European basis and relations of the basic principles of the activities of administrative bodies

With the emphasis on the area of discretionary powers

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INTRODUCTION

The research into the influences of the accession of the Czech Republic to the European Union in the area of administrative law presents a very wide spectrum of questions of legal nature as well as necessarily of those of non-legal nature. This is caused by the fact that administrative law presents in its essence basically a legal order[1], or a regulatory framework of the real system of public administration (in the conditions of the continental Europe especially, and in this country also to a rather large extent), which, apart from the legal dimensions, has also other dimensions that cannot be neglected, from which we should mention the political and economic dimension, and which by many of its aspects touch the life of the society as well as its individual parts and individual people. Sometimes in an essential way.

From the above-described wide framework of administrative law, the object for closer observation was

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[1] PRŮCHA, P.: Správní právo, obecná část [Administrative law, general part], Masarykova univerzita, Brno, 2003, p. 15.

chosen to be area of problems connected with **discretionary authority**, applied in the sphere of decision taking of the administrative bodies.

1. TO THE PROBLEMS OF DISCRETIONARY AUTHORITIES OF ADMINISTRATIVE BODIES

From the point of view of the content, the notion of ***discretionary powers*** is based on the word *"discretion"*[2]. Some German sources use the name *"Das (freie) Ermessen"*.

In current Czech literature, the term *administrative discretion* (sometimes also *free consideration of the administrative body*) or the term discretionary powers established, usually without any difference in the meanings.

The notion "discretionary powers" evokes the impression of its meaning as a manifestation of authority of somebody who decides and bears the relevant sector of public power (either state or self–governing), i.e. who governs the relevant decision taking space created by legal norms.

If we try to characterise briefly discretionary powers, we will in the first place speak about the space, founded by the law for administrative bodies[3], for the option for one of more possible solutions of the concrete decision–taking situation.

We would be looking for the legal definition of administrative discretion in the positive law in vain. Administrative discretion as a legislative solution of the transfer, or the foundation of a discretionary authority, is on one hand included in many legal regulations, but on the other hand, the legislator does not provide them with any explicit sign in the text of legal regulation and it is necessary to reach its identification through interpretation, which is not always a simple matter.

The theory finds consent on the general characteristics or maybe on the *definition* of the administrative discretion (discretionary powers), which is represented by the situation (or the fulfilment of the legislatively–technological means), when the origin or existence of certain conditions (facts of the issue) do not relate to the relevant clause of the legal regulation to the necessity of a single possible legal consequence to follow, but on the other hand leave some (smaller or larger) space for the choice of a certain solution, or decision, to the subject executing the public administration. This sometimes means to apply or not apply the competence of the office (the so–called considering the action), in other cases the administrative discretion means the possibility to choose from a wider spectrum of behaviour alternatives (the so–called considering the choice).[4]

Discretionary authority thus represents one of the sides or areas of the execution of the public administration, or more concretely of its addressees. This area is rather complicated. The essential problem lies not only in the name of administrative discretion, which, however, is in fact an obligatory or not absolute consideration[5], but also directly in the nature of the issue and the foundations and requirements of the state respecting the rule of the law.

In the conditions of a state respecting the rule of the law, we cannot speak of the claim to use of the executive power without the natural awareness of the relationship of this component of public power to the legislative power, or to the acts of legislative power and also to the judicial power, or to its function towards the executive power. These relationships can be in a simplified way characterised as the interconnections of the public administration by the laws, or by the law in the first case and by the control of legality or the judiciary in the second case. We have to see the administrative discretion and its application in this way.

The essential issue is how to secure, under the conditions of a state respecting the rule of the law, the accord of elastic borders of the execution of public administration formed by the legislator in the form of administrative discretion on one hand with the area of subjective rights of the individuals – the addressees of the execution of the discretionary authorities, and in this area especially the intensively (constitutionally) protected sphere of the fundamental rights and freedoms, in which the interference on the basis of consideration should happen, on the other.

At the same time, the solution should exist at the general level as well as for any single execution of the discretionary authority.

The above–mentioned facts suggest that the admi-

[2] Tento výraz může evokovat související významy, jakými jsou např. ohleduplnost, šetrnost, rozvážnost, vlastní úsudek. Jak nám později naznačí zásady, které by měly provázet uplatnění discretionary pravomoci, mělo by se správní uvážení vskutku obdobnými vlastnostmi vyznačovat.

[3] The subject that within the framework of the execution of public administration decides on the basis of free consideration confined to him by the law, might be on one hand a body of state administration, self–governing territory or its body, further a subject authorised by the law or accredited on the basis of the law to execute public administration.

[4] Hoetzel states in a lapidary way: The question is, whether the administrative body has to conclude a certain legal conclusion from the legal factual assumption. HOETZEL, J.: Československé správní právo, část všeobecná [Czechoslovak Administrative Law, General Part], , Melantrich Praha, 1937, p. 346.

[5] Z. Bažil draws attention to these terminological and content problems in his monograph "Neurčité právní pojmy a uvážení při aplikaci norem správního práva, se zřetelem na judikaturu bývalého čsl. nejvyššího správního soudu" [Indefinite legal notions and consideration when applying the administrative law norms with regard to the judicature of the former Czechoslovak Supreme Administrative Court], Praha, Univerzita Karlova, 1993, p. 57.

nistrative discretion is a phenomenon and also a problem with three essential levels, of which the first creates the basis for the claim to use this authority (the legislative level), the second presents the domain of the public administration itself in this area (the legal–application level), and the third one includes the system (especially the judicial one) of the monitoring of the previous two levels of discretion.

To put it differently, the problems connected with discretionary authorities of the administrative bodies include ***three large areas for research:***

- the foundation of the discretionary powers of the public administration in legal regulations, including the way of determining the criteria for the regular execution of discretionary authorities (and the issue of their interconnections),
- the activity of the administrative bodies themselves when applying the norms containing the administrative discretion, including the issue of respecting the determined criteria,
- the system of monitoring (especially judicial) of the execution of the discretionary authorities of the public administration, including the respect to binding criteria for the execution of the discretionary authorities.

2. *THE PRINCIPLES OF GOOD ADMINISTRATION AND THE DISCRETIONARY POWERS*

The effort to stand up to all the different kinds of standards that make the fulfilment of the requirement of the state respecting the rule of the law, of the protection of the individual's rights and freedoms, and also the effectiveness of the public administration execution are significant features of the modern systems of public administration. Such efforts are natural not only to the individual states and their legal systems, but they are also asserted (or in the mutual interconnections of these efforts) at the European Union level. The wider "European" environment is then represented by the space of the Council of Europe member states, which implies significant historical and content connections for the issues we study, which we will further mention. In these, either purely "Union"[6], or sometimes, on the other hand, wider European connections, the term ***"European administrative space"*** is used.

Within the European Union, but also on the wider basis of this European space, four cornerstones of values have been formulated and recognised in the last decades – principles that attribute or enlarge and complement the "traditional" requirements and principles of the state respecting the rule of the law and the protection of human rights and freedoms

They are the following requirements – principles:

- reliability and predictability,
- openness and transparency,
- accountability,
- efficiency and effectiveness.[7]

On the basis of this, certain principles that should control the execution of public administration in Europe were or are created. At the most general level, the name ***"principles of good administration"*** has been coined for them.

In some legal systems, the principles of good administration serve as the criteria of legal proceedings of the administrative bodies in the wider sense of the word. E.g. according to the Belgian sources, they serve the courts of justice for the monitoring whether the public administration has taken action in accord with the law. They are also used directly by the administrative bodies as the measures of correctness within the framework of the decision taking processes.[8]

Our interest is directed at the principles that control the administrative discretion, that is, they are legally binding. In the outlined context, we could speak of the *principles of good administration in a narrower* sense, or rather of the ***legal principles of Good Administration (Governance).***

In the prism of the influence of the Czech administrative law by the integration process, the question *whether the (legal) principles of Good Administration are legally binding* is of key importance for the theme of discretionary powers. When dealing with this question, it is also necessary to take into account that the general legal principles of European law that are applied by the European Court of Justice also belong among the sources of European law.[9]

The importance of the judiciary for the profile and assertion of some general legal principles in the area

[6] Compare e.g. POMAHAČ, R.: Správní právo, obecná část [Administrative law, general part], 5th edition, C.H.Beck, Praha 2004, pp. 731–733. This author defines the notion elsewhere as a set of principles, rules, and measures that are applied in a unified way in the administrative activity of EU member states, or the same author: Zásady správního řízení a evropské právo (K návrhu nového českého zákona o řízení před správními úřady) [Principles of administrative procedure and European law (To the draft of the new Czech act on the procedure before the administrative bodies], Evropské a mezinárodní právo, 2001, No. 3, p. 41.

[7] Compare e.g. Pomahač, R., op. cit., p. 733, or POMAHAČ, R., VIDLÁKOVÁ, O.: Veřejná správa [Public Administration], C.H. Beck, Praha, 2002, p. 47.

[8] MAST, A.., DUJARDIN, J., VAN DAMME, M., LANOTTE, J.V., Overziclet van het Belgish Administratief Recht, Kluwer Rechtswetenschappen, antwerpen, 1999, pp. 45–46.

[9] They exist on the primary law level. They do not have any form and they are based on the legal orders of the EU member states. They are based on the basic values common to all the member states, while their main part concerns fundamental rights in the

of administrative law, or in the area of the principles of Good Administration, is crucial. It is a process that has been developing in the European context for a long period of time already, and its outputs and direction are highly significant for the conditions of the public administration in the Czech Republic, especially with regard to the incorporation into the European administrative space governed by the above–mentioned principles.[10] While in the "old" member states, the development was more or less natural, gradual, and continuous, while in the Czech Republic, we may observe a rather chaotic as well as delayed process in this area.

It is necessary to realise that the European system of justice, based especially on the common constitutional traditions of the member states, interferes also with the legal systems of the member states, whose judicial systems and legal orders it has significantly influenced. It thus has impact on the development of the European Communities as a legal community, in the sense of asserting the principles of the state respecting the rule of the law.[11]

Since the mid–1960s, the European Court of Justice protects the legal standard in the sense of the constitutional traditions common for the member states, as well as of international conventions, especially then the European Convention on Protection of Human Rights and Fundamental Freedoms. A further significant act was the accepting of the Declaration of Fundamental rights and freedoms (European Parliament – 1989).

As a member state of the EU, the Czech Republic also has to come to terms with the fact that the principle of equality before the law holds without exceptions together with the *principle of proportionality when applying the discretionary authorities* and that any restrictive interpretation of basic rights and freedoms is prohibited.[12]

Further development in this area then brought the Charter of Fundamental rights of the European Union (European Council – 2000), which is (up to now) a political document but it is however expected that it will become a part of the primary law.

Article 41 of the Charter, named "The right to good administration", is of special importance for our purposes, and towards the administrative discretion, it bases the principle of objectivity.[13]

In the activities of the European Court of Justice, the effort to formulate rules distinguishing *the good execution of administrative activities* form the bad one is apparent. The main principles of the stated ones have become a direct part of the primary community law; others are rather of a substitution or auxiliary character.

With regard to the influence of the French and German law on the recent European law, the most frequented principles are the principles of equality, the principle of bondage of the administration by acts, or by the law, the principle of limited freedom in administrative decision taking, or discretionary authorities, the principle of responsibility of the administration, the principle of proportionality, and the principle of legitimate expectations.[14]

Looking at the set of principles presented above, it is obvious that not all of them are on the same level of generality, as some may under certain circumstances include others. There are also intersections with regard to the content of the individual principles. For the purposes of the "correct" administrative discretion, this is the case with the principle of equality and the principle of bondage by the law, which belong to the basic features of the state respecting the rule of the law, or legal community, further with the principle of limited discretion, which, however, is a consequence of the previous two for the area of free thoughts on public power, or it limits it in the way outlined.

For the correct execution of the discretionary authorities, we may consider especially the principle of proportionality and the principle of legitimate expectations to be decisive.

Good Governance was not left unattended even by the Treaty on the Constitution for Europe, where the *"right to regular administration"* is based in Article II–101. It contains the right of any person for having their matters dealt with before the bodies of the Union

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form of material law and process guarantees. For more details see TICHÝ, L., ARNOLD, R., SVOBODA, P., ZEMÁNEK, J., KRÁL, R.: Evropské právo [European law], 2nd edition, C.H.Beck, Praha, 2005, pp. 230–231.

[10] In relation to the principles of good administration, as well as to the phenomenon that is new in our conditions, J. Grygar suggests to seek for the real line of development in those cases where the stated principle has a longer history, while he finds the judicature of the EU member states and of the European Court of Justice suitable. For more detail see GRYGAR, J.: Právo na dobrou správu [The right to good administrtion], Justiční praxe, 2002, No. 7, pp. 488–495.

[11] TICHÝ, L., ARNOLD, R., SVOBODA, P., ZEMÁNEK, J., KRÁL, R.: Evropské právo [European law], C.H.Beck, Praha, 1999, p.233. Further the authors stated say: *"The unified use and keeping to the law (emphasis by the author) is a powerful integration tool. ... In its judicature, the European Court of Justice a.o. applies the generalisation of some tendencies and features, it formulates some principles as specific rules of European law" and influences the creation of the norms.* Ibid, p. 234.

[12] PÍTROVÁ, L., POMAHAČ, R.: Evropské správní soudnictví [European Administrative Judicature], C.H.Beck, Praha, 1998, pp. 254–255.

[13] For more details and the content of the Charter of Fundamental Rights of the EU see e.g. Sander, G.G.: Poznámky k Chartě základních práv Evropské unie [Notes on the Charter of Fundamental Rights of the EU], Evropské a mezinárodní právo, No. 7–8/2001, pp. 9–13. For the text of the Czech translation of the Charter see http://.euroskop.cz.

[14] PÍTROVÁ, L., POMAHAČ, R., op. cit., pp. 257–258.

impartially, justly, and *within a reasonable time span,* which includes especially the right to be heard, the right to access the files, the right to the justification of the decision. This right further includes the right to reimbursement of the damage caused by the bodies of the Union and the right to pose questions to the bodies of the Union and the right to an answer in one of the languages of the Constitution. Although further fate of the Treaty is not yet certain, there is no doubt as to the entitlement to good administration.

Even the Czech Constitutional Court in its decision taking practice does, nevertheless, not waive community law, or the general principles applied in it.[15] The Constitutional Court emphasizes the "radiating" function of the community law, which especially in the form of general legal principles shines to a great extent onto the actual decision-taking practise of the Constitutional Court. Further, the Constitutional Court has stated that it has repeatedly applied the general legal principles that are not contained in the legal regulations explicitly, but that are applied in the European legal culture without exceptions (e.g. the principle of proportionality).[16]

The existence, binding, and ways of formulating and assertion of the principles of good administration are sufficiently apparent from the above stated.

The courts have played and quite certainly will play an important role in the formulation and application of the stated general principles. Their role is especially important in those cases when the concrete legal regulation of the proceedings of the administrative bodies is not at disposal, which are typically those cases where the discretionary authority of administrative bodies is applied. Courts, especially the courts in the administrative judiciary, must provide protection to subjective rights and their decisions also have to be based on certain viewpoints, which should be applied on the basis of equality, and therefore should be generally valid.

After the renewal of the monitoring of the public administration by the judiciary (1992) and especially after accepting the new regulation of the administrative judiciary in the Czech Republic in 2002 (effective from January 1st2003) we are witnessing the assertion of (some) immediately above emphasized legal principles of good administration that concern the discretionary authorities of the public administration. This is a rather interesting process with elements of continuity as well as turns and twists – changes of the up-to-then judiciary.[17]

We have met the notion of *principles of Good Governance (administration)* in our legal regulation in two cases so far.

First, the use of the good administration principles as the criterion for judging the activities of public administration is entrusted to the public defender of rights ("ombudsman"), within the framework of his work in the "protection of people against the actions of the authorities and other institutions". Further criteria for the compliance of ombudsman's activities are the compliance with the law and the principles of a democratic state respecting the rule of the law. The stated activity of the ombudsman should, as a whole, contribute to the protection of fundamental rights and freedoms.[18]

Further, second in a row became the new administrative order, i.e. the new legal regulation of the proceedings of the administrative bodies anchored in Act No. 500/2004 Coll., which became effective on January 1st2006. The acceptance of this legal regulation in 2006 established further reasons for proper examination of the problems of good administration and their bondages and relations.

This is caused by the fact that the new administrative order, Act No. 500/2004 Coll. introduced explicitly into legal order of the Czech Republic its index of the "basic principles of the activity" (§ 2–8) and made them the universally valid principles for all the execution of public administration (compare the diction of § 177 par. 1 of the cited act.[19]).

The administrative order also fully, in the establishment of review authority of the appellate body (§ 89 par. 2), puts next to the traditional requirement of legality or lawfulness (with the spectrum of sources growing larger through history) of the decision also the requirement of ***"correctness"*** of the decision, and also requirements with regard to the quality of the previous proceedings (the notion ***"faults of the proceedings"***, some of which can and others of which cannot render the decision unlawful or incorrect).

The ***criterion of "correctness" of the decision*** is the one that needs to be dealt with. It will also be necessary to further sufficiently explain its connection with the notion of "abuse of administrative discretion"[20] (i.e. incorrect use of the authority of the admi-

[15] Pl. ÚS 5/01, No. 149, Coll. n. ÚS, vol. 24, C.H.Beck, Praha, 2002, p. 79.

[16] Thus presented in the finding of the Constitutional Court, Pl. ÚS 33/97, Coll.n. ÚS, vol. 9. p 407.

[17] Compare e.g. the development of the opinions on the existence or acceptability of the so-called absolute administrative discretion, when the development necessarily reached the statement of unacceptability of such a way of deciding of the administrative bodies (the resolution of the enlarged senate of the Supreme Administrative Court, No. 6 A 25/2002–42 of March 23rd2005).

[18] Compare § 1 par. 1 of Act No. 349/1999 Coll., on the public defender of rights.

[19] *"Basic principles of the activity of administrative bodies stated in § 2–8 are to be used for the execution of public administration also in the cases when a special law determines that the Rules of Administrative Procedures should not be applied but it does not contain a regulation corresponding with these principles".*

[20] *"The court abolishes the contested decision even in the case when it finds out that the administrative body* **has crossed the limits**

nistrative body), which is one of the most important ones for our research of the discretionary authorities.

The *"correctness"* of the decision certainly bears in itself (apart from the requirement on the sufficient fact–finding and its correct evaluation) also the criteria of justice of the decision, i.e. suitability, adequateness, justified expectations ("predictability"), consideration of the rights obtained in good will, and further respect to the public interest (as it is brought in the concentrated and binding form in § 2 par. 2–4 of the Rules of Administrative Procedure, while most of the "items" mentioned present directly the constitutional principles of a state respecting the rule of the law).

Correctness of the decision is apparently a part of *good* administration. "Good administration" should always be also the "correctly deciding administration", or the just public administration (?).

3. *NEW RULES OF ADMINISTRATIVE PROCEDURE AND ITS BASIC PRINCIPLES OF ACTIVITY*

The basic principles of the activity of the administrative bodies are stated in § 2 – § 8 of the Act No. 500/2004 Coll. The act, however, contains in it manifestations of the principles that are not stated in the given clauses separately, but from the point of view of the requirements on the quality of the activity of administrative bodies, they are important. I will focus on those principles that are related to the area of discretionary authorities.

The new law namely brings and sets more demanding qualitative requirements on the procedure aspect of the decision taking processes of the public administration, but it also explicitly sets much more demanding requirements, in contrast to the literal adjustment of the "old" Rules of Administrative Procedure, for the content of the accepted decisions in the most general sense of the word, i.e. whether they have the form of classical administrative decisions of the meritorious or process standpoint, the form of the so–called certificate, the form of the so–called public law contracts (agreements), the form of a measure of general nature, as they are explicitly regulated in the individual parts of the new Rules of Administrative Procedure, or any other form.[21]

If there is, to use the words of a classic, any "emission of the authority of an administrative body", and if there is a space defined by the law for the so–called free consideration of the administrative body, it will be necessary to respect the requirements indicated.

However, it is not pertinent to use the future tense. The requirements mentioned have already been stated and the new Rules of Administrative Procedure are "only" introducing them into the society of common legal regulations, i.e. to the level of legal directives with which our public administration is used to work.

As the title of the relevant section in Part One of the Act states, these are really the *principles of the activities of the administrative bodies.* The wording and content, which with most principles exceeds the traditional framework of purely process principles, of the principles really hints at the wider application of the mentioned principles.

Apart from the direct *legal bondage,* the basic principles also have another traditional role, namely to serve as an *interpretation rule* for the explanation and application of the individual clauses of the law, or the clauses regulating the procedures of the administrative bodies in the individual special laws that are in the relation of specialty with respect to the regulations contained in the Rules of Administrative Procedure.

The basic principles have inevitably become a logical guideline for the legislators who project their requirements in many cases into the concrete clauses of the Rules of Administrative Procedure solving various process situations and regulating the individual (not just the classical process ones, because they are also related to other kinds of administrative bodies procedure) notions and institutes. The interconnection of especially some clauses of the law in connection with the essential principles of activity is evidently even more apparent than it was in the previous regulation.

The new Rules of Administrative Procedure was to a certain extent influenced by the previous regulation from 1967 in the sense that it preserves, albeit with some necessary changes, a certain range of traditional principles of classical process nature. However, it became a breakthrough regulation by bringing the reflection of the principles of good administration in its first part, or to put it more precisely, states at the legal level some concrete requirements concerning the *quality of the accepted decisions* and on the *way of executing public administration* in the relationship officer – the addressee of the officer's activity.

In the observed first part of the Rules of Administrative Procedure, the principles of activity are stated in the following order:

- **the principle of legality (lawfulness)**

is the basis for any execution of public power nature and also for the execution of public administration towards relevant people.

set for administrative discretion by the law or has abused them" (author's emphasis) – § 78 par. 1 of Act No. 150/2002 Coll., Rules of Administrative Procedures, as amended.

[21] The reader is referred here to § 177 par. 1 of the new Rules of Administrative Procedure.

The Rules of Administrative Procedure imposes the administrative bodies to proceed in accord with the *acts* and *other legal regulations,* as well as with *international conventions* that form a part of the legal order. For these binding sources, the legislative abbreviation "legal directives" is used in the text of the act.

The principle of lawfulness may be considered to be the most important one, as for the public administration executed in the conditions of a state respecting the rule of the law, it determines the conditions, limits, and way of execution of its authorities especially towards the administered persons. It is, however, also a basis for the application of further principles, as its content, way of application, and bondage is determined by the law.

The principle of legality is a concrete manifestation for the condition of public administration and at the same time a constitutional guarantee of legality in the sphere of public administration, anchored in the Constitution of the Czech Republic and in the Charter of fundamental rights and freedoms.[22]

The principle of legality presents one of the guarantees of legality in the area of public administration. None of the procedures by which the subjects perform public administration and interfere with legal relationships of the addresses or influence them should remain outside the sphere of its application. It is also for this reason that the principle of legality, and with it also other basic principles of the activity of administrative bodies, is set as a universal principle, controlling the execution of the public administration.

The principle of legality (lawfulness) thus explicitly receives the necessary scope from the point of view of constitutional regulations and also from the point of view of bindings resulting from relevant international conventions. By such explicit formulation, the legal state based by the "Europeisation" amendment of the Constitution has thus been reached.[23]

- **the principle of adequateness (proportionality) and its components**

belongs to the principles influencing in a fundamental way the content of the accepted decisions and the execution of the discretionary authorities. It consists of several partial principles that can also stand independently, which is why they should be dealt with in greater detail:

1. THE PROHIBITION TO ABUSE ADMINISTRATIVE DISCRETION[24]

The administrative body only applies its authority for those purposes to which it has been confined in him by the law or on the basis of the law, and in the *scope* in which it was confined to it.

The principle helps to *materialise correctly* the principle of legality, while it emphasizes its content side (purpose of the authority determined by the law) and at the same time follows up on the requirement to act always (or take a decision that will be) in accord with the public interest.

2. THE PRINCIPLE OF ACCORD WITH PUBLIC INTEREST

can also stand independently.

The notion "public interest", as an indefinite notion, may be fulfilled or determined exactly with the help of the purposes that the legislator has determined in relevant laws for the execution of authorities of the administrative bodies in the individual sections of the administration.[25]

The principle of the prohibition of the abuse of authority is followed by and the principle of proportionality is organically complemented with:

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[22] Art. 2 par. 2 of the Charter: *"State power may be applied only in the cases and within boundaries stated in the law and in the way stated in the law"* and further Art. 4 par. 1: *"Obligations may be set only on the basis of the law and within its limits and only while preserving basic rights and freedoms."*

[23] Compare Art. 10 of the Constitution of the Czech republic: *"Announced international conventions to whose ratification the Parliament has given its consent and by which the Czech Republic is bound form a part of the legal order: if the international convention stated something else than the law, the international convention is to be used."*

[25] In the decision taking in the public administration, we always find an element of law and an element of purpose. Purpose is in the most general level represented by public interest.

According to V. Vopálka, the category of purpose prevents the abuse of authority (in Hendrych, D. et al.: Správní právo, obecná část [Administrative law, general part], 5th edition, C.H.Beck, Praha 2004, p. 85).

"The purpose of the law" serves as an important interpretation rule that helps the correct fulfilment of the space founded for administrative discretion.

The "public interest" explicitly or implicitly included in the legal regulations is then the main criterion determining the content–wise direction of the public administration. From the legal order, we may extract a whole structure of public interests that are not always in accord, and when deciding, it is necessary to balance them or to put them into accord (*the principle of the cooperation of administrative bodies* – § 8 par. 2 of Act No. 500/2004 Coll.), and at the same time monitor the accord with the legitimate private interests (for these, see § 2 par. 3 of Act No. 500/2004 Coll., or the *principle of subsidiary,* i.e. minimisation of interference) or to prevent the influence of the illegitimate private interests.

For the details on the issues of purpose and the public interest see e.g. SKULOVÁ, S.: Správní uvážení, základní charakteristika a souvislosti pojmu [Administrative Disretion], Masaryk University, Brno, 2003, pp. 91–100.

3. THE PRINCIPLE OF PROTECTING THE GOOD FAITH AND JUSTIFIED INTERESTS

The state body takes care of the *rights obtained in good faith* as well as the *justified interests* of the people who are affected by the activity of the administrative body in the individual case (further only "affected people") and may ***interfere*** with these rights ***only under the conditions determined by the law and in the necessary range.***

The requirement emphasised at the end of the previous sentence is sometimes called

4. THE PRINCIPLE OF SUBSIDIARY;

and this goes together with the requirement that the

- **accepted solution corresponded with the circumstances of the given case.**

5. THE PRINCIPLE OF THE PREFERENCE FOR REMOVING CONFLICTS BY RECONCILIATION

when discussing and deciding on the issue matter-of-factly follows from the stated requirements.

The principles mentioned also complement the *content of the adequacy principle* in the sense that the means of public power were applied only to the extent necessary, justified by the purpose of the execution of this authority, and only in the cases where the reconciliation is not reached within the procedure of the administrative bodies and their decisions. The accepted solution then should be, with regard to the above-stated viewpoints, adequate to the solved case or situation.

- **The principle of predictability (legitimate expectations)**

is the second major principle for the execution of the discretionary authorities.

In the Rules of Administrative Procedure, it is introduced by the requirement to pay attention that *while deciding on the matter-of-factly identical or similar cases, no unjustified differences originated.*

It is the projection of the equality principle and also the legal certainty on the conditions of public administration.

It presents the guarantee of the constitutional principle of equality in the rights and dignity, the equality before the law (and also the prohibition of discrimination).[26]

The principle of legitimate expectations does not mean an absolutely constant decision taking. As follows from the concurrently established principle of adequacy, there is always also the requirement to look for a suitable, adequate solution, and this on the level of looking for even more adequate solutions (more perfect balancing of the interests) or a justified change of the practice.

In relation to the issued administrative acts, the requirement of **justification** of the processes and decisions, which concern the rights and obligations of the individuals, is thus introduced, especially if the use of administrative discretion is concerned, for the situations of changes in the stabilised practice or towards the legitimate expectation.[27]

From the other principles included in the first part of the new Rules of Administrative Procedure that have in concrete cases a narrow or loose relationship to the area of administrative discretion, I will further mention also the *principle of material truth, the principle of procedural equality and impartiality of the procedures of administrative bodies, the principle of public administration as service, the principle of rapid and economic procedures* (procedural effectiveness).

CONCLUSION

The principles of the activity of the administrative bodies, as they are incorporated into the new Rules of Administrative Procedures, present a real change in the system in the explicitly and obligatory formulated requirements on the decision-taking activity of the public administration with all the features that the systemic change has. The stated principles affect the area of discretionary authorities of the administrative bodies quite severely. The demands have increased significantly.

The influence of this significant change of the legal regulation will unavoidably and constantly spread in all the necessary directions that have been hinted in the introduction, and it will affect the public administration, the judicial review activities towards public administration, and undoubtedly also the certain feedback to the legislators.

With regard to the current situation in the monitored areas, it is evidently not to be expected that the influence will be swift and intensive, but rather continuous and gradually spreading circles on the surface. Their running and the (hopefully) positive erosive effects towards the sometimes maybe even too steep or rigid banks of bureaucracy and its foundations will deserve to be studied in detail.

[26] Compare especially Art. 1, Art. 3, Art. 5 of the Charter of Fundamental Rights and freedoms.

[27] As contained in the Recommendation of the ministers of the Council of Europe, as cited in Note No. 24.

For the purposes of the research plan, the concrete suitable task in this field will consist in the attempt at categorisation – the classification of the principles of good administration into an adequate scheme and the specification and structural description of the components of the individual principles of activity of the administrative bodies. That is the creation of a certain scheme of "principles", whose application to a concrete case may enable us to assess in a more concrete way the possible faults of the authority and the classification of these faults, which might present a contribution to the application of the principles of good administration in the practice of administrative and review activity of the courts.

The load–bearing lines of the stated schemes could be e.g. the criteria for the assessment of the regular procedure of the administrative body, further the criteria of just and correct decision, and further the criteria of adequate behaviour and approach of the authorities and the officers towards the addressees of the administration. Across through these viewpoints or aspects of activity and the approach of the authorities and officers, the line of the intensity of legal binding character (the legal strength of the principles, or the rules, where there is no real principle involved) or "just" the ethical dimension would meander.

The starting point must be exactly the necessary European context of the stated principles, with its legislative, legal–application, and judicial aspects. These, however, are principles, and thus this would also contain the aspect of values, which is actually referred to by the essential documents and judicial decisions.

If the stated scheme is compiled, then it will be possible, where the concrete basis for this exists, to connect it with the relevant clauses of the Rules of Administrative Procedure and other legal regulations, especially those that regulate the review regimes and responsibility regimes. At this point, some interesting connections can appear, and maybe also discord. The use of the stated scheme for some significant or specific areas of administrative discretion, as e.g. the area of administrative punishment, may also be interesting.

It may be assumed, and the signal cases are already at disposal, that there will be cases of unsuitably founded discretionary authority.

The examination of the structure and way and the extent of the overlapping of the requirements of a democratic state respecting the rule of the law and also the protection against silence of administrative authority will be a rather extensive, but not unjustified, task.

The outlined questions and consequences, however, have the starting point at the formulation level, and especially the nature and legal obligation of the individual principles of good administration. It will be necessary to deal with this requirement in a concrete and dignified way.

As a partial motivation to this activity, I shall conclude with a quotation:

"The state should behave not only legally, but also justly, as law is only a means to reach justice. ... The principle of justice is not a mere criterion for moral acceptability or unacceptability of a legal norm, judgement, finding, or a decision taken by a administrative body, but becomes a criterion for its legal acceptability and as a part of the state respecting the rule of the law it poses limits that cannot be crossed by the positive law."[28]

[28] KLOKOČKA, V.: Ústavní zřízení České republiky [Constitutional establishment of the Czech Republic], Vyšehrad, Praha, 1997, p. 11.