DEFERENCE TO THE ADMINISTRATION IN JUDICIAL REVIEW IN THE CZECH REPUBLIC

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Abstract: *Administrative courts at the onset of the new century face the challenge of ever-changing legislation. Frequent amendments do solve some gaps but create even more gaps which have to be filled by the courts. In the Czech Republic relative ease of judicial review by the courts of first instance and the wide open access to the Supreme Administrative Court mean that many administrative cases are resolved in four instances – two instances of administrative proceedings and additional two instances of judicial proceedings. All these things considered, it is not surprising that neither legal scholarship nor case law defines any general concept of judicial deference (or self-restraint) to the administration. Various areas of public law contain some expressions of judicial deference (most notably the limitation of judicial review of administrative discretion and subsidiarity of judicial review). Nevertheless, both case law and scholarship are far from subsuming these concepts under the common label of "judicial deference to the administration". This paper provides an in-depth analysis of the notion of judicial deference in the Czech Republic as well as some prospects in this field.*

Keywords: *judicial review, administrative courts, judicial deference to the administration, corporate liability in public law, administrative sanctions*

1. JUDICIAL REVIEW AND DEFERENCE TO THE ADMINISTRATION: INSTITUTIONAL SETTINGS

The experience of the Czech administrative judiciary is framed by the unfortunate legacy of communism. Between 1952 and 1991 administrative review proper did not exist as it was considered useless in a communist regime which did not want to allow its citizens to sue their state.[2] Complex issues of administrative, constitutional or commercial law left the court rooms to be decided by different bodies or, simply, did not exist in the communist state.[3] We will show that the experience of the communist regime and the lack of proper judicial review before 2003 contributed to the activist notion of the contemporary Czech administrative judiciary.

The second legacy relates to the historical origins of the administrative judiciary in the Austro-Hungarian Empire in the 1870s. The Administrative Court in Vienna (*Verwaltungsgerichtshof*) was created in 1876 and exercised the review of legality of administrative decisions. This was the only administrative court deciding in the single instance.[4] In 1918,

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[1] This paper was written within the project of the Czech Science Foundation reg. No. 16-22016S entitled "Legal Transactions and Legal Responsibility of Juristic Persons".
[2] Cf. in English MARKOVITS, I. Socialist vs. Bourgeois Rights – An East-West German Comparison. University of Chicago Law Review. 1977, Vol. 45, No. 3, p. 619–620.
[3] Cf. MARKOVITS, I. Justice in Lüritz. American Journal of Comparative Law. 2002, Vol. 50, No. 4, p. 852.
[4] See the Act No. 36/1876 RGBl. [Imperial Collection of Laws of the Austrian Empire] on the establishment of Administrative Court.

when Austria-Hungary was dissolved, the Czechoslovak Supreme Administrative Court continued its tradition, survived the Nazi occupation and continued to operate until it was abolished by the communist regime in 1952. However, the conceptions of administrative law review used between 1876 and 1952 were reborn in the 1990s and influenced the new Czech administrative courts in the 2000s.

The influence of these two legacies should not be underestimated. Much of what relates to judicial deference has been inspired by conceptions dating back to the scholarship and case law of the old Austrian Administrative Court and the Czechoslovak Supreme Administrative Court. In contrast, much of what relates to judicial activism of the contemporary administrative courts could be explained as negation of the communist past. Discontinuity in the legal development, both the absence of judicial review during the socialist regime and the lack of traditional relations between the executive and judicial branch play a significant role in the difficult search for judicial self-restraint.

The administrative judiciary of the Czech Republic in its current form was created in 2003. Until then, provisional and simplified post-communist review functioned between 1991 and 2002, basically decentralised among eight regional courts and two higher courts, however without the supreme court or any appellate court which would unify the case law.

Today the Czech Republic has a two-tier system of administrative courts. One of eight regional courts decides the case in the first instance. Cassation complaint against the first-instance decision is decided by the Supreme Administrative Court (SAC). Although, in theory, cassation complaint is an extraordinary remedy, technically the access to SAC is wide open and SAC has no filtering mechanism to select cases (with the sole exception of asylum cases). Therefore, in reality, cassation complaints could be used against any final decision of the first instance court. Interestingly, SAC is not limited to legal issues and could equally decide issues of fact as well. Hence, the admissibility of "extraordinary" cassation complaints is wide open and resembles appeal in all but name.

Administrative courts never decide on the compensation of damages caused by the administration. This is a result of the strong adherence to the public / private law divide, mentioned above. According to this rigid theory, which has been rejected in many other European jurisdictions,[5] administrative courts, being courts of public law, should never decide on financial compensation or anything of a private law nature. In this line of reasoning, deciding on money, compensation and damages is not a task for the administrative courts.

The leading and most important task of the administrative judiciary is to review the lawfulness of decisions of the public administration. In addition, the administrative judiciary decides lawsuits seeking protection against the failure of an administration to make a decision as well as protection against an unlawful interference by an administration. While the former is protection against the public administration unduly not making a decision (inactivity lawsuits), the latter is protection against any other illegal encroachment on rights (different from decision), such as illegal police intervention, illegal inspection

[5] Cf. France and jurisdiction of administrative courts there (see BROWN, L. N., BELL, J., GALABERT, J.-M. French Administrative Law. Clarendon Press, 1998).

or seizure, etc. (lawsuits against unlawful interference). Last but not least, protection against so-called "measures of a general nature" (inspired by the German concept of *Allgemeinverfügung*)[6] should also be mentioned. Administrative courts also perform some additional tasks which it is, however, not necessary to analyse for the purpose of this paper (e.g. election issues).

The general concept of judicial deference to the administration is unknown in Czech law. However, there are many specific features close to what is known in the common law system as judicial deference to administrative action or administrative interpretation of law.[7]

Above all, the key principle of **subsidiarity of judicial review** applies in all three main types of lawsuits, i.e. against administrative decisions, against inactivity or against unlawful interference. In sum, this means that the court should intervene only if the administration was not able or willing to remedy the alleged injustice. If a plaintiff does not exhaust the available remedies within the administrative proceedings, the lawsuit would be dismissed as inadmissible. This is additionally strengthened by the fact that administrative proceedings have two instances.

Case law emphasises the constitutional nature of the subsidiarity of judicial review: *"Based on the* [constitutional] *principle of the separation of power and subsidiarity in the protection of individuals' rights, it is clear that the protection of the rights of individuals in the case under judicial review is primarily in the hands of legislative and executive powers. Only if they do not protect individual rights it is the task of courts to step in."*[8] Subsidiarity of judicial review is an expression of the separation of powers, checks and balances in a country governed by the rule of law, where no power could dominate over any other. Therefore, there must be both limits on undue expansion of either power and guarantee of effective protection of rights when needed.[9]

The key concepts relating to judicial deference are the notions of administrative discretion and deference to the administrative interpretation of open-ended (ambiguous) administrative terms. We will show that the notion of deference persists in the former, while it seems to disappear in the latter.

Before going into the details of practical implementation of these doctrines, however, let us highlight some specific features of the Czech administrative judiciary which have an important impact on the judicial deference to the administration.

One important issue which could affect judicial deference to the administration is non/specialisation of administrative law judges. We could expect, at least on a general and theoretical level, that judges with narrower specialisation would have greater deference to an administrative decision. On the contrary, the less judges are specialised, the more often they would be willing to encroach on administrative discretion.[10]

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[6] Measures of a general nature are defined by their specific subject and indeterminate group of their addressees. The most typical examples cover urban zone plans and other measures of land-use planning.

[7] *Chevron U.S.A. Incorporated v. Natural Resources Defense Council Incorporated*, 467 U.S. 837 (1984); *United States v. Mead Corporation*, 533 U.S. 218 (2001). See in the comparative perspective N. Garoupa & J. Mathews, Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review, 62 *Am. J. Comp. L.* 1 (2014).

[8] Judgment of the Grand Chamber of the SAC of 27 August 2015 No. 1 Afs 171/2015-41, para 22, *Photon SPV 3*.

[9] See judgment of the Grand Chamber of the SAC of 21 November 2017 No. 7 As 155/2015-160, *Eurovia*, para 40.

[10] See Garoupa & Mathews, supra, note 6, at 12.

Like most of their European counterparts, Czech administrative judges are specialised judges in the field of administrative (public) law. Technically, the Czech administrative judiciary is a mixture of general courts, inside which specialised administrative judges sit, on the one hand, and the separate SAC at the top of the system, on the other hand. However, the key question is whether the administrative judges are further specialised within the more specific fields of administrative law. It is fair to say that the Czech judiciary is considerably less specialised than most other European administrative court systems.[11]

The law does neither require nor does it prohibit court specialisation. The actual framework rests with the decision of the court's president. At the first instance level, a judge's specialisation varies court by court. Because of the seat of some important authorities, the cases of a specific nature could be reviewed by only one of eight regional courts. This is the case of competition and public procurement law, industrial property law, etc. These complex issues are decided by a few specialised judges within one court. Moreover, most courts of the first instance do apply some sort of specialisation in many of the areas they deal with (environmental law, construction and building law, administrative penal law etc.).

The situation with respect to specialisation is different at the level of the SAC. The law does not require internal division of the SAC. Based on the decision of the SAC sitting *en banc*, the SAC had two sections or "collegiums" (collegiums of financial law and social security law) between 2003 and 2013. In fact, it was a rather limited specialisation because most areas of law were dealt with by all judges. The specialisation prior to 2014 meant that tax law cases and financial law issues were decided by six chambers of the financial law collegium whereas social security law belonged to three remaining chambers of the second collegium. The cases in any other field were decided by all chambers indiscriminately. In 2014, however, this internal division of the SAC was abandoned altogether by a qualified majority vote of the SAC's plenary session. At the present time, all the judges of the SAC deal with all cassation complaints.[12]

The lack of any specialisation at the SAC is rather rare within the European continental judiciary. It could be explained by several factors. The SAC is formed of a diverse judicial body; only less than half of its judges are classical European career judges, who would be more in favour of specialisation. The majority of the SAC is made up by "outsiders", coming from other legal professions, from academia, private practice, etc., many of whom are not particularly specialised within one special field of administrative law. Last but not least, the personality and influence of the SAC's first President, Josef Baxa (2003–2018), contributed to the non-specialised court.

Likewise, the number of cases decided by administrative courts and the fact of the number of cases that an average judge must decide could also be important. The number of

[11] Cf. for instance the Polish administrative judiciary. The Supreme Administrative Court of Poland is divided into three chambers, the Financial Chamber, the Commercial Chamber and the General Administrative Chamber, within which judges are further specialised. See www.nsa.gov.pl/en.php.

[12] The only exception to the rule of the non-specialised SAC is its specialised chamber, which deals with elections and the lawfulness of political parties and another chamber which deals with competence issues within the public administration.

cases decided by the Czech administrative judiciary is admittedly not large. Conversely, the number of administrative judges is also small, compared to the overall Czech judiciary (approx. 120 administrative judges out of the total number of 3000 judges). The workload at the administrative courts of the first instance in 2014, 2015 and 2016 was 8609, 8705 and 9664 cases respectively. The number of judges at those courts is approx. 90, which means approx. 100 cases per judge annually. At the SAC the number of cassation complaints was increasing (2647 in 2014, 2886 in 2015 and 3246 in 2016).[13] The number of judges at the SAC is 32 which makes this court one of the smallest supreme administrative courts in continental Europe.[14]

Before we start analysing specific features of judicial deference to the administration, it is necessary to point out that this sort of deference is not applicable to judicial review of administrative decisions in civil matters.

The Czech legal system does distinguish between cases decided by administrative authorities in the area of public law and civil law. Lawsuits in cases relating to public law are decided solely by administrative courts. Civil courts rule on appeals when administrative bodies decide in some private-law matter (e. g. the telecommunication office's decision on unpaid balance on a phone bill, compensation for expropriation, etc.). The criteria are based on the public / private law divide: if the issue is of private law nature, it is decided by a civil court, notwithstanding the fact that the final administrative decision was made by an administrative authority. Vice versa, if the case is of public law nature, the administrative court would decide. The public – private law divide, incomprehensible from the common law perspective, has produced a great many questionable interpretations and sometimes delays deciding the case in merits.[15]

In public law cases, the administrative court reviews decisions of the administration. It has the power to quash the decision if it is unlawful or to declare that the decision is null and void. In these cases, the court returns the case for further proceedings to the administration. Otherwise, it dismisses the lawsuit. The court is not limited to the facts found by the administration, it could repeat taking some of the evidence or it could take new evidence. Likewise, the plaintiff can bring new legal arguments before the court. The only limitation is that the state of facts and law is fixed at the moment the administrative decision is made (*ex ante* judicial review).

On the contrary, in civil law cases the activity of the civil courts, governed by the Code of Civil Procedure,[16] is of an entirely different nature. Strictly speaking, it is not judicial re-

[13] See the data at the SAC website (www.nssoud.cz) and at the Ministry of Justice for the lower courts (www.justice.cz).

[14] Cf. 115 judges at the Polish Supreme Administrative Court (*Naczelny Sąd Administracyjny*), almost 70 judges at the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*) – see www.vwgh.gv.at/english.html or 54 judges at the German Federal Administrative Court (*Bundesverwaltungsgericht*) – see www.bverwg.de/informationen/english/federal_administrative_court.php. Moreover, in Germany two additional supreme courts in administrative matters exist – the Federal Social Court (*Bundessozialgericht*) and the Federal Finance Court (*Bundesfinanzhof*).

[15] It happens that both the civil and administrative court refuses to decide the case for lack of jurisdiction or (less often) both claim jurisdiction. If this is the case, a special competence chamber would decide such a competence dispute. This consists of three Supreme Court judges and three SAC judges.

[16] Part Five of the Code of Civil Procedure.

view of the administrative decision but rather new judicial proceedings notwithstanding the earlier administrative decisions. A plaintiff who has exhausted all remedies within the public administration and is not happy with the outcome has the right to ask the court to hear the case once more. Unlike administrative courts in public law matters, the courts in civil law cases do not quash the decision if they find the plaintiff is right. Instead they decide the case again in place of the administrative authority. They do not annul the administrative decision; courts' judgments simply replace the administrative decisions. However, if the court finds that the verdict of the decision is correct then, the court will dismiss the lawsuit.[17] The administrative authority which decided the case in earlier administrative proceedings is not the defendant in this case (this is another deviation from the judicial review in public law matters). The only function of the administration in judicial proceedings is to hand in the dossier. In addition, it can write its viewpoint on the case.[18] The court is not bound by the fact-finding of the administration and is free to take new evidence. In sum, there is no scope for any deference in this type of proceedings.

2. JUDICIAL DEFERENCE TO THE ADMINISTRATION: LEADING CONCEPTS

2.1 The Court Cannot Go Beyond the Plaintiff's Arguments

The administrative courts operate on the principle that they can review only those deficits on the part of the administration which have been claimed (on time) by the lawsuit. The court cannot go beyond the arguments brought by the plaintiff.[19] This is perhaps one of the most important examples of the statutory limitation of the administrative judiciary. Even if the deficiency is clear and the judge notices it, the court cannot interfere on its own motion without the argument brought by the plaintiff. If the court violates this rule and quashes the decision for the reasons which were not disputed by the lawsuit, this is a reason for annulling such a judgment by the SAC.[20]

The law and the case law formulated only a few exceptions to this rule. The most typical example is if the administrative decision is not comprehensible or its parts are in inner contradiction or some arguments are entirely lacking and that is why the decision is not eligible for the review.[21]

2.2 The Decline of Judicial Deference to the Administrative Interpretation of Law?

Laws are full of ambiguous terms. The SAC explained that *"ambiguous terms cover phenomena or circumstances which cannot be properly defined by the law, because their meaning and scope could change, could be subject to scientific findings in empirical sciences, time and location of the application of the rule, etc. The use of ambiguous terms relates to*

[17] Decision of the Supreme Court of 26 February 2014, No. 21 Cdo 1072/2013, or decision of the Supreme Court of 31 August 2010, No. 33 Cdo 415/2008.
[18] Judgment of the Supreme Court of 25 February 2016, No. 21 Cdo 5046/2014.
[19] Section 75 (2) of the Code of Administrative Justice.
[20] See the recent decision of the Grand Chamber of 21 February 2017 No. 1 As 72/2016-48.
[21] Ibid.

the diversity and variability of social relations and the need to take into account all possible conditions of the rule application with respect to changing circumstances."[22]

Legal scholarship has always distinguished between ambiguous terms and administrative discretion (see below).[23] Unlike administrative discretion, ambiguous terms do not allow the option of whether to act in some way or not, or to pick one of the choices provided by the law.

The real question is whether courts should be content to accept reasonable interpretation of the law by the executive branch notwithstanding the fact that another interpretation is also plausible. One (minority) line of the earlier case law from the early 2000's seemed to suggest that this is exactly the case, i.e. that courts should defer to reasonable interpretation of ambiguous terms of the statute.[24] However, this case law has never gained the majority support of the SAC. Moreover, it has recently been rebuffed by the Grand Chamber of the SAC, with respect to ambiguous terms "likelihood of confusion of the trademarks":

"Interpretation of ambiguous term and its application to the facts of the case should be fully reviewable by court […] If the administrative court would assess "likelihood of confusion of the trademarks" […] in a different way than the administrative authority, the court can make a different legal evaluation of the facts of the case which would then be binding on the administrative authority."[25]

The question of judicial deference with respect to ambiguous terms is not entirely resolved, however. In fact, it is possible to link deference to the concept of uniform administrative practices. In defining the doctrine of the binding force of uniform administrative practices, the SAC was inspired by the German concept of "self-limitation of the administration" (*"Selbstbindung der Verwaltung*").[26] The SAC allows the creation of uniform practice if the law includes gaps or indeterminate phrases,[27] which obviously also includes ambiguous terms. If uniform administrative practice has once been *"established, the administration cannot deviate from it in an individual case. Such a deviation would have been arbitrary, which is unacceptable in the rule of law state."* The deviation would be possible in an individual case only if such a case was unique and unusual. "The administration could deviate from its practice in general only in the future, based on rational arguments and for all cases which relate to formerly established practice."[28]

[22] Judgment of the SAC of 28 April 2004, No. 7 A 131/2001-47; similarly, decision of the Grand Chamber of the SAC of 22 April 2014, no. 8 As 37/2011-154 (case *FERRERO*), para 15.

[23] Cf. BAŽIL, Z. *Neurčité právní pojmy a uvážení při aplikaci norem správního práva* [Ambiguous legal terms and administrative discretion]. Prague: Charles University, 1993.

[24] See judgment of the SAC of 22 March 2007 No. 7 As 78/2005-62, or judgment of the SAC of 30 April 2008 No. 1 As 16/2008-48.

[25] See the decision of the Grand Chamber of the SAC of 22 April 2014, no. 8 As 37/2011-154 (case *FERRERO*), para 24.

[26] See BVerwG (the German Supreme Administrative Court), the decision of 17 January 1996 - 11 C 5.95 - NJW 1996, 1766.

[27] See judgment of the SAC of 23 August 2007 No. 7 Afs 45/2007-251.

[28] Judgment of the SAC of 28 April 2005 No. 2 Ans 1/2005-57. Cf. decision of the Grand Chamber of the SAC of 21 July 2009 No. 6 Ads 88/2006-132, *L'ORÉAL*, paras 80-82.

It is obvious that self-limitation of the administration is applied by the SAC in order to promote principled decision-making of public administration. However, by the same line of reasoning, it could be plausibly argued that if the administration has once created a uniform practice, it is not for the court to reject this practice only because there is another, competing reading of the law.

2.3 Administrative Discretion: the Bastion of Judicial Deference?

When analysing judicial deference to the administration, most Czech lawyers would think of the notion of administrative discretion. The concept of administrative discretion refers to the flexible exercise of decision-making allocated by the law to public administration.[29] The discretion relates to 1) whether to act in a certain way or not, or 2) which of the options allowed by the law the administrative should choose.

The Grand Chamber of the SAC defined administrative discretion in the following way:

"The concept of administrative discretion […] in general exists if the law gives the administrative authority a certain free space within certain limits. The operative facts of the rule are not linked to a single legal outcome and the lawmaker gives the administrative authority the option to choose from more outcomes given by the legal rule. This free space is typically delineated by phrases such as "the administrative authority could", "can be" etc."[30]

The notion of administrative discretion dates back to the late 19th century and the birth of modern judicial review. Originally, administrative discretion was excluded from any judicial review whatsoever.[31] This limitation was abolished in 1918.[32] However, the review of discretion has always been limited and did not touch the core of administrative discretion. The newly established Czechoslovak Supreme Administrative Court followed the tradition of the Austrian judiciary and limited judicial review of administrative (free) discretion to only the issue of whether the administration "did not overstep its limits" of discretion stated by the goal of the law and nature of the case, especially whether it did not follow other than lawful criteria to exercise discretion. The power of the administrative court to review discretion did not include the power to replace administrative discretion by its own judicial discretion.[33]

Interestingly, the case law remained consistent although between 1918 and 1952 the law did not address the review of discretion at all, whereas between 1992 and 2002, at the time of renewal of judicial review after the fall of the socialist regime, administrative discretion was limited only to the issue of whether a decision did not deviate from the limits or stand-

[29] Therefore, this concept is understood more or less similarly throughout different legal cultures. Cf. RABIN, J. Administrative Discretion. In: *Encyclopedia of public administration and public policy*. New York: Dekker 2003, p. 35.

[30] Decision of the Grand Chamber of the SAC of 22 April 2014, no. 8 As 37/2011-154 (case *FERRERO*), para 14.

[31] Art. 3 (e) of Act No. 36/1876 RGBl., on the establishment of the Administrative Court.

[32] Act No. 3/1918 Sb., on the Supreme Administrative Court.

[33] Judgment of the Czechoslovak Supreme Administrative Court of 21 January 1919 No. 191/18, Boh. A. (The Bohuslav Collection of the decisions of the Czechoslovak Supreme Administrative Court, administrative section) No. 13, in the same line of argument see judgment of the Czechoslovak Supreme Administrative Court of 1 September 1919, No. 3755/19, Boh. A No. 164.

points given by the law.[34] The case law of that time highlighted that *"administrative discretion should not be confused with total arbitrariness. This would have been in conflict with the nature of the administration as an activity within the law and guided by the law.*"[35]

Today the importance of administrative discretion is highlighted by the Code of Administrative Justice.[36] In its Section 78 (1), it states that the court shall annul administrative decision for its unlawfulness *"if the administrative authority overstepped the legal limits of discretion or the authority abused the discretion*". This implies that the court shall not question the exercise of discretion if the authority stayed within the limits stated by the law. These limits are usually explicit, stated expressly by the law. However, even if the limits are not stated by the law, there are still limits which bind the authority, following from the constitution and protection of basic rights (implicit limits).[37]

Therefore, the court reviews whether the limits of discretion have been overstepped, whether the decision is consistent with the rules of logic and whether propositions of that decision have been found in due process. Moreover, additional limits could be (self)imposed on the administration by creating an established administrative practice.[38] However, the court cannot simply disagree with the outcome of the discretion.

The ban on the abuse of discretion is rarely found by the administrative courts. One of few examples of abuse was the case when the administration initially promised to make a decision of a certain type but later changed its mind without sufficient justification, the only justification being that after all the administrative authority is equipped with the power of discretion.[39]

The Grand Chamber of the SAC in its 2005 case stressed that "absolute discretion" in the rule of law state never exists. This is a major deviation from the earlier case law which simply assumed that if the law states no limits (legal criteria to exercise discretion), there is nothing which could be reviewed by the court:

"Administrative discretion has always been limited first by the principles stemming from the Czech Constitution; these principles make it clear that, even in cases of pure discretion, the administrative body is limited by the prohibition of arbitrariness, the duty to decide like cases alike (divergences of decision-making in similar cases could be the expression of constitutionally prohibited arbitrariness), i.e. the principle of equality, the prohibition of discrimination, the duty to preserve human dignity, as well as the duty of the administrative body to state expressly which criteria and consideration it has used in its discretion, which evidence it applied and how it evaluated it, and explain the factual and legal conclusions."[40]

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[34] MAZANEC, M. Neurčité právní pojmy, volné správní uvážení, volné hodnocení důkazů a správní soud [Ambiguous legal terms, administrative discretion, free evaluation of evidence and the administrative court]. *Bulletin advokacie*. 2000, No. 4, p. 8. Between 1992 and 2002 the provision on discretion was Section 245 (2) of the Code of Civil Procedure.

[35] Judgment of the High Court in Prague of 15 October 1992, No. 6 A 6/92.

[36] Act No. 150/2002 Sb., the Code of Administrative Justice (*Sbírka zákonů*, Collection of laws of the Czech Republic).

[37] Judgment of the SAC of 28 February 2007, No. 4 As 75/2006-52

[38] See judgment of the SAC of 13 August 2009, No. 7 As 43/2009-52.

[39] See judgment of the SAC of 20 July 2006, No. 6 A 25/2002-59, *Nabhani II.*

[40] Decision of the Grand Chamber of the SAC of 23 March 2005, No. 6 A 25/2002-42, *Nabhani I.*

This means that even discretion bound by no limits (quite often called "absolute" discretion by scholarship[41]) will not escape judicial review, although this review would be limited to only to the basic principles just mentioned. The Grand Chamber's decision of 2005 was a turning point in the development of Czech judicial review as it technically allowed, though very limited, review of "absolute" discretion.

The SAC emphasises that the administrative authority must carefully explain the way it applied its discretion. Its reasoning must be transparent, it must explain which facts were established and which evidence was used in finding those facts. Legal reasoning must be also outlined in detail.[42]

The concepts of administrative discretion and the limitation of judicial review have constitutional value. The Czech Constitutional Court stressed that the limitation is demanded by the constitutional requirements of the separation of powers between the judicial and executive branches of government. Therefore, the court cannot unduly interfere with administrative discretion; if the court violates this limitation, it acts unconstitutionally.[43]

2.4 Judicial Deference and Administrative Penal Law

The whole area of administrative penal law is decided by the administrative authorities and ultimately controlled by the administrative judiciary. Administrative penal law covers a plethora of very different (public) wrongdoings, including both individuals and corporations. The law[44] distinguishes between the offenses of individuals, on the one hand, and the offenses of corporations and individuals acting as entrepreneurs, on the other hand. The range of mostly financial punishments is very broad, from petty penalties for minor traffic offences of individuals to significant penalties (in millions of Euros) imposed on corporations in competition and public procurement law, environmental law, etc.

Unlike administrative discretion, where the situation with respect to deference remains pretty much stable since 1918 (with the exception of "absolute discretion"), the deference with respect to administrative penal law has undergone the most significant development.

Originally, in the first half of the 20th century, the Czechoslovak Supreme Administrative Court insisted that it had no power to deal with the lawfulness of the amount of a penalty imposed by an administrative authority. The only issue subject to judicial review was whether the fine remained within the limits stated by the law. If it did, the court had no further power to meddle with the free exercise of the administrative discretion to impose an appropriate penalty. It was up to the administration to decide which amount of penalty corresponds to the nature and circumstances of the offense at stake.[45]

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[41] See MAZANEC, M. Neurčité právní pojmy, volné správní uvážení, volné hodnocení důkazů a správní soud [Ambiguous legal terms, administrative discretion, free evaluation of evidence and the administrative court]. *Bulletin advokacie*. 2000, No. 4, p. 8.

[42] E.g. judgment of the SAC of 30 November 2004, No. 3 As 24/200479.

[43] Judgment of the Constitutional Court of 16 March 2006, No. IV. ÚS 49/04.

[44] Act No. 250/2016 Sb., on responsibility for public offenses and related proceedings.

[45] Judgment of the Supreme Administrative Court of Czechoslovakia, No. 1466/23, Boh. A. 1918/1923 (Administrative courts could deal with the amount of the penalty only with respect to the question whether it remained within the legal margins); judgment of the Supreme Administrative Court of Czechoslovakia, no. 8244/32, Boh. F. 6261/1932 (The issue of which particular amount of penalty imposed within the lawful limits is appropriate falls beyond the jurisdiction of the administrative court).

The 19th century and the early 20th century conception of the limitation of the judicial review of administrative penalties came into conflict with the requirements of the European Convention of Human Rights, notably Art. 6 (1) which provides, inter alia, that *in the determination of any criminal charge* against him, everyone is entitled to a fair and public hearing within a reasonable time *by an independent and impartial tribunal established by law*. According to the European Court of Human Rights (ECtHR), the scope of *criminal charge* also includes administrative offences and relating punishments, no matter how trivial and no matter how small the fine that could be imposed. What matters is the deterrent nature of the penalty.[46] This means that the limitation of judicial review of administrative penalties was in open conflict with Art. 6 (1) of the Convention.

The broad interpretation of criminal charges within the meaning of Art. 6 (1) of the European Convention by the ECtHR caused the transformation of the Czech notion of deference to the administration in the realm of administrative penal law. When the administrative judiciary was revived in the Czech Republic in 1992, deference to administrative penalties was broadly criticised. One of the reasons why the early regulation of the administrative judiciary was annulled as unconstitutional by the Czech Constitutional Court (the legislature followed in due course and subsequently enacted a new 2002 Code of Administrative Justice) was the lack of review of the proportionality and appropriateness of administrative penalties. The Constitutional Court emphasised that the court had to *"be endowed with the power to evaluate not only the legality of the sanction, but also its reasonableness."*[47]

The 2002 Code of Administrative Justice established the new power of the administrative courts to reduce or waive a penalty for an administrative offense (also called *"moderation"*). Section 78 (2) of the Code states that if there are no reasons to quash the administrative decision for its unlawfulness, the court may waive the penalty or reduce it within the limits provided by the law if the amount is *apparently disproportionate*. The court can do this if the outcome could be justified by the facts found by the administrative authority, or also those modified by the administrative court. The court can proceed to make this decision only if the plaintiff suggested this in the lawsuit.

The power to moderate a penalty is an important tool which has modified the long-established nature of the Czech administrative judiciary. This means that the court could interfere with the exercise of administrative discretion (could substitute its own opinion for the administrative evaluation). Moreover, it is an exception to the cassation principle: the cassation principle means that the court can only quash a decision but never replace it by its own judgment. The replacement of the administrative decision by the court's judgment is possible only if the administrative decision does not suffer from any unlawfulness. For instance, if the justification of the amount of penalty is incomprehensible or for any

[46] See the European Court of Human Rights, case *Lauko v. Slovakia*, 2 September 1998, case No. 26138/95, and *Kadubec v. Slovakia*, 2 September 1998, case No. 27061/95 (the absence of any judicial review of a decision imposing a fine on applicants who committed a common traffic offense constituted a violation of their right to a hearing by an independent and impartial tribunal established by law).

[47] Judgment of the Czech Constitutional Court of 27 June 2001, No. Pl. ÚS 16/99 (translated into English at www.usoud.cz/en/decisions/).

other reason insufficient, the court should quash the decision instead of exercising its own power to moderate.

The function and purpose of judicial moderation is neither a search for any "ideal" amount of the penalty nor should it try to replace the administrative authority. Rather, it is judicial discretion which functions in parallel and independent of administrative discretion. It is the correction of an amount which is not just and adequate despite the fact that this amount is imposed within the lawful limits including all the legal criteria for its calculation. One could hardly imagine the exercise of discretion in the area of minor offenses of individuals. Therefore, in general, the moderation would be more frequent with respect to harsher penalties imposed on an entrepreneur or corporations.[48]

Another important feature of the judicial power to moderate penalties is that the facts relating to moderation are not fixed at the moment when the administrative decision was made. The court could take into account new facts which occurred only after the reviewed decision was made (for instance, this could be the fact that the corporation's property has significantly changed and the amount of penalty originally imposed could threaten the corporation's very existence).

A very important deviation from standard judicial review also lies in the fact that the plaintiff can bring new evidence before the court even though he or she did not use this evidence during the administrative proceedings. The plaintiff can bring this evidence to judicial proceedings even if it was available to him earlier. This does not mean that the administrative procedure does not matter or that the plaintiff could be entirely passive in the course of those proceedings, waiting for the judicial review to "surprise" the administration. New evidence could often be considered as unreliable if the administration carried out proper proof-finding. A reason to quash administrative decision would usually be only that the administrative decision was based on insufficient evidence. New evidence brought before the court could constitute proof that this is indeed the case.[49]

2.5 The Treatment of Fact Finding based on Science and Technology

The administrative courts cannot form their own opinions in respect of purely technical questions. If it is necessary to deal with these questions or to assess correctness of the findings of the administration, the court should appoint its own expert who would make his or her own expert testimony. As summarised by the SAC:

"Experts should be called […] so they would observe facts whose knowledge requires specific expertise and would make their own findings based on those observations (expert opinions). Experts should not be called, however, to communicate their views and judgments on legal issues […] nor should they be called to testify about aspects that do not require expert knowledge and normal judicial experience is sufficient."[50]

[48] Cf. the judgment of 19 April 2012, no. 7 As 22/2012-23; in the same line the decision of the Grand Chamber of the SAC of 16 November 2016, no. 5 As 104/2013-46, para 25.

[49] See decision of the Grand Chamber of the SAC of 2 May 2017, No. 10 As 24/2015-71.

[50] Judgment of the SAC of 12 May 2010, No. 1 Afs 71/2009-113.

Section 70 (d) of the 2002 Code of Administrative Justice excludes from judicial review an administrative decision which *depends solely on the state of health of persons or is of a purely technical nature (technical state of things)*, unless it represents "by itself" an obstacle to the pursuit of a profession, employment or business, or any other economic activity.[51] The application of Section 70 (d) is rare; furthermore it is not entirely clear how to interpret a key condition as not an obstacle "by itself".

According to case law, decisions which depend solely on the technical condition of things include determination of whether some item fits within the range of a certain utility model, a decision to terminate temporary incapacity for work, a physician's report on medical disability to hold a firearms license, or certain other decisions relating to medical capacity without any impact on the pursuit of professional activities etc.[52]

The Czech Constitutional Court reviewed the constitutionality of Section 70 (d) and did not find it unconstitutional. However, administrative courts should avoid unconstitutional application of this provision. Above all, an administrative court should deny the review of decisions which affect fundamental rights.[53] This is why the SAC concluded that a decision of a health insurance company whether or not to provide comprehensive rehabilitation care does not fit within the scope of Section 70 (d). Although this is purely a medical question, it also interferes with the protection of fundamental rights, namely the right to healthcare.[54]

Another reason why not to apply Section 70 (d) could be its conflict with EU law. If EU law provides for judicial review of some administrative decisions, it is the duty of the national courts to review such a decision despite Section 70 (d). One example is binding tariff information within the meaning of Article 12 of the 1992 Community Customs Code. The courts have to review such a measure despite the fact that it is of purely a technical nature.[55]

The exception under Section 70 (d) should be construed narrowly. If it is not clear whether Section 70 (d) should be applied, it is necessary to choose the interpretation which is plaintiff-friendly, which means it would establish the plaintiff's standing.[56]

Last but not least, the concept of administrative discretion (see 2.3. above) is often mentioned with respect of not interfering with the expert competence of public authority.[57]

2.6 The Use of Proportionality Review

The principle of proportionality is one of the general legal principles which applies to all branches of government. At the beginning of its decision-making activity, the Consti-

[51] Section 70 (d) of the Code of the Administrative Justice.

[52] Decision of the Municipal Court in Prague of 29 April 2015, No. 9 A 160/2011-49, judgment of the SAC of 7 October 2004, No. 2 As 16/2004-44, decision of the Municipal Court in Prague of 21 February 2012, No. 9 Ca 100/2009 – 48, judgment of the SAC of 17 February 2010, No. 4 Ads 168/2009-86.

[53] Judgment of the Constitutional Court of 15 January 2013, No. Pl. ÚS 15/12.

[54] Judgment of the SAC of 30 September 2013, No. 4 Ads 134/2012-50.

[55] Judgment of the SAC of 28 March 2013, No. 1 Afs 72/2012-29.

[56] Judgment of the SAC of 15 December 2005, No. 3 As 28/2005-89.

[57] Judgments of the SAC of 18 December 2003, No. 5 A 139/2002-46, of 30 November 2004, No. 3 As 24/2004-79, and of 26 November 2009, No. 1 As 89/2009-73.

tutional Court already defined the application of proportionality to include its three criteria (the criteria of appropriateness, of necessity and of balancing of competing interests – proportionality in a narrow sense).[58]

With respect administrative law and activities of the administration, one can refer to the proportionality of legal regulation which forms the basis of the administrative activities, the proportionality of administrative decision making and other activities of public administration and, in addition, also the proportionality of judicial decisions reviewing the activities of the administration. The latter is closely associated with judicial deference to the administration.

The requirement of proportionality in relation to the administration stems from the Czech Constitution and is also expressly stated in the Code of Administrative Procedure.[59] The duty of the public administration is to make sure that the outcome of the case corresponds to the circumstances of the case ("static" aspect of proportionality) as well as to guarantee that like cases should be decided alike ("dynamic" aspect of proportionality, which relates to established uniform legal practice). If the administration can choose among more measures to deal with the case it should choose the most appropriate measure. Second, if the measure could be implemented in several ways, it is necessary to choose the least invasive approach. Finally, negative impacts of the measure should be also taken into account. Much of these considerations should be applied in the exercise of administrative discretion, interpretation of ambiguous legal terms, evaluation of the evidence, etc.

The use of proportionality by the judiciary is not very consistent. Sometimes, its application turns into mere rationality, although the court would not admit this and rhetorically uses the proportionality language. In doing so, the judiciary, in fact, defers to the administration. This is very important, especially with regards to the review of zoning plans (see below).

2.7 Zone Planning and Self-administration

We have already said that the general concept of judicial deference to the administration does not exist. So far the most complex idea of deference could be found in the area of local development plans and zoning ordinances.

The legal form of local development plans is a measure of general nature.[60] They are enacted by the local municipal or regional assemblies in the exercise of their territorial autonomy (local self-government as opposed to state administration). The municipalities and regions are local self-governed bodies distinct from the state; they have the constitutionally protected right to self-administration. The state can interfere with the exercise of self-government only based on the law. [61]

Local development plans could be challenged by a lawsuit against a measure of general nature. The lawsuit could be made by the plaintiff who claims that he was harmed by the

[58] First formulated by Judgment of the Constitutional Court of 12 October 1994, No. Pl. ÚS 4/94.
[59] Section 2 (4) of the Act. No. 500/2004 Sb., Code of Administrative Procedure.
[60] See note 5 and the accompanying text.
[61] Art. 99, Art. 100 (1) and Art. 101 (3) and (4) of the Czech Constitution.

measure of general nature. The lawsuit could be made separately or together with the lawsuit against the decision which applied the measure of general nature.[62]

The court reviews the lawfulness of the local development plans and zoning ordinances based on the following criteria:

(1) the power of the administration to enact the measure of general nature,
(2) whether the administration overstepped the limits of its jurisdictions (including possible *ultra vires* decision),
(3) whether the measure of general nature was enacted in a lawful way (question of due process),
(4) lawfulness of the content of the measure of general nature, and
(5) proportionality of the measure of general nature.[63]

Assessment of the proportionality of local development plans is complicated both due to the expertise and technicalities of their content and the constitutional autonomy of local self-government. The concept of judicial deference is based mainly on the latter.

The SAC emphasised that the proportionality test must be exercised with utmost care and deference. The constitutional right of the municipality to self-government must be also taken into account. This includes the right to organise their territorial relations according to their own ideas. On the other hand, zoning and local development plans are a serious breach of property rights to the extent that the court cannot resign on its duty to review obvious excesses and extreme violations of the fundamental rights of an individual. The SAC also emphasised that judicial intervention (annulment of a local development plan) must be based on the principle of subsidiarity of judicial review and minimization of the court's intervention.[64] The same approach was taken by the Constitutional Court, which criticised some judgments of the administrative courts. It reproached the courts for excessive formalism of the SAC with respect to local self-administration: the requirements for dealing with the objections of land owners in the course of local development proceedings cannot be too detailed. In addition, the Constitutional Court highlighted that judicial review should not threaten the stability of the local development plans.[65]

Deference to the assessment of proportionality also relates to the aspect of how to proceed with respect to the person who questioned the proportionality of the measure before the court but had not used this right in the proceedings before the administration. The SAC emphasised that the court could not judge the proportionality of the measure if the administration had not decided on this issue in the first place because no one had questioned proportionality earlier.[66]

The SAC emphasised its deference also with respect to the selection of variants of the key highway infrastructure corridor – this is a matter of the expertise of the administration, which is not for the court to question.[67]

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[62] Section 101a (1) of the Code of Administrative Justice.
[63] This test was applied for the first time by the SAC in its judgment of 27 September 2005, No. 1 Ao 1/2005-98.
[64] Judgment of the SAC of 31 August 2011, No. 1 Ao 4/2011-42.
[65] Judgment of the Constitutional Court of 7 May 2013, No. III. ÚS 1669/11, *Rokytnice nad Jizerou*.
[66] Judgment of the SAC of 7 October 2011, No. 6 Ao 5/2011- 43. See also judgment of the SAC of 13 May 2014, No. 6 Aos 3/2013-29.
[67] Judgment of the SAC of 21 June 2012, No. 1 Ao 7/2011-526.

2.8 Deference and Courts' Interim Measures

Deference is obviously also the issue when the courts decide on interim measures in the initial stage of judicial proceedings. The law is based on the concept that a lawsuit does not have suspensive effect (with a few exceptions, such as asylum cases). After all, the administrative decision has the force of *res judicata* and is considered correct and lawful until the court decides otherwise in its final judgment.

However, at the plaintiff's request after hearing the opinion of the public administration, the court could award suspensive effect to the lawsuit if the enforcement of the administrative decision or any other consequence of the decision would result in irreparable damage to the complainant, provided that the award of suspensive effect does not unreasonably affect the acquired rights of third persons and is not contrary to the public interest. If this interim measure is granted, the decision ceases to have any effect till the end of judicial proceedings (the court could annul or modify its earlier interim measure if it turns out that there were no reasons to grant it or that circumstances have changed).[68]

Deference to the administration matters in deciding on interim measures and is also visible in comparing the threat to the plaintiff's rights, on the one hand, and public interest to enforce and apply the duties arising out of a decision, on the other hand. This is why the opinion of the public administration is important, because it is the administration which should defend public interest in the court proceedings. The judicial decision on interim measures must be well justified.

Deference to the administration and the preference of the ongoing effects of its decision over their suspension is also visible on the example of a decision which did not threaten the rights of the plaintiff as a whole, but only in part. Then the court would grant suspensive effect only vis-à-vis that part of the decision which threatens the plaintiff's rights, whereas the rest of the decision remains fully applicable and enforceable.[69] Moreover, in granting an interim measure, the court cannot go beyond the scope of the lawsuit and cannot rule on decisions which are not subject to judicial review, although they relate to the case.[70]

The second type of interim measure, although rarely applied, is injunction.[71] By virtue of an injunction the court can order someone to do something or abstain from doing something in order to avoid the threat of serious harm. Injunction is applicable only if the award of suspensive effect of the decision cannot redress the problem.[72] Interestingly, injunction is in theory applicable also if serious harm threatens the public interest represented by the public administration.[73]

Unlike most other issues discussed in this paper, decisions on interim measures are not subject to appeal (cassation complaint) and the SAC thus cannot unify the case law

[68] The Code of Administrative Justice, Section 73.
[69] Decision of the Regional Court in Prague of 12 May 2014, No. 45 A 35/2013-58 (at stake was an urban zone plan, or its part).
[70] Decision of the Regional Court in Prague of 6 February 2013, No. 45 A 4/2013-29.
[71] The Code of Administrative Justice, Section 38.
[72] Decision of the SAC of. 24 May 2006, No. Na 112/2006-37.
[73] Decision of the SAC of 1 February 2017, No. 6 As 6/2017-75.

of the lower courts in this respect.[74] Therefore, the actual application of interim measures and the level of deference to the administration vary throughout the administrative judiciary.

2.9 Cassation Principle

One important expression of a sort of deference is the so-called cassation principle in the decision-making of an administrative court. It has been the rule since the beginning of the administrative judiciary in the 1870s in the Austro-Hungarian Empire that courts can quash the decision of the administration but can never replace it by their own judgment (the principle of cassation). Nothing much has changed 150 years after this original conception was created. The origins of this principle, which are still applicable today, rest with the concept of the separation of powers. The administrative court is not part of the administration and this is why it cannot decide on the merits of the case instead of the administration.[75] It cannot decide the case instead of the administration even if the outcome of its judgment is absolutely clear and gives the administration no option but to make just one specific decision according to the clearly expressed legal opinion of the court.

The major exception (besides moderation – see 2.4 above) to the cassation principle is the Freedom of Information Act, which binds the court to order the administration to disclose the information rather than just annulling the decision which refused to provide the information. But even here the case law limited the power of the court to decide the case instead of the administration. One important condition to the order to provide information (and thus to complete and close the case) is that the decision challenged by the lawsuit include sufficient reasons to be reviewed. If this is not so (the lack of justification, contradictory or internally conflicting reasons, etc.), the court must give the administration a second chance to explain the reasons why it did not provide the information.[76]

The cassation principle still prevails in much of Central Europe today, such as in Slovakia or Poland (an important exception being Austria, where the courts are required to not only annul the administrative decision, but also to decide the issue instead of the administration).

2.10 Period of Prescription (Statutes of Limitation) and the Protection of Good Faith

The legality and the need to annul unlawful decisions could come into conflict with legal certainty and good faith. One well-known way to protect legal certainty and to question the activity of the administration without unnecessary delays is the rule on time limits to file a lawsuit (which limits the possibility of judicial intervention to annul administrative decisions or measures of a general nature, ordering the administration to act or declaring unlawful interference by the administration). The Code of Administrative Justice gives the

[74] The Code of Administrative Justice, Section 104 (3)(c).

[75] HOETZEL, J. *Československé správní právo.* Část všeobecná [Czechoslovak Administrative Law. General Part]. Praha: Melantrich, 1937, p. 447.

[76] Judgment of the SAC of 31 July 2006 no. A 2/2003-73.

plaintiff the right to challenge the decision of the administration within two months from the date of delivery (Section 72 (1)), within one year from the time when the decision was supposed to be made (in lawsuits against inactivity of the administration – Section 80 (1)), within two months from the date when the plaintiff learned about the unlawful interference, but no longer than two years of the time when the unlawful interference took place (Section 84 (1)), or within one year since the given measure of general nature became valid (Section 101b (1)). Those deadlines cannot be excused even if there are good reasons on the part of the plaintiff to extend the relevant periods of time.[77]

Another problem is connected with protection of rights acquired in good faith. This relates, first, to rights acquired in good faith based on an unlawful decision which has become valid but later became subject to review in extraordinary administrative proceedings. Second, the protection relates to a decision which in reality never became valid, typically because it was never delivered to one of the parties (but other parties acted in good faith as if it was indeed valid and binding).

The Czech Code of Administrative Procedure[78] deals with both types of good faith protection. The first case is when an administrative decision which has meanwhile become legally effective is reviewed by the superior administrative authority (review of binding decisions processed by the superior authority based on its own motion). Even if the decision is found unlawful, the superior authority should not annul it if the harm to the rights acquired from the decision in good faith would be in apparent disparity compared to the harm to other parties or the public interest.[79] Second, in the course of deciding on the appeal of the omitted party, the rights in good faith of the other parties based on the (not yet valid) decision should be taken into account and protected.[80]

Ironically, the Code of Administrative Justice does not mention protection of rights acquired in good faith or legitimate expectation based on the unlawful decision or (not-yet) valid decision. It is very debatable whether such a difference in the regulation of administrative procedure and subsequent judicial review can be justified. This relates not only to the aspect of deference to the administration but also to the protection of legal certainty. One solution would be to find such a protection of good faith in the general principles of public law.

However, case law does not go in this direction. Quite the opposite, it starts from the premise that other parties which could be affected by the annulment of the administrative decision cannot base their legitimate expectation on the unlawful decision. If some parties suffer damage because the decision was annulled by the court they should seek damages against the public administration. The SAC says that the administrative courts must not deviate from their duty to annul unlawful decisions and protect legality.[81] The SAC noted that the impacts of unlawful decisions in social reality cannot justify a different decision of the administrative court and that the court simply cannot ignore unlawfulness.[82]

[77] See judgment of the Grand Chamber *Eurovia*, supra note 8.
[78] Act No. 500/2004 Sb.
[79] Section 94 (4), Section 95 (5). Cf. also Section 97 (3) and Section 99.
[80] Section 84 (3).
[81] Judgment of the SAC of 14 May 2008, No. 3 As 11/2007-92.
[82] Judgment of the SAC of 21 July 2010, No. 3 Ans 11/2010-193.

Case law is also not entirely clear with respect to the effects of annulment. With respect to annulment of a measure of general nature, the SAC emphasised that the effect of annulment shall arise at the moment when the judgment is announced; the SAC emphasised the protection of good faith and legitimate expectation.[83] The effects of the annulment of an unlawful decision are more questionable, however, and case law has still not settled this issue.[84]

3. CONCLUSIONS

Contemporary administrative courts face the challenge of ever-changing legislation. In relation to fluid laws, it is not the executive branch but the judiciary which has the more important word in most cases. Frequent amendments do solve some gaps but create even more gaps which have to be filled by the courts. Moreover, legislative chaos and uncertainty in the current state of legislation further complicates judicial deference to the administration. Last but not least, the legacy of communism is still present in the Czech Republic. The former degradation of the judiciary in the communist period (and almost complete annihilation of judicial review between 1952 and 1991) caused a reverse movement of the pendulum after 1990. Much of judicial activism and the relative lack of judicial deference can be explained by the historical memory and the discontinuity of legal development.

Another reason for judicial activism lies in the current nature of the Czech administrative judiciary. Relative ease of judicial review by the courts of first instance and the wide open access to the SAC mean that many administrative cases are resolved in four instances – two instances of administrative proceedings and additional two instances of judicial proceedings. While this wasteful approach overburdens the SAC, it also provides a plethora of options for reversing decisions of the administration.

All these things considered, it is not surprising that neither legal scholarship nor case law defines any general concept of judicial deference to the administration. If any general doctrines were formulated, it was in the area of urban planning, where especially the Constitutional Court restrained the administrative courts. The rationale behind this case law, however, lies in the protection of local self-government, which should be safeguarded from undue interference from all state power including the administrative courts. Other areas contain are some expressions of judicial deference (most notably the limitation of judicial review of administrative discretion and subsidiarity of judicial review). Nevertheless, both case law and scholarship are far from subsuming these concepts under the common label of "judicial deference to the administration".

[83] Judgment of 21 June 2017, No. 3 As 157/2016-63.

[84] Interestingly, if the superior administrative authority annuls the decision outside of appellate proceedings (based on some extraordinary remedies), it enjoys discretionary power to decide about the effects of the annulment. See Section 99 of the Code of Administrative Procedure. If we were to apply analogy, the court should enjoy a similar freedom.