]

5. In conclusion – about the "principal" role of courts, i.e. about the question of effect of the principles of the "European" Administrative Law

According to L. Pítrová and R. Pomahač, constitutional justice is inherently connected with the idea of hierarchic arrangement of primary and secondary sources of law and with enforcing the priority of fundamental rights, while administrative justice is based, in particular, on the principle of legality, proportionality, limited discretion, legitimate expectation, and similar legal tests.[41] According to the cited authors, it is more expected from administrative justice that with its control activity it will protect the *legal correctness* (emphasized by author) of everyday, common decision-making in the cases of public administration.[42]

The above-mentioned role of administrative justice implies a really wider concept of criteria according to which the decision-making of public administration is considered than lawfulness was traditionally understood in this country (within the meaning of conformity with legal regulations).

It means that the model of the so-called "black box" the content of which is not examined by a judge is no more acceptable in the current situation and according to the valid legal regulation for the establishment of judicial review of administrative discretion, as it was well characterized by M. Mazanec[43] in the previous legal regulation, because the judge is to be now interested in what takes place "inside" the decision-making of public administration. As already reasoned, concordance with the legal order includes also the *correctness of application* of its individual components.

The relevant principles and rules which direct mainly into the content aspect of decisions are the test of correctness of applying individual legal regulations related to a particular case of administrative discretion.[44]

In this respect, the new term, gradually taken up by recent judicature, *"abuse"* of administrative discretion (Section 78, paragraph 2, Code of Administrative Justice) can be interpreted as an *incorrect application of administrative discretion*.

In the case of an abuse of administrative discretion, it is always also an *incorrect application of public power*, i.e. the application of public power in a different *way* or to different *purposes* than assumes the wording, purpose or meaning of not only the appropriate applied legal regulation, but also of the relevant parts of the entire legal order, including fundamental rights and

freedoms or other legally protected values at the constitutional and international levels.

If, in the case of breaching the right of an individual in the field of public subjective rights which is also the constitutionally protected right, a remedy is not established within a review through authorized channels or within administrative justice or civil proceedings according to the fifth part of the Code of Civil Procedure, the protective role of the Constitutional Court starts against the decision of public administration that is "incorrect" at the level of constitutional regulations (and international conventions acc. to Art. 10 of the Constitution).

The activity of the Constitutional Court thus has created, in a legally binding form, additional qualitative requirements for decision-making and, especially, the execution of public administration authority and for the public administration-citizen relationship.

This is particularly important in the sphere of discretionary authority, as these are situations where exact legal aspects for decision-making are not given, it is necessary to follow more general principles that should ensure the correctness of adopted solutions.[45]

In the Czech conditions, the above-emphasized complementary relation of constitutional and administrative justice takes effect in it in the field of decision-making of public administration established on the so-called free discretion.

However, the decisive role in enforcing the legal principles of good governance is in administrative justice.[46]

Courts (Administrative Courts and Civil Courts when examining the decisions of Public Adminsitration) have been caught in a situation where they are forced to find the necessary criteria for the purpose of consideration of legal correctness of public administration's conduct or the results of its activity without them being specified in the relevant laws establishing the competence of courts in these matters.

Although at the turn of the millennium, it was difficult to argue for the principles, and especially the „leading" ones for the sphere of adminsitrative discretion - the principles of proportionality or legitimate expectations at an administrative authority or during a judicial review (if one had ever known what these terms meant), the high time came to specifically formulate major qualitative standards for the decision-making procedure of administrative authorities (if not for the general requirements of the rule of law and the constitutional principles, so for the reasons that the time of admission of the Czech Republic to the EU was approaching, and not only sporadic cases from the Czech Republic were submitted at the European Court for Human Rights, some of them having been launched at administrative authorities).

In this situation, adoption of a new Code of Administrative Procedure in 2004 must have been welcome (Act has been in force since 2006). From our 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 activity and has a general application for the execution of public administration. Thus the principles are not only of a procedural, 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 expectations (although not explicitly designated as such, but described quite adequately).[47]

And the new, above-mentioned regulations of judicial review enable (generally said) the review in the case of a breach of the monitored principles. As regards the principle of proportionality, such cases may be encountered [48]. There are still some diffidences and certain constraints in arguing and applying a breach of the principle of legitimate expectation, although in certain cases the principle is applied in terms of arguments[49].

Judicature has also, on general level, defined the term "abuse of administrative discretion"[50], which can be considred as a significant moment in the long-time process of the development of the judicial review of Public Administration, in the context outlined above.

---

* Doc. JUDr. Soňa Skulová, Ph.D., lecturer in Law, Masaryk University, Brno, Czech Republic

[1] According to the regulation established by Act No. 150/2002 Coll., Code of Administrative Justice, as amended.

[2] Executed by Act No. 151/2002 Coll., by which the Code of Civil Procedure was changed and amended.

[3] From the wider range of literature in Czech relating to the topic, I will mention, e.g. Macur, J.: Správní soudnictví a jeho uplatnění v současné době *(Administrative justice and its application in the present time)* Brno, Acta Universitatis Brunensis, Masaryk University, 1992, Mazanec, M.: Správní soudnictví (Administrative Judiciary), Prague, Linde, 1996, Hácha, E.: entry "Supreme Administrative Court" (Volume II, p. 827–880), "*Administrative Judiciary*" (Volume III, p. 589–605), in Slovník veřejného práva československého *(Dictionary of Czechoslovak Public Law)*, Brno, 1929-1948, Krejčí, J.: Zásada právnosti státních funkcí a zásada zákonnosti správy *(The principle of lawfulness of state functions and the principle of administration lawfulness)*, Prague, by edition of the publisher of the magazine Moderní stát *(Modern state)*, 1931, Bažil, Z.: Neurčité pojmy a správní uvážení při aplikaci norem správního práva *(Indefinite concepts and administrative considerations in applying administrative law standards*), Prague, Acta Universitatis Carolinae, Iuridica 6/1992.

[4] Merkl, A.: *"By fulfilling the requirement of administrative justice, guarantees are created that the will of the nation expressed in laws will be realized in administration, not*

influenced by uncontrolled and irresponsible officials." The most cogent argument which, according to the cited author, speaks for the existence of administrative justice, is the argument that administrative justice is a legal-technical means with which the activity of dependant (administrative) bodies is subject to the review of independent (judicial) authorities and which enables that an award of the court eliminates impermissible influences that may have affected the administrative officer due to his legal and political dependence in executing a legal act. - in Obecné právo správní (*General Administrative Law*), Volume II, Orbis, Prague – Brno, 1932, p. 215, 217 and following.

With regard to the current reality, it should be added that these impermissible influences need not only result from a possible legal and political dependence of administrative officers, but also from the side of various private interests.

[5] For more information on the model or real ways of solutions in individual, particularly European legal systems or orders see, for example, Pítrová, L., Pomahač, R.: Evropské správní soudnictví (*European Administrative Judiciary* (Volumes 1 and 2), Prague, C.H.Beck, 1998, Delamy. H.: Judicial Review of Administration Action, A Comparative Analysis, Dublin, Sweet Maxwell, 2001, Halliday, S.: Judicial Review and Compliance with Administrative Law, Oxford and Portland, Hart Publishing, 2004, Hertogh, M., Halliday, S. (eds.): Judicial Review and Bureaucratic Impact, international and interdisciplinary perspectives, Cambridge, New York, Cambridge University Press, 2004.

[6] Merkl, cited work: p. 231 and following.

[7] Merkl, p. 233.

[8] Macur, J., cited work, p. 50.

[9] Bažil, Z., cited work, p. 8 and following.

[10] "Substantial forms of administrative proceedings", as the model of later regulations of administrative proceeding, were based on it.

[11] Mazanec, M.: Správní soudnictví *(Administrative Justice)*, Linde, Prague, 1996, p. 29.

[12] In connection with the cited law it should be useful to point out to the institute of *legal principles*, unfortunately not introduced in practice, which were supposed to be adopted by the extended board of the Supreme Administrative Court to enforce its steady opinions or their change. The cited first republic's regulation is connected, to certain extent, to the institute of the so-called *substantial rulings* of the Supreme Administrative Court which is to be used for lawful and uniform decision-making of administrative bodies and also its *statements* which are to be adopted within the interest of uniform decision-making of courts in administrative justice (see Section 12, paragraph 2 and Section 19 of the Act No. 150/2002 Coll., Code of Administrative Justice, as amended).

In this respect, the critical comments on inconsistency of judicature and its insufficient influence on the quality of public administration's decision-making were healed, to certain extent. Conf. Mikule, V.: "Význam správního soudnictví pro všeobecnou právní kultivaci veřejné správy" *(Importance of administrative justice for the general cultivation of public administration)*, in Správní právo, 1997, No. 3, p. 137 and following. This apart from others, lead to cancellation of the regulation of administrative justice of 1991 by the Constitutional Court in its finding No. 276/2001 Coll.

[13] The Constitutional Court to the determination of the then conception of the review role of courts: "...the administrative discretion itself is only subject to an ordinary court's review as to whether it did not depart *from the limits and aspects set by law* (emphasized by author), whether it is in compliance with the rules of logical consideration and whether the premises of such discretion were found by proper process proceedings... if these conditions are fulfilled, an ordinary court is not entitled to deduce different or opposite conclusions from the same facts." (III. Constitutional Court 101/95, in Collection of Findings, p. 354.).

[14] This situation was problematic for both the administrative body itself and the court. But because at least general aspects are necessary for a review, this drawback restored the sensitive problem of applicability of analogy in the public-administrative law, sometimes even the question of analogy with the provisions of regulations of private law (conf. e.g. the judgment of the High Court in Prague, ref. no. 6 A 12/94-16, which concluded that *"...in decision making on the obligation of a legal entity to pay a sanction for an administrative offence in the field of private law (i.e. liability of an administrative offence), the administrative office is governed, unless otherwise expressly stated, by similar principles as the court in the field of private law in decision making on their general liability for damage (sic!)."*

[15] E.g. in the ruling in case III. Constitutional Court 101/95: *"...as regards administrative discretion, the judicature of ordinary courts agreed on an opinion that the law creates criteria according to which and within their framework a choice may be made including selection and finding those facts of a particular case that are not anticipated by an administrative standard, but by a discretion of an administrative body they are recognized necessary for the choice of its decision..."*

However, the situation is more complicated in those cases when the legal regulation left on the discretion of an administrative body to determine a criterion for its particular decision according to which it would decide. This case was solved by the Constitutional Court, for example in the case of I. Constitutional Court 116/96 *("...the question of selecting a suitable criterion for determining the pension tax base must enable observance of the basic principles of tax proceedings set in the provisions of Section 2, Act No. 337/1992 Coll., on administration of taxes and charges, as amended."* It was then on the (administrative) court to consider in the further review proceedings whether the current criteria were or were not chosen within "administrative discretion" in the meaning of Section 245, paragraph 2, Code of Civil Procedure.

[16] This conclusion was also suggested by judicial act No. 3, supplement to the magazine Správní právo *(Administrative Law)* No. 3/93: *"Administrative discretion can be reviewed by a court and an administrative body cannot act quite arbitrarily; it would be in conflict with the character of public administration as a by-law activity and an activity governed by law. However, determination of administrative discretion by law does not mean its complete negation. The law creates criteria according to which and within its framework, the choice can be made including selecting and finding those facts of a particular case that are not anticipated by an administrative standard, but by a discretion of the administrative body they are recognized as necessary for the selection of its decision."*

[17] This results from the application of the criterion "abuse of administrative discretion" which is used in the crucial provision of Section 78, paragraph 1, Code of Administrative Justice.

[18] Macur, J., cited work, p. 37 and following.

[19] Conf. the regulation of legitimacy of action included for individual types of actions in Sections 65, 79 and 82, and of

proposal for annulment of the measures of a general nature in Section 101a Act No. 150/2002 Coll., as amended.

[20] The law set so on the administrative body (no body was authorized by law until that time), then the Attorney General and "he who is expressly authorized by a special law or an international convention that is part of the legal order" (conf. Section 66, paragraph 1 to 3, Code of Administrative Justice).

[21] See Section 2, paragraph 4, Act No. 500/2004 Coll., as amended.

[22] See Pomahač, R.: Zásady správního řízení a evropské právo *(Principles of administrative proceedings and European law)* (To the bill of the new Czech law on proceedings before administrative bodies), Evropské a mezinárodní právo *(European and International Law)*, 2001, No. 3, p. 38.

[23] Within the bounds of the written law the term „juge-made law" should be understood not in the menanig of precedent, but as an accordance with the principle of legitimate expectations and legal certainty.

[24] Pomahač, R., cited work, p. 38.

[25] See also Vopálka, V. in Pocta Vladimíru Mikule *(Honour to Vladimír Mikule*, on his 65th birthdady), C.H.Beck, Prague 2002, p 275.

[26] Section 1, Act No. 150/2002 Coll.

[27] Conf. Section78, paragraph 1 of the cited law.

[28] Baxa, J., Mazanec, M.: Reforma českého správního soudnictví *(Reform of the Czech Administrative Justice)*, in Právní rádce *(Legal Advisor)*, 2002, No. 1, p. 10.

[29] It can also be an *unlawful intervention, instruction or forcing of an administrative body* (which is not a decision), if the party's rights were to be cut, but on condition that the intervention or its consequences last or its repetition threatens (Section 82 of the cited law), and obviously an *unlawful measure of a general nature* (Section 101d). For the so-called *unlawful inactivity* of an administrative body (if a decision in the case alone or a certificate is not issued), how the law counts on it also as a variant of a breach of subjective rights, a review of administrative discretion will probably not come to consideration generally, due to the claim of right to act (conf. Section 79, paragraph 1.).

[30] Conf. Section 2, paragraph 1 of the cited law.

[31] Published under no. 209/1992 Coll., as amended by protocols no. 3,5 and 8.

[32] Baxa, J., Mazanec, M.: Reforma českého správního soudnictví *(Reform of the Czech Administrative Justice)*, Právní rádce *(Legal Advisor)*, 2002, No. 1, p. 10.

[33] See Section 77 of the Code of Administrative Justice.

[34] If, however, such a decision can be made based on the facts of a case, to which the administrative body kept and which the court complemented possibly with its own evidence in not fundamental directions. Conf. Section 78, paragraph 2 of the cited law.

[35] If an administrative body has decided *"according to a special law on a dispute or on another legal case which results from civil-law, labour, family and trade relations"* and if the administrative body's decision has become legally effective, the same case may be heard on proposal in a civil trial. See Section 244, paragraph 1, Code of Civil Procedure.

[36] If it finds out that the given case should be decided differently from the decision of the administrative body, *the court itself will decide in the form of a judgment* – Section 250j, Code of Civil Procedure.

[37] See Section 250e of the cited law.

[38] For inspiration, it is useful to draw, and it is already doing so, from foreign sources. For example, in the German law an abuse of administrative discretion is seen in its application for an unlawful purpose or that its execution is based on incorrect motives or that for its application irrelevant findings were taken into consideration. It is, however, typical that with one and the same case, more forms of abuse of discretionary power can be found. The forms of abuse of discretion can be deduced from abundant court judicature and they often consist in breaching some principles such as the principle of (material) equality, principle of proportionality (and within it also of suitability, expedience, necessity), the requirement of impartiality (objectiveness) arising from the principles of equality, and the principle of legitimate expectations. They thus move within the framework of the so-called principle of good governance. Singh, M.P.: *German Administrative Law in Common Law Perspective*, Berlin, Springer, 2001, p. 159-176.

[39] Vopálka, V., ibid.

[40] *„Far from being merely a fact-finding tribunal, the CFI has made its own mark in the case law. In some areas, it has applied a higher standard of scrutiny than hitherto applied by the Court of justice, adopting a more critical stance towards the discretion of the Community institutions and requiring more exacting standards in their decison-making.*"– Tridimas, T.: The General Principles of EU Law, 2nd edition, Oxford University Press, 2006, Oxford, New York, p. 9.

[41] Pítrová, L., Pomahač, R.: Evropské správní soudnictví *(European Administrative Justice)*, p. 36.

[42] Ibid.

[43] See Mazanec, M.: Neurčité právní pojmy, volné správní uvážení, volné hodnocení důkazů a správní soud *(Uncertain legal terms, free administrative discretion, free evaluation of evidence and administrative court)*, Bulletin advokacie *(Advocacy Bulletin)*, 2000, No. 4, p. 12. The situation as regards insufficiency of fulfilment of Section 6, paragraph 1, European Convention, was characterized and criticised also by P. Hrdina in his article "Přezkoumatelnost rozhodnutí správních orgánů vydaných v rámci diskreční pravomoci" *(Possibility to review administrative bodies' decisions within discretion power)*, Právní rozhledy *(Legal Views)*, 1999, No. 4, p. 184 – 190, and he compared it to an absolutely different situation in the German regulation of judicial review.

[44] In this respect, quite appropriate seems to be inclusion of the criterion *"correctness"* for the consideration of public administration's decisions within the regulation of the fifth part, Code of Civil Procedure, solving judicial review of decisions in the cases of the so-called private-law nature.

[45] 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 expectations (although more frequently in the field of legislative acts – for the first time comprehensively in the case Pl. ÚS 4/94, 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 admittedly drew inspiration particularly from the European Court for Human Rights and selected constitutional or supreme courts of European states.

It also applied the paradigm of constitutionally 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). See more in Holländer, P.: Ústavněprávní argumentace, ohlédnutí po deseti letech Ústavního soudu *(Constitu-*

tional-law based argumentation, a glance back after ten years of the Constitutional Court), Linde, 2003, Praha, p. 37-39.

[46] Identically, Vopálka, V., cited article, p. 272.

[47] See Section 2–8 Act no. 500/2004 Coll., Administrative Procedural Act, as amanded.

[48] See, e.g., judgement of the Supreme Administrative Court no.4 As 71/2006-83.

[49] See, e.g., judgement of the Supreme Administrative Court no. 398/2004, of the Collection of Decisions of the Supreme Administrative Court.

[50] See, for example, decisions no. 906/2006 or 950/2006 of the Collection of Decisions of the Supreme Administrative Court.