CLIMATE CHANGE DISPUTES IN THE CZECH REPUBLIC

Vojtěch Vomáčka,* Ilona Jančářová**

Abstract: *This chapter is aimed at describing the relationship between individual rights and climate change agenda in the Czech Republic. Firstly, the authors provide a brief description of the Czech framework policy for climate change adaptation and specific acts dealing with the climate change. After that, the means of judicial protection in climate change disputes are analysed, with a particular emphasis on the role of administrative courts. For better understanding, the authors present the most significant decisions of the Czech courts. They conclude that the courts may provide relatively effective protection against both public and private actors. However, climate change is still a new topic with which the applicants have not yet learned to work. In some cases, which are primarily concerned with other issues such as air pollution, climate change serves more as a supporting than a stand-alone argument. This is not likely to change any time soon, because the country is not affected by climate change to the degree it would be forced to act and immediate action would be deemed necessary. Moreover, the judicial review of the state policies is not allowed, even though at the governmental level, short-term economic goals are clearly preferred to the environmental agenda.*

Keywords: *Czech Republic, climate change, air pollution, access to justice, actio popularis*

INTRODUCTION

The Czech Republic (Czechia) was the last EU Member State to ratify the Paris Convention. Pursuant to Art. 10 of the Czech Constitution (Act No. 1/1993 Coll., the Constitution of the Czech Republic), all international treaties approved by the Parliament become a part of the domestic legal order and take precedence over the law. However, general obligations stemming from the international law are usually not considered directly applicable and need to be implemented by the national legislator in order to become effective in practice. At the same time, Czechia is bound by numerous EU regulations and directives which reflect international climate change obligations.[1] At the domestic level, however, these obligations are not sufficiently implemented as the politicians prioritize the short-term economic interests of industrial production over the long-term protection of the environment and public health. Recently, ambitious climate protection policies have been adopted but specific implementing instruments are still absent. This does not satisfy the general public. Nevertheless, climate change disputes are estimated to require significant financial and personnel resources which may discourage many potential claimants. Currently, there is a trend of hostility towards environmental NGOs and public participation in general fuelled by the industrial lobby and the politics. Any forthcoming climate change disputes will therefore certainly attain a strong political dimension.

* Mgr. Vojtěch Vomáčka, Ph.D., LL.M. Assistant professor at the Faculty of Law of Masaryk University, Brno, Czech Republic and legal advisor at the Supreme Administrative Court of the Czech Republic

** Associate Professor JUDr. Ilona Jančářová, Ph.D. Associate professor and head of the Department of Environmental Law and Land Law at the Faculty of Law, Masaryk University, Brno, Czech Republic

[1] See ŽIDEK, D. Adaptace na klimatické změny z pohledu odpovědnosti státu za jeho závazky. Je současný stav udržitelný? In: M. Damohorský – M. Franková – M. Sobotka (eds.). *Půda, voda a krajina. Adaptace na klimatické změny z pohledu práva.* Beroun: Nakladatelství Eva Rozkotová, 2017. pp. 127–135.

CLIMATE CHANGE LAW IN THE CZECH REPUBLIC

Framework Policy for Climate Change Adaptation

The governmental State Environmental Policy adopted for the 2012 - 2020 period lists climate mitigation and adaptation among its goals.[2] In 2015, a specific Strategy on Adaptation to Climate Change[3] introduced the assessment of the climate change impacts and proposals for specific adaptation measures, legislative and partial economic analysis.[4] The Adaptation Strategy is implemented by the National Action Plan on Adaptation to Climate Change which was adopted in 2017. The structure of the Action plan reflects the most significant climate change impacts in Czechia: long-term droughts, floods and flash floods, extreme meteorological events (heavy rainfall, extremely high temperatures; extreme wind) and wildfires. The Action plan sets 33 specific targets and one crosscutting target focused on education and awareness raising. These targets are supposed to be implemented through 52 priority measures, which have 160 priority tasks.[5]

The Climate Protection Policy (CPP) was adopted by the government in March 2017 for the period of 2017 - 2030 and outlook until 2050. The first evaluation is scheduled for 2021.[6] It identifies the objectives, priorities and specific measures to reduce the greenhouse gas emissions in order to meet the requirements of the international and EU law. It sets primary and indicative emission reduction targets:

Primary emission reduction targets

- Greenhouse gas reduction of 32 Mt CO_2 eq. compared to 2005 until 2020
- Greenhouse gas reduction of 44 Mt CO_2 eq. compared to 2005 until 2030

Indicative emission reduction targets

- Indicative level towards 70 Mt CO_2 eq.of emitted greenhouse gases in 2040
- Indicative level towards 39 Mt CO_2 eq.of emitted greenhouse gases in 2050

---

[2] Czech State Environmental Policy for 2012 – 2020. In: *The London School of Economics and Political Science* [online]. 12. 9. 2012 [2017-10-12]. Available at <http://www.lse.ac.uk/GranthamInstitute/law/state-environmental-policy-2012-2020/>.

[3] Strategy on Adaptation to Climate Change in the Czech Republic. In: *Climate Change Adaptation* [online]. [2017-10-12]. Available at <http://www.regio-adaptace.cz/en/novinky/195.ministerstvo-zverejnilo-konecny-text-strategie-prizpusobeni-se-zmene-klimatu-v-podminkach-cr/>.

[4] See ŠVARCOVÁ, K. Odvody za odnětí půdy ze zemědělského půdního fondu – nepřímý nástroj udržitelného využívání půdy. In: M. Damohorský – M. Franková – M. Sobotka (eds.). *Půda, voda a krajina. Adaptace na klimatické změny z pohledu práva.* Beroun: Nakladatelství Eva Rozkotová, 2017. pp. 47–48.

[5] MINISTRY OF ENVIRONMENT OF THE CZECH REPUBLIC. Strategy on Adaptation to Climate Change in the Czech Republic, Executive Summary. In: *Ministry of Environment of the Czech Republic* [online]. [2017-10-30]. Available at:
<https://www.mzp.cz/C125750E003B698B/en/strategy_adaptation_climate_change/$FILE/OEOK_Adaptation_strategy_20171003.pdf>.

[6] MINISTRY OF ENVIRONMENT OF THE CZECH REPUBLIC. Climate Protection Policy of the Czech Republic. Executive summary. 2017. In: *Ministry of Environment of the Czech Republic* [online]. [2017-10-12]. Available at: <https://www.mzp.cz/C125750E003B698B/en/climate_protection_policy/$FILE/OEOK_CPPES_20180105.pdf/>.

Individual measures are proposed in the following key areas: energy, final energy consumption, industry, transport, agriculture and forestry, waste, science, research development and voluntary tools. The Ministry of Environment argues that the CPP will - even without the adoption of anti-fossil law (see below) - contribute to a long-term, gradual transition to a competitive low-emission economy.

Specific Acts Dealing with Climate Change

There is no specific act which would deal with climate change. In 2014, the government confirmed a new legislation aimed at reducing the country's dependence on the fossil fuels would become one of the top priorities.[7] However, this move turned out to be destined to failure due to the strong industrial lobby behind the government. A specific Act on Reduction of Fossil Fuels Dependence was prepared but in 2016, it became obvious that it was not going to get political approval. A discussion between representatives of the executive and the Economic Committee of the Chamber of Deputies of the Parliament effectively buried the legislative proposals. The MEPs called on the government not to adopt the ambitious EU targets for the low-carbon energy and mobility which could affect many people and have a significant impact on the domestic industry and thus the economy. Disputes among the Ministries could not be easily settled. Finally, the Minister of Environment Richard Brabec (ANO Party) announced he would not submit the proposals to the government saying it is necessary to discuss their social impacts. His move was accepted with a general political appreciation.[8] Instead of adopting specific measures, the Ministry of Environment adopted the ambitious Climate Protection Policy in March 2017 (see above).

Currently, climate protection is mainly embodied in the general air pollution legislation and emission trading regulation. The legislation on protection against climate change was introduced by the Air Protection Act (Act No. 86/2002 Coll.),[9] which was replaced in 2012 by the new Air Protection Act (Act No. 201/2012 Coll.). However, it does not provide a comprehensive regulation since only its minor part on biofuels is geared towards reducing greenhouse gas emissions and promoting renewable energy sources. Stipulations on the allowance trading system came in a separate legal document - Act No. 695/2004 Coll., on the Conditions of Trading in Greenhouse Gas Emission Allowances.[10] Some issues are further dealt with by Act No. 73/2012 Coll., on Substances that Deplete the Ozone Layer and on Fluorinated Greenhouse Gases. Furthermore, international obligations and requirements of the EU climate law are partially implemented by mitigation and adaptation measures enacted in various legislative acts, in particular in the fields of energy demand and

[7] See THE CZECH TELEVISION. Antifosilní zákon by chtěl Brabec od roku 2018, dopadnout má i na dopravu a zemědělství. In: *Česká televize* [online]. 10. 4. 2016 [2017-09-04]. Available at: <http://www.ceskatelevize.cz/ct24/ekonomika/1751065-antifosilni-zakon-chtel-brabec-od-roku-2018-dopadnout-ma-i-na-dopravu-a>.

[8] MRÁZOVÁ, Š. Brabec: Česko sníží závislost na fosilních palivech i bez zákona. In: *Ekolist* [online]. 27. 1. 2017 [2017-11-11]. Available at: <http://ekolist.cz/cz/zpravodajstvi/zpravy/brabec-cesko-snizi-zavislost-na-fosilnich-palivech-i-bez-zakona>.

[9] See JANČÁŘOVÁ, I. Legal Aspects of Global Warming Regulation. *Amsterdam Law Forum.* 2010, Vol. 2, No. 2, pp. 51–60.

[10] Later on replaced by the new Act No. 383/2012 Coll.

management,[11] promotion of low carbon energy including renewables,[12] management of fluorinated and other greenhouse gases[13] and transportation.[14]

Land use, land-use change and forestry (LULUCF) activities can provide a relatively cost-effective way of offsetting emissions.[15] This is, however, not reflected in the rules on planting and cutting the trees, timber logging and forest management.[16] Pursuant to the regulation on land development and land protection,[17] the use of agricultural and forest land for other purposes is possible only after assessment and approval by the authorities prior to the development consent.[18]

CLIMATE CHANGE LITIGATION IN THE CZECH REPUBLIC

Concepts of public litigation and *actio popularis* are very much absent in the Czech legal system, at least when it comes to environmental matters. In contrast, the protective norm theory (*Schutznormtheorie*) is traditionally applied which means that in order to be allowed to bring a case to the court, the applicant has to show that his individual rights have been affected. In this respect, the character (legal form) of the climate change regulation adopted at the national level is crucial. Political documents are generally not considered binding for individuals unless embodied into a legally binding form such as the governmental regulation, ministerial regulation, individual decisions or a specific administrative act in a mixed form called "measure of general nature" (MGN). The MGN relates to specific subject matter and, at the same time, is generally binding on individual persons. For example, the land-use plans are adopted in this form.

3.1 Constitutional Rights and Access to the Constitutional Court

The Constitutional Court is empowered to abolish the statutes and implementing legislation which is not in compliance with the Constitution or with the international treaties.

[11] Act No. 406/2000 Coll., on Energy Management, Act No. 458/2000 Coll., on the Conditions for Operating Business and on Performance of State Administration in Energy Sectors.

[12] Act No. 165/2012 Coll. on Supported Energy Sources.

[13] Act No. 73/2012 Coll., on Ozone Depleting Substances and on Fluorinated Greenhouse Gases, Act No. 85/2012 Coll., on Carbon Dioxide Storage.

[14] For example requirements of minimum biofuel content for transportation fuels in the Air Protection Act (No. 201/2012 Coll.).

[15] See United Nations Climate Change. Land Use, Land-Use Change and Forestry (LULUCF). In: *United Nations Climate Change* [online]. [2017-09-25]. Available at: <http://unfccc.int/land_use_and_climate_change/lulucf/items/3060.php>.

[16] The rules concerning cutting down the trees and bushes and timber logging are embedded in the Nature Protection Act (Act No. 114/1992 Coll.) and in the Forest Act (Act No. 289/1995 Coll.).

[17] Act No. 183/2006 Coll., the Building Code, Act No. 334/1992 Coll., Act on Agricultural Land Protection, Act No. 289/1995 Coll., the Forest Act.

[18] See JANČÁŘOVÁ, I., ŽIDEK, D. Permit procedures for industrial installations and infrastructure projects: Assessing integration and speeding up, Czech Republic, 2016. Avosetta questionnaire. In: *Avosetta Group* [online]. [2017-09-25]. Available at: <http://avosetta.jura.uni-bremen.de/czechrepquest2016.pdf>. JANČÁŘOVÁ, I. Environmental Protection Law vs. Economic Activity in the Czech Republic. In: A. Powalowski – M.Vrabko – P. Mrkývka (eds.). *Selected Issues of Public Economic Law in Theory, Judicature and Practice in the Czech Republic, Poland and Slovakia*. Warszaw: C.H.Beck, 2017, pp. 207–220.

A petition proposing the annulment of a statute, or individual provisions thereof, may be submitted by the President, a group of at least 41 Deputies or a group of at least 17 Senators, a Panel of the Court deciding a constitutional complaint, the government or anyone who submits a constitutional complaint. This means that for the individuals including the NGOs, the access to the Constitutional Court is restricted to the actual cases and violation of their constitutional rights listed in the Charter of Fundamental Rights and Freedoms (Const. Act No. 2/1993 Coll.). Of these, protection of ownership and privacy is often invoked in environmental cases. The Charter also grants the right to a favourable environment (Art. 35), but its significance is diminished by Art. 41 which stipulates that it is enforceable merely through and in the scope of regular laws implementing it. There is no single act which would deal with this right and its protection in a comprehensive way, or provide the definition thereof. Current, we are witnessing a lively discussion among legal professionals as regards the character of the right.[19]

In the wide sense, the right to a favourable environment is considered to be reflected in the levels of pollution in water, air and soil protection legislation supported by the procedural framework which provides public participation in decision-making and access to justice. In the narrow sense, the right to a favourable environment is explicitly recognised by the Civil Code within the protection of personality.[20]

A petition seeking the annulment of a legal regulation is of an accessory nature as regards a constitutional complaint, which means that it shares its fate. Therefore, if the constitutional complaint is denied for any reason, the petition seeking annulment of a legal regulation is thereby automatically denied.

It should be emphasized that the Constitutional Court is not positioned above the general courts as the court of final appeal. It reviews "only" constitutionality and not the legality or correctness of judicial decisions. Even if the Constitutional Court decides in favour of the applicant, it cannot, for example, order the legislator or a public authority to adopt specific legal regulation or decision.

3.2 Access to the Civil and Administrative Courts

In summary, an individual can bring a case against a public or private actor that allegedly does not comply with its climate change obligations. However, the lack of class action or *actio popularis* renders any defence against complex pollution and climate change issues very difficult, even though the system of judicial protection is deemed accessible. To a large extent, the civil judiciary is perceived as complementary to the administrative one. The main instruments of the civil law protection mostly deal with contractual obligations and liability, nuisance or protection of personal rights. As such, they are not applicable against the state environmental policies, decisions of public authorities or basically any future nuisance or interference. Still, the civil courts may provide effective protection in some situations, for example, if no administrative remedies are available to the

[19] See MÜLLEROVÁ. H. et al. *Právo na příznivé životní prostředí: Nové interpretační přístupy*. Prague: The Institute of State and Law of the Academy of Sciences of the Czech Republic, 2016. 282 pp.

[20] § 81(2) of the Act No. 89/2012 Sb., Civil Code.

public concerned. This could be the case of major industry productions authorized long years ago.

At the moment, administrative courts play a pivotal role in environmental protection. The number of environmental cases that reach Czech administrative courts is rather constant and presents minor, but not negligible part of the general caseload. The court disputes concerning urban planning, development of infrastructure and permitting procedures of various industrial applications especially raise public awareness. Nevertheless, climate change is still a new topic. Within the wide framework of various state policies, urban planning or environmental impact assessment, climate change based arguments of both the claimants and the courts rarely play any substantive role and usually serve as the introductory remarks or general observations. It is assumed that the climate change issues are somewhat a vague concept which does not affect the individuals in particular cases concerning their rights or duties.[21]

Four main types of judicial protection are provided by the administrative courts: action against a decision of an administrative authority, protection against a failure to act, protection against unlawful interference and a judicial review of measures of a general nature.

Provided the state climate change policy is implemented in the form of administrative decision, the individuals and the NGOs may challenge such decision if they meet conditions of access to justice set out in the Czech Administrative Justice Code (Act. No. 150/2002 Coll.). They must be directly affected by the decision and must exhaust all appropriate remedial actions before the submission of a complaint. Some claimants are allowed to reach the judicial protection easily. For example, the owners may rely on their *in rem* rights, but the tenants are not considered sufficiently concerned, even though they have been tenants for a long period of time. However, some decisions are deemed not to interfere with the rights of other persons than the applicant in the administrative proceedings himself, for example, the authorizations to operate a nuclear facility.

As regards measures of general nature, there is no administrative appeal allowed and the only possible legal remedy against the MGN is a judicial review. Once again, the administrative courts deal with the question of impairment of rights because pursuant to § 101a of the Czech Administrative Justice Code, any person which claims infringement of his or her rights by the MGN, is entitled to file an action against it. In this case, there is no previous administrative proceeding with a list of participants, but the courts follow their case law concerning the owners, tenants, NGOs and other subjects. The scope of the review encompasses both procedural and material issues but is restricted to the rights of the plaintiff. In the judicial review of the MGNs, the courts recognize there is a considerable space for political discretion – and the more abstract the MGN gets, the wider this space is. Without a doubt, climate change cases will open questions as regards reviewability of administrative discretion and state policies, proportionality and effectiveness of measures adopted at various levels of state administration. Traditional legal concepts may serve their purpose but will hardly be applied straightforward. But this is yet to be seen.

[21] See FRANKOVÁ, M. Žaloba ve veřejném zájmu při ochraně životního prostředí. In: J. Hanák – I. Průchová (eds.). *Kontrolní mechanismy při prosazování ochrany životního prostředí.* Brno: Masaryk University, 2017, pp. 195–204.

Theoretically, the NGOs or other individuals may opt for protection against unlawful interference. In this case, the court would have to agree that the inability or unwillingness of the state to comply with international climate change obligations would result in such interference. There have been already some cases suggesting this is feasible. On the other hand, the scope of protection against a failure to act is restricted to the omission to adopt a decision in administrative proceedings. As a consequence, it cannot be used against the lack of will to adopt a specific policy or an MGN.

4. EFFECTIVE CLIMATE CHANGE LITIGATION IN THE CZECH REPUBLIC: THE WAY FORWARD

Czech case law on climate change is limited. So far, there has not been a single case similar to the Dutch *Urgenda* case or the Austrian *Vienna airport* case. In some cases, which are primarily concerned with other issues, climate change serves more as a supportive than a stand-alone argument. In administrative cases concerning renewable energy, for example, it is often argued that the renewable energy sources should be promoted in the interest of protecting the climate and the environment. The same argument is to be found in several tax cases concerning additional tax imposed on the solar energy producers or obligation to put a minimum amount of biofuels into free circulation for transport purposes. In cases concerning air pollution, obligations arising from the Kyoto Protocol and the Paris Agreement are sometimes put forward but do not have a decisive role in the particular case.

Nevertheless, there are several significant court decisions in related fields, especially air quality regulation. One of the cases that did shatter the settled approach to complex air pollution issues and which is likely to have a significant impact on future climate change cases was the case of *Ostrava against the State*. In 2010, the city of Ostrava filed an action against the Czech government, the Ministry of Environment and the Ministry of Transport. It claimed, in essence, that the inactivity of the defendants contravenes the relevant EU law, rendering Ostrava helpless in dealing with the desperate air quality in the region. The court of the first instance dismissed the case for procedural reasons, concluding that the city does not have any rights to be violated. The Supreme Administrative Court did not share this opinion and concluded that the right to self-government was at stake and Ostrava was also entitled to defend the right to a favourable environment of its citizens. However, according to the court, the city failed to prove a direct relationship between the inactivity of the defendants and the exceeded air pollution limits. The court pointed out that the city itself is one of the authorities responsible for the harmful situation and that there are far more aspects to be addressed, including the transboundary air pollution coming from Poland.[22]

Recently, in a series of similar cases, the individuals aided by the NGOs challenged the air quality management plans adopted for several highly polluted regions – Ústí nad

[22] See judgment of the Czech Supreme Administrative Court of 14 November 2014, No. 6 As 1/2014–30. All decisions of the Supreme Administrative Court cited in this chapter are available on-line in Czech language at www.nssoud.cz.

Labem region and agglomerations of Prague, Brno and Ostrava. The courts quashed the plans (or their parts) because they did not provide effective measures, contrary to the EU Directive 2008/50/EC on ambient air quality and cleaner air for Europe, and the Czech Air Protection Act, which both require that the plans reassure the achievement of the legal air pollution limits *"in the shortest time possible"*. The courts basically held that the plans should contain not only measures contributing to better air quality, but also the timeframe for their implementation, which would assure that the plans meet their goals in a given time. According to the courts, the plans should also contain the methods to evaluate the individual measures and to quantify their contribution to the air quality improvement.[23] This indicates that the courts are willing to review the effectiveness of the mitigating measures which is crucial for the climate change agenda.

4.1 Moving forward the Climate Change Agenda against Public Actors

An individual may bring a case against a public actor charged to authorise for example a major infrastructure if all the procedural requirements are met. Nevertheless, the court will only quash the decision provided that 1) it truly does not comply with obligations leading to a rise in greenhouse gas emissions and there is no other way to fulfil these obligations, 2) this fact renders the authorisation illegal.

In general, the national climate laws concerning the emission trading scheme and regulation of ozone layer depleting substances (see above) do not constitute a sound basis for judicial action because they do not deal with substantive climate change questions and focus on very limited and mostly administrative issues.

The crucial procedures for any effective legal action against a large infrastructure project are the urban planning and environmental impact assessment (SEA and EIA) which, once again, do not deal with climate change in a comprehensive manner. The individuals are entitled to challenge the regional and municipality urban plans and most of the decisions in the subsequent authorization procedures. It is not evident; however, which planning or permitting phase is the most suitable for the climate change arguments concerning a specific project. The urban plans, even though subject to SEA, provide only the basic conditions for the development of the area. The most important arguments regarding the negative impacts of the project on the environment fall within the scope of the land use permitting procedure. For this reason, the EIA which takes part prior to this procedure is of a major importance.[24] It should identify, describe and assess the direct and indirect effects of a project on various factors including climate. Detailed requirements on assessment of the impact on climate (for example the nature and magnitude of green-

[23] See in particular judgment of the Czech Supreme Administrative Court of 20 December 2017, No. 6 As 288/2016-146.

[24] See TOMOSZKOVÁ, V. Implementation of the EU Directive on Environmental Impact Assessment in the Czech Republic: How Long Can the Wolf Be Tricked?, *Washington and Lee Journal of Energy, Climate and the Environment*. 2015, Vol. 6, No. 2, pp. 457–458. VOMÁČKA, V., STROUHAL, J. Conservation of nature and Landscape in the Process of Locating, Constructing and Operating Wind Power Plants in the Czech Republic. In: I. Jančářová – J. Dudová (eds.). *Sustainable developments and Conflicts of Interests in Nature Protection in Czechia, Poland and Slovakia*. Brno: Masaryk University, 2017, pp. 209–218.

house gas emissions) and the vulnerability of the project to climate change have been introduced only recently, following the EU Directive 2014/52/EU. Before that - and for a very long time - ignorance of climate change could only hardly constitute the grounds for the illegality of the authorization.

The public and various official authorities can participate in the EIA procedure and submit written comments. Later on, the public concerned including the NGOs may become a participant in the consequent decision-making procedures, submit their comments, appeal the decision and access the court. Furthermore, a transboundary EIA might be initiated by other countries affected by the project. In practice, this option is not used frequently, although it is not restricted to other EU member states. In 2009, most notably, the Federated States of Micronesia have requested the initiation of a transboundary EIA, to examine the expansion and life-extension of the Prunéřov power plant in Czechia. Micronesia claimed to be seriously endangered by the impacts of climate change, including the flooding of its entire territory and eventual disappearance of a portion of its land. In other words, a Pacific island state west of the Marshall Islands and east of the Philippines has challenged a project over 6,000 km away on the grounds that it could harm its environment. In response to Micronesia's opinion, the Czech Ministry of Environment asked a Norwegian company Det Norske Veritas for an independent expertise of the project regarding the efficiency rate and consequences of emissions. The conclusions presented by Det Norske Veritas supported Micronesia's concern and concluded that the refurbishment project generally complies with BAT (best available techniques), but deviations were observed on net unit efficiency and on CO emissions.[25]

Currently, the outcome of the EIA process in Czechia is either a negative result of the screening procedure in the form of an administrative decision or a binding EIA statement. The EIA procedure is not a standard administrative decision-making procedure with participants. It is a process of preparation and adoption of a binding statement which is relevant for the subsequent decision-making procedures (development consent, building permit and most of the authorization procedures for the operation of the projected activity). Beside the EIA statement, competent environmental authorities (Water Protection Authority, State Forest Administration, Air Protection Authority, Nature Protection Authority and others) adopt particular decisions or binding statements for the final decision. All of these procedures are governed by common administrative rules, yet differ in their scope, the range of participants and the competent authority. Specific rules for these procedures are spread among a huge amount of legislative pieces dealing with land use and construction, protection of nature, water management, waste treatment etc.[26]

The public concerned may participate in a large variety of the permitting proceedings. Nevertheless, this does not mean that there is a coherent regulation of the public partici-

[25] See VOMÁČKA, V., JANČÁŘOVÁ, I. Transboundary Impact Assessment from the Central European Perspective. In: *Czech Yearbook of International Law*. Huntington USA: Juris Publishing, Inc., 2012, pp. 19–37.

[26] See HUMLÍČKOVÁ, P., VOMÁČKA, V. Public Participation and EIA in the Multi-Stage Decision Making Process: The Czech Example. In: J. Jendroska – M. Bar. *Procedural Environmental Rights: Principle X in Theory and Practice*. Cambridge: Intersentia, 2018. pp. 389–408.

pation in the Czech legal system. Quite contrary, we may notice stipulations on public participation in various legal acts.[27]

As far as the judicial protection is concerned, the plaintiffs including the NGOs and other members of the public have to meet criteria of *locus standi*. Conditions for legal standing in administrative and judicial proceedings are similar, yet not the same. The administrative courts consider impairment of rights independently on the participation in administrative proceedings, although in theory, both proceedings match each other and form related phases of effective public participation. For a long time, judicial interpretation restricted the NGOs to point at only procedural aspects of the administrative decision because legal entities enjoyed no substantive rights in connection to environmental harm. Under the threat of the European Commission, minor changes have been introduced and the NGOs may now challenge the outcome of the subsequent proceedings in court from both substantive and procedural aspects. Nevertheless, the Constitutional Court stepped into the game in 2014, overturned its settled case law and concluded the NGOs may claim a violation of the right to the favourable environment should they demonstrate a close relationship to the issue at question.[28] As a consequence, the administrative courts have developed a set of conditions of impairment of rights, most notably a local activity of the NGO, which is independent on participation in the administrative proceedings and applies to all environmental cases.

Needless to say that the limits of pollution (the amount of greenhouse gas emissions) as such are difficult to dispute because Czechia is not threatened by the sea level rise or any visible and harsh impacts and the causal link between the state policy and changes in temperature causing dryer seasons in some parts of Czechia or changes of habitats of wildly living species of plant and animals is not established. As a consequence, the public may only raise its claims within the limits of environmental protection set by the state. Moreover, according to the Czech case law, welfare of animals and plants is not considered protected by the constitutional right as far as their state is not detrimental to humans. For example, in case that reached the Supreme Administrative Court in 2010,[29] a resident of a municipality located in the National Park Šumava claimed that her right to a favourable environment had been infringed by the Visiting Rules of the National Park which allowed water sports in a nearby river. This could have a negative impact on the population of critically endangered species of a freshwater pearl mussel (*Margaritifera margaritifera*). The Court stated that the plaintiff enjoys the right to a favourable environment and may ask for protection from various types of pollution. Nevertheless, according to the Court, it is hard to imagine that the decline of *Margaritifera margaritifera* population may have a real impact on the life of the plaintiff. Hence her right to a favourable environment was not infringed. The NGOs are considered affected by the loss of biodiversity, but even their claims must be based on the infringement of their rights (the rights of their members).

[27] In Act no. 114/1992 Coll. on the Conservation of Nature and Landscape, Act No. 254/2001 Coll. on Water and Amendments to Some Acts (The Water Act), Act No. 76/2002 Coll. on Integrated Pollution Prevention and Control and EIA Act No 100/2001 Coll.

[28] Judgment of the Czech Constitutional Court of 30 May 2014, No. I. ÚS 59/14.

[29] Judgment of the Czech Supreme Administrative Court of 13 October 2010, No. 6 Ao 5/2010–43.

If we take a look at the other members of the public concerned, they are in rather a difficult position. The affected neighbours, for example, have to pay attention to the official boards because if the project is subject to the EIA procedure, the official announcements are not distributed directly to the neighbours affected but merely published on the official board. The neighbours may challenge the land use permit, but cannot appeal the test operation permit because they do not even belong among the participants of the proceedings. However, they may challenge the operation permit at the court as the *locus standi* is considered separately from the regulation of the proceedings. In some cases, there are only one-level administrative proceeding and no administrative review is possible. And there is also limited standing in some cases. For example, a negative screening conclusion that the project is not subject to the EIA might be challenged only by the investor and the public concerned.

It should be evident that there is a very sophisticated and complicated system of the multi-stage decision-making process in Czechia,[30] with multiple authorities responsible for particular procedures. Czech administrative courts continuously deal with questions concerning relationship and hierarchy of certain procedures within a wider chain of building permits. It is therefore not surprising that so far, there has been no case in which the plaintiff would rely solely on climate change issues.

Various climate change adaptation measures may raise public concerns since science is frequently showing that climate change will lead to more devastating impacts in the short and especially in the medium and long-term. This problem is usually connected to the regional and local land use planning and development of the flood resilience.

In Czechia, the construction of flood resilience infrastructure must be envisaged in the regional and local urban plans. Provided that there is a flaw in the design of the plans, a change may be suggested by any person and initiated by the municipality as the investor of the plan - and adopted in the form of a measure of general nature. The public concerned the may also participate in the process of preparation of the plan. No appeal is possible against the urban plan. If not satisfied, the public concerned (including the NGOs) may opt for the only possible legal remedy against the plan - a judicial review of the MGN.

On the other hand, the regions and the municipalities enjoy a high level of political discretion as regards the choice of particular means and methods they deal with regional or local problems. The courts are careful not to step too far to interfere with such discretion. In case the findings of the SEA are not *overly* insufficient and the measures proposed by the plan are not *exceedingly* disproportionate to the goals of the regulation, the court may refuse to revoke the plan.

4.2 Moving forward the Climate Change Agenda against Private Actors

Disputes between the private actors in environmental matters are usually solved on the basis of the provisions protecting the rights of the neighbours (§ 1013 of the Civil Code). According to these, the person affected may ask the court to order the owner to re-

[30] See ŽIDEK, D. Stavební dozor jako prostředek ochrany životního prostředí. In: J. Hanák – I. Průchová et al. *Kontrolní mechanismy při prosazování ochrany životního prostředí.* Brno: Masaryk University, 2017. pp. 142–155.

frain from anything that would cause emissions which are disproportionate to the local circumstances and substantially restrict the normal use of the tract of land. This kind of protection serves only the owners and the tenants, not the public concerned in general.[31] The claimant may also ask the civil court to issue a preliminary injunction in order to provisionally amend the conditions of the parties, or if there is a risk that the enforcement of the (subsequent) court decision could be threatened.

However, if the emission is the result of the operation of an enterprise or a similar facility which has been officially approved, a neighbour only has the right to compensation for harm in money, even where the harm was caused by circumstances which had not been taken into account during the official proceedings. This does not apply if the operation exceeds the extent to which it has been officially approved.

The neighbours can, therefore, bring a case against a private actor whose acts lead to a large rise in greenhouse gas emissions, but can only claim the emissions are disproportionate to the local circumstances. If the activities of the particular factory have been officially approved, the neighbours may only ask for damages. In this respect, there are principally no limitations to the standing of natural or legal persons in proceedings concerning damages claims, including those from other jurisdictions. There is a specific, strict liability established in the Civil Code for the damage caused by a particularly hazardous operation. A person who operates an enterprise or another facility which is particularly hazardous shall compensate the damage caused by the source of the increased danger; an operation is particularly hazardous if the possibility of serious damage cannot be reasonably excluded in advance even by exercising due care. Otherwise, the person is released from the duty if he proves that the damage was externally caused by *force majeure* or that it was caused by the very acts of the victim or unavoidable acts of a third person; if other grounds for the release from the duty have been stipulated, they are disregarded (§ 2925 of the Civil Code).

However, there is a huge difference between damage sustained more or less directly and damage caused indirectly by the emissions of greenhouse gases. The plaintiff can hardly prove the existence of the causal nexus between droughts or floods and the operation of the particular facility.

At the moment, protection of personality in the Civil Code (Act no. 89/2012 Coll.) offers a plausible way to protect the right to a favourable environment but remains unused in practice. Although explicitly recognized in the Civil Code and the Constitution (Art. 35), the right to a favourable environment has been rarely litigated in courts and never matched with climate change matters. In future, however, it may play an important role in filling the gap between protection of traditional rights such as the right to life and health, and protection provided for the ownership rights. Furthermore, it may contribute to the so-called *forum shopping* in international private law because foreign public concerned may give preference to the Czech legal system and opt for its protection of personal

[31] See JANČÁŘOVÁ, I. Privilegované imise vs. ústavní a veřejnoprávní základy ochrany životního prostředí. In: I. Jančářová – J. Hanák – I. Průchová et al. *Vlastník a podnikatel při ochraně životního prostředí.* Brno: Masaryk University, 2015. pp. 15–19, 155–169.

rights to deal with cases with transboundary aspects. However, the concepts of causation are applied rather strictly in the Czech civil law.

A major disadvantage of civil law disputes is the length of legal proceedings, which is a long-term and endemic problem in Czechia. The average duration of civil proceedings can take several years in one region, yet only a few months in another. The length of the proceedings in front of the administrative courts also vary, but not to such a large extent.

5. CONCLUSION

Despite legislation aimed at climate change mitigation along with numerous legal instruments that have the potential to contribute to climate change issues (for example land use planning, environmental impact assessment and others described above), it can be disputed that there is sufficient political will in Czechia to effectively address the climate change agenda. The government hesitates to adopt a specific act which would deal with climate change. Besides the state policies, preference is given to adaptation measures to fight with the symptoms of the climate change such as water scarcity. Furthermore, both the overly complicated decision-making process and restricted procedural remedies render any defence against complex pollution and climate change very difficult, even though the system of judicial protection is deemed accessible.

At the same time, we are witnessing some evident trends that may in longer run contribute to the growing number of the climate change cases before the Czech courts:

1) The civil society represented by the environmental NGOs has gained a valuable know-how and has established itself as the main driving force in the court disputes. In the 2012 – 2016 period, more than 80 environmental NGOs have brought at least one case to the administrative court. This seems to be a very high number in comparison to other EU members. Recently, the NGOs have often stood behind the individuals living in the regions affected by air pollution and challenged the particular decision or measure of a general nature in the name of these individuals. In complementing civil lawsuits, these individuals demand just satisfaction for the immaterial harm that was caused by an illegal action of the regional authority (one such case is pending before the Supreme Court). These cases, should they turn successful for the claimants, will constitute a positive precedent for similar cases and may in effect change the position of the government towards class actions and more effective protection of the environment in general. Future climate change cases will, without a doubt, follow the same pattern and the courts will build their conclusions on the air pollution agenda which is currently taking momentum.

2) The judicial branch of administrative courts has been formed rather recently, in 2003. Since then, the claimants (or their attorneys) have mastered all the main types of legal actions and the important environmental cases have evolved from simple actions against decisions to more complex disputes concerning strategic programme or planning documents.[32] This is evident in urban planning and also in other areas. These complex cases

[32] See JANČÁŘOVÁ, I. Conception Documents as a Pollution Reduction Tool - the Czech Experience. *Ecology & Safety*. 2017, Vol. 11, pp. 24–32.

will play a huge role in the climate change disputes that are yet to come, not only as regards substantial arguments but also considerations upon *locus standi*.

We are not convinced there is an element of good practice in climate change issues stemming from our country. At the governmental level, short-term economic goals are clearly preferred to the environmental agenda. On the other hand, the country is not affected by climate change to the degree it would be forced to act and immediate action would be deemed necessary. Therefore, certain problems in drafting climate change policy are understandable. Currently, this is up to the new government which has taken office only recently.