

The Impact of Recent European Developments on Operation of the Rule of Law Principle in the Czech Republic

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Abstract: The rule of law principle is an essential basis of European administrative law as an interpretative concept of the exercise of public powers in the EU and its member states. It is a broad principle encompassing substantial number of sub-principles impacting both the legislator and also the administrative bodies. The later ones must act only within their powers and only for proper purposes. Administrative bodies are subject to control as to whether their acts are in conformity with the applicable laws as the prerequisite for the rule of law proper operation is a system of independent judiciary review. The paper focuses mainly on the principle of legality and proportionality as the key elements of rule of law and their interpretation by the Czech administrative courts. Relevant case law is analysed and compared to the interpretation provided by the Court of Justice of the EU and the European Court of Human Rights. The paper summarizes how the recent developments on the European level affected the operation of rule of law in the Czech Republic.

Key Words: Administrative Justice, Europeanization, Good Governance, Legality, Proportionality, Rule of Law.

1. INTRODUCTION

The rule of law being a guarantee against misuse of power and linked to protection of human rights is an umbrella principle which encompasses a substantial number of other principles, some of them having their own independent existence. Although there has been a vivid academic discussion about its content, universal agreement has not been reached.² However, the majority of the scholars agree that the underlying value is the idea of constraint, which applies to officials as well as citizens. Thus, it comprises such elements as authorization of administrative bodies, correct exercise of their discretionary powers, proportionality, legal certainty and clarity, protection of legal expectations, transparency, legal liability for administrative action, and last but not least right to fair trial before independent court that is empowered to review the contested administrative body's action. This supervision is crucial to ensure public administration bodies' adherence to all other elements of rule of law. "Administrative actors must act within power and only for a proper purpose. Supervisory mechanism must exist to ensure that all actors conduct themselves in conformity with law; supervision gives substance to the rule of law." [9, p. 150]

The rule of law principle operates as an interpretative concept in most contexts of the exercise of public powers in the EU and its member states. As such, it is applied by courts when they exercise the supervision mentioned above. This contribution seeks to delineate the understanding of rule of law by the Court of Justice of the EU (hereinafter the "CJEU") and further also by the European Court of Human Rights (hereinafter the "ECtHR") through analysis of their relevant case law. Subsequently, influence of this case law on the Czech administrative courts practice is evaluated. Mainly, two independent principles contained in the rule of law – the principles of legality and proportionality – were chosen for the analysis. The principle of legality requires that all administrative action has to have a legal ground and that administrative bodies act within the legal framework, contained both in statutory laws and secondary regulations that were created by public administration. The principle of proportionality is

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² See e.g. Aagaard Tood S.: Agencies, Courts, First principles and the Rule of Law. In: *Administrative Law Review* 70, 2018, p. 2.

considered to be a tool to protect from excessive administrative acts and as such it can serve well as ground of judicial review.

2. METHODOLOGY

The main research question is whether and how the European Courts, the CJEU and the ECtHR have contributed to the application of the rule of law and of the principles of legality and proportionality by the Czech administrative courts when they exercise supervision over administrative bodies' decisions. For the purposes of this qualitative research, several different methods were applied as relevant. First, a comprehensive overview of the rule of law and the principles of legality and proportionality was made through literature review and normative-analytical method. Using systematic approach, the author analysed relevant case law of both the European courts and the Czech Supreme Administrative Court. This case law is studied using analogy, comparative method and inductive reasoning. In the conclusion a synthesis of the findings was carried out.

3. THE RULE OF LAW AND SUBORDINATE PRINCIPLES

The rule of law represents a fundamental value being the cornerstone of western democracies. The perception of what it exactly means and which principles are most crucial for its preservation depends on philosophical and legal traditions embedded in individual countries as well as on the societal context in which it is developed. There is an ongoing debate [4, p. 125], with some authors preferring a narrower concept while others a broader one. [2, p. 2] Agreement prevails that it is connected to the limitation of statehood on one hand and on the other it contributes to a social equilibrium where the vast majority of people accept to be ruled by legal norms, which then have a high probability of compliance. The state is governed by and has to adhere to the same rules as the citizens and these rules are applied indiscriminately. The state also ensures that the law is enforced.

It contains both elements that impact on legislative institutions and those which relate directly to administrative functions. [9] For purposes of this paper, the impact on administrative functions is to be examined. Most importantly, under the rule of law, the available forms of administrative acts are solely those contained within the statutory laws or based upon them (principle of authorization). Administrative bodies must exercise their powers solely for the proper purposes (ban on misuse of powers) and administrative discretion is not unlimited. The administrative acts need to be proportionate; proportionality also sets limits to the discretionary powers. Justification, predictability, consistency, transparency, efficiency and accountability are other principles contained in the multi-faceted rule of law. Last but not least, supervision gives substance to the rule of law, as any breach of the principles should result in invalidity of such acting. Independent and impartial courts should provide for a remedy.

The Czech Republic being a Central European country is traditionally close to the German and Austrian legal systems and their doctrinal interpretation of constitutional law and administrative law principles. The German understanding of rule of law (*Rechtsstaat*) is much more related to the separation of powers than the common law perception. *Rechtsstaat* implies the elimination of arbitrary authority and is the ideal of a fully democratic state respecting and protecting human rights. [17] For the *Rechtsstaat*, the role of administrative courts contributing to the checks and balances and preventing misuse of power by the executive, is of fundamental importance. The

principle of legality and principle of proportionality are core principles in limiting the administrative bodies' powers and as such often referred to by the courts when they ground their decisions on arguments related with the rule of law theory.

3.1 The Role of Principles in Adjudication and Interpretation of Legal Texts

The administrative courts provide remedy when administrative bodies fail to act according the laws. The trial before the courts needs to be fair and the review procedure should be accessible to wide range of applicants seeking protection while claiming that an administrative body breached binding legal provisions and thus infringement of their rights. The administrative courts should be bound by laws in their adjudication only. They review the application of abstract legal provisions on specific cases by administrative bodies. Doing so, they need to interpret the laws and check whether the interpretation presented by the administrative body in the contested decision is adequate and reasonable. One of the methods of legal interpretation, i.e. ascertaining the meaning of a rule created by the legislative power and contained in statutes, is the so-called teleological method. This method is used to capture the aim the legislator wanted to achieve by adopting the statutory law. The arguments that are used are the general principles of law, the values that the law is intended to promote and protect (the final goals of the law), and human rights. Therefore, the rule of law serves as a value and principle for interpretation of legal rules meaning. Whenever more interpretations of a legal text are possible, the one which is closest to the values of the society and general principles of law, should be chosen.

3.2 Principle of Legality

Administrative bodies must always act within the law, irrespective of its source. They have to adhere to statutory rules but also to the rules created by the public administration itself, in government or ministerial ordinances. However, the hierarchy of legal norms has to be respected. The law (both the substantive and the procedural) may not be violated as the executive branch needs to respect the primacy of the legislative power.

This requirement has several aspects. First, the administrative bodies must be authorized by laws when they act (their powers stem from the laws). Thus, they may not act *ultra vires*. They have to use the powers only for the purposes for which they were vested, not for improper purposes. Administrative discretion must be exercised within the limits set by the laws – administrative bodies may chose only from the tools foreseen by the laws and they may not impose sanctions other than within the range. Acting must be within the procedures set by the laws, including the equal treatment of participants, and such participant rights as right to provide evidence, to be represented, to access the file, and to appeal. The administrative body must conduct enquiries, gather necessary evidence in sufficient quantity to be able to ascertain the facts of the case correctly. It has to allow for participation of public, if the law grants for it, and the decisions have to be reasoned.

3.3 Principle of Proportionality

The principle of proportionality is based in German legal culture and is closely related to the rule of law. Over time, many continental constitutional courts and the ECtHR have begun to rely on it. It also became one of the fundamental principles of administrative law. It is a legal instrument by which the government is to be forced to comply with the legal rules contained in the statutory laws. State interventions should be minimal and should only be taken if they are necessary in the public interest. As such, it is intended primarily to address conflicts of public

interests on the one hand and private ones on the other. At the same time, the private interest may also have the nature of a fundamental human right to be affected by administrative action.

The principle of proportionality consists of three constituent parts - prohibiting abuse of discretion, protection of good faith and legitimate interests, and subsidiarity. These all elements stand as separate principles. Subsidiarity requires the administrative body to use the least intrusive means which still leads to the objective pursued. Public administration protects public interests which are often contrary to individual interests. Thus, it may not always avoid interference with rights of individuals, however this interference must be the softest possible. Thus, a reasonable measure, an acceptable compromise, is being sought. The degree of restriction in relation to the purpose of the restriction is assessed.

The proportionality test includes three basic criteria for measuring two interests. These are the criteria of suitability, necessity, and measurement of the relevance (importance) of two conflicting interests. The suitability criterion answers the question of whether a measure used by public administration restricting a certain private interest (or right) makes it possible to achieve the objective pursued. That is, whether the public interest can be achieved at all by using that particular measure. The criterion of necessity consists in comparing the instrument used limiting the private interest with other measures enabling it to achieve the same objective but not affecting that private interest. If another (milder) means could be used, this criterion will not be met. Finally, measuring the relevance of the two competing interests on the imaginary plates of scales is understood to be the proportionality in the strict sense.

4. THE CZECH REPUBLIC ON ITS WAY FROM PURE LEGAL FORMALISM TO APPLICATION OF GENERAL PRINCIPLES

As it was already explained above in section 3.1 how are the rule of law and other general principles used by courts as arguments for their interpretation of legal texts. However, principles were not used by judges in the communist regimes. The interpretation of laws was almost purely linguistic. The legal science disregarded anything like customary practice, impact of rules and their efficacy; it put an emphasis on written law. Basically, no unwritten principles existed.

Therefore, the courts disregarded principles as interpretation tools. The reasons for such formalistic approach were several. First, not dealing with any principles and rationale of law behind the text is a comfortable and practical way of deciding cases without deeper and time-consuming analysis. [12] Secondly, the communist judges were solving much simpler cases than their western colleagues (almost no administrative cases appeared before the courts, the commercial issues of businesses did not exist, as private businesses were not allowed to exist). [11] Some of the judges protected themselves while hiding behind the legal texts as they refused to serve the regime. Interpreting laws by values of contemporary society would mean interpreting with the help of Marxist doctrine which they did not believe in.

Hand in hand with the change of the regime came the change in legal thinking. However, the ordinary judges progressed rather slowly – in the Czech Republic as well as in other post-communist countries. They continued in their formalist reading of law focusing on the legal text only. However, the situation was different with the newly established Constitutional Courts. The Czech Constitutional Court exercising review of both constitutionality of statutory laws and constitutionality of individual decisions repeatedly emphasized the necessity of anti-formalist

way of interpretation³. Although some scholars joined this effort to fight the textual positivism,⁴ the legal academia predominantly approached new laws in an utterly textualist way. [10] Kúhn explains that “When it was necessary to solve a more difficult case, the judges, poorly supported by their legal academia, often sought a way out by disposing of the case on purely formalist grounds. In this way the simplified version of textual positivism and the ideology of bound judicial decision-making were able to survive. ... In post-communist countries, such an approach became untenable, however, as literally overnight the level of societal life became much more complex and the courts were faced with the post-Communist transition – in which they had to solve completely new issues such as commercial cases, privatization and new types of business practices – and to cope with an increased caseload.” [10]

The question this article is trying to find an answer is whether the formalist approach prevails with the administrative courts in the Czech Republic as well, or whether they tend to use the general principles of law in their interpretation. The cases discussed before administrative courts are often difficult and not suited to be decided only on the basis of a legal text. Therefore, the presumption is that the formalist approach is retreating and use of teleological arguments should prevail in difficult cases. In 2003 the Supreme Administrative Court was established. It does not comprise career judges only, as former legal practitioners and legal academics may apply to become a judge with this court. The Supreme Administrative Court decisions thus might be influenced by other views similarly to the situation with the Constitutional Court. However, Matczak, Bencze and Kúhn in their study of 2010 come to a conclusion, that “...formalistic approach to judicial decision-making seems to be a consistent strategy followed by the administrative judiciaries in ECE, with the Czech Republic judiciary being formalistic with regards to general principles application. This strategy is not in accordance with the approach taken by the legislative branches of government in these countries, which raises question over judicial deference to legislative value choices.” [13, p. 96] However, they also show in a study dedicated to decision-making during the years 1999 -2004 that compared to other ECE countries due to the influence of the Constitutional court the ordinary Czech courts tend to use for their argumentation standards external to law more often (approximately in 20% cases). [13, p. 92] Has this changed due to the Supreme Administrative Court case law?

³ See for example case Pl. ÚS 21/96 where the Constitutional Court emphasizes the necessity to abandon the formalist approach by explaining that ordinary courts are not: “...absolutely bound by the literal wording of a legal provision, and they can and must deviate from it if such a deviation is demanded by serious reasons of the law’s purpose, the history of its adoption, systematic reasons or any principle deriving from the constitutionally conform legal order ... In doing so, it is necessary to avoid arbitrariness; the decision of the court must be based on a rational argumentation.”

⁴ For example in 2000 Irena Pelikánová tried to rouse the judges when she wrote: “The aim is not to create new systems and new constructions, the aim is to understand the existing legal principles and solutions, whether they are in our own past or in other countries. In our situation, the idea of arriving at our own and better concepts is usually a perilous one that leads to the prolongation of that transitional stage between totalitarian and democratic law, to the introduction of new legislation by distorted pseudo-constructs, requiring laborious corrections in a number of subsequent amendments.“ [14]

5. THE RULE OF LAW IN THE CASE LAW OF COURT OF JUSTICE OF THE EU AND THE EUROPEAN COURT OF HUMAN RIGHTS

EU is a community based on the rule of law as was first found by the ECJ found in its landmark judgment *Les Verts*.⁵ Since then⁶, the ECJ continued to refer to this principle and explain that it is not of a mere rhetoric value. A high degree of consensus among the member states existed on the perception of rule of law as a “good thing”, however the individual states had different understanding of its content. After the collapse of communist regimes the rule of law became a shared political ideal of constitutional value and dominant concept together with democracy and protection of human rights, which was supposed to unite the previously divided Europe. Later, the member states amended the founding treaties confirming the importance of rule of law - namely in Art. 6 par. 1 TEU⁷. This article refers to not exclusively the rule of law, but also to principles of liberty, democracy, respect for human rights as principles common to the EU member states and ones on which the EU itself is founded. The Treaty, however, fails to define the rule of law principle, thus it is still left to scholars and judges to elucidate its meaning.

Unsurprisingly, its understanding by the ECJ has evolved during time. In the *Les Verts* case it was equalled not only to the right to judicial protection encompassing the right to a fair trial and right to obtain the final decision in a reasonable period of time, but the ECJ used the rule of law as an argument to reinterpret the wording of the Treaty regarding the annulment actions. The ECJ came to a conclusion that actions brought against the measures adopted by the European Parliament were intended to have effect vis-à-vis third parties. The rule of law comprises the principle of legality, thus the requirement that the public authorities (including EU institutions) enact measures in conformity with the hierarchy of norms system.

In *Hoechst*⁸ the ECJ stated that the principle of legality included the ban on acting beyond the competence (*ultra vires*).

Neither its Member States nor EU institutions can avoid review of the question whether their acts are in conformity with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to enable the ECJ to review the legality of acts of the institutions. Thus principle finds expression in the right, conferred on the applicants by the fourth paragraph of Article 230 EC, to submit the lawfulness of the contested regulation to the Court of First Instance, provided that the act is of direct and individual concern to him, and to rely in support of his action on any plea alleging lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application, or misuse of powers.⁹

⁵ Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23.

⁶ For further evolution of the ECJ case law see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 16; Case C-314/91 *Weber v Parliament* [1993] ECR I-1093, paragraph 8; Joined Cases II - 3621 JUDGMENT OF 21. 9. 2005 - Case T-306/01 T-222/99, T-327/99 and T-329/99 *Martinez and Others v Parliament* [2001] ECR II2823, paragraph 48; see also Opinion 1/91 of the Court of Justice of 14 December 1991, ECR I-6079, paragraph 21.

⁷ Art. 7 TEU, which was added later in 1997, allows for EU sanctions in case of serious and persistent breach of principles mentioned in Art. 6 par. 1 TEU by any member state.

⁸ Case C-46/87 - *Hoechst v Commission*.

⁹ According to CFI judgment of 21. 9. 2005 - case T-306/01.

More recently in the *Kadi*¹⁰ case the ECJ emphasised the fundamental nature of the rule of law principle from a material point of view. EU law must be always interpreted with a view of compliance with this principle.

Another consequence of the rule of law principle is the correct exercise of discretionary powers, which may not be abused for other purposes. Article 263 TFEU provides that the ECJ may decide on actions for annulment on the basis of misuse of powers. The principle of proportionality influences the correct exercise of discretion. When reviewing the exercise of power, the ECJ may not substitute its own assessment for that of the Community legislature, and must confine itself to examining whether the legislature's assessment contains a manifest error or constitutes a misuse of powers or whether the legislature clearly exceeded the bounds of its discretion.¹¹ This applies not only to legislative acts, but also to administrative decisions.

It is not always clear in the case-law how the examination of proportionality should be carried out.¹² According to some judgments the lawfulness of a measure can be affected only if it is manifestly inappropriate in relation to the objective which the competent institution seeks to pursue; some cases go even further by stating that what matters is not whether the measure adopted by the legislature was the only one or the best one possible. However, Kokott AG explains that when there are clearly less oppressive measures available which are equally effective, or if the measures adopted are obviously out of proportion to the aims pursued, the persons affected must be given judicial protection. Otherwise the principle of proportionality, which is part of primary law, would be deprived of its practical effect. Under what conditions a measure is clearly incompatible with the principle of proportionality has not yet been explicitly defined by the Court. The decisive criterion must ultimately be the consideration that the Community judicature must in principle not substitute its own assessment of difficult questions for the legislature's assessment.¹³ The same applies to administrative decisions.

The contribution of the ECtHR to expand the rule of law in the CEE countries can be seen particularly in its interpretation of Article 6 par. 1 of the European Convention on Human Rights and requirements that must be met by the national courts in order to consider the procedure led by them to be a fair trial. The judiciary's independence, impartiality and fairness of the trial are viewed to be essential for a democratic state based on the rule of law. The ECtHR interpretation of Art. 6 par 1 meaning also that broad access to judicial remedy in cases first decided by administrative bodies is part of the fair trial, and its interpretation of full jurisdiction in any civil matter and criminal matter influenced legislation governing the procedure before administrative courts in the Czech Republic.

6. IMPACT OF THE EUROPEAN COURTS APPLICATION OF THE RULE OF LAW PRINCIPLE ON THE CZECH ADMINISTRATIVE COURTS PRACTICE

Carlin links establishment of rule of law to wealth and to the degree and longevity of democracy. The more profound the rule of law is, the wealthier the society gets and the democracy is less struggling and more immune to negative political influences. He suggests five main typologies: Full Rule of Law, Incomplete Rule of Law, Peaceful Unrule of Law, Unstable Lawlessness, and Violent Unrule of Law. [3] It is obvious that the post-

10 Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the EU and Commission of the European Communities.

¹¹ Joined Cases C-248/95 and C-249/95 SAM Schiffahrt and Stapf [1997] ECR I-4475, paragraph 24, and Omega Air and Others, cited in footnote 10, paragraph 64.

¹² Kokott AG in Case C-558/07 SPCM and others [2009] ECR I-5783, pars. 73 – 77.

¹³ Ibid.

communist countries including the Czech Republic started their way up from the last category in 1990s and that they have not reached the top level yet. It is less obvious which country falls within which category. However, more important are the factors that influence the speed of the change and tools that support the rule of law promotion.

Hoff and Stiglitz explain how after the fall of communism in Eastern and Central Europe most observers agreed that were it politically feasible to establish quickly the rule of law to underpin a market economy as or before state enterprises were privatized, it would be desirable to do so. However, it was argued not to be politically feasible. Advocates of rapid privatization argued that granting individuals control of property would create a political constituency for the rule of law, where there is protection for private property rights. But there was no theory to explain how this process of institutional evolution would occur and, in fact, it did not. Although their paper is targeted at former Soviet Union, they name the Czech Republic as one of the unsuccessful countries expressly. They argue that the central reason was the weakness of political demand for the rule of law and show that the beneficiaries of privatization may fail to support the rule of law even if it is the Pareto efficient “rule of the game”. [8] Thus, it is obvious that the adherence to the rule of law principle did not come easily only with the change of centrally managed economy to a market one.

If the economic change did not bring about much progress and the local political demand for the rule of law is weak, then there is no other chance for the post-communist countries than to seek help from the outside by importing the values and principles through engaging themselves into organizations already associating states countries with more developed rule of law. The move from Unrule of Law to what I believe to be in the case of the Czech Republic the stage of Incomplete Rule of Law happened through cooperation with western countries. The necessity to create the same level of human rights protection throughout Europe and legal environment similar to the western democracies was the most important factor influencing this change. The law, its interpretation, principles and values used by the western democracies (and thus the European courts) play most important role. The mutual influence of legal orders of different national systems has become more intensive in the second half of the twentieth century with the establishment of international organizations promoting protection of human rights such as the Council of Europe. As already explained above, the Czech Republic joined the western countries only after the fall of the communist regime in 1989. The return to Europe (including adherence to the rule of law principle) was supposed to happen through membership of the Council of Europe and later the EU. The EU played a much more fundamental role due to its detailed sets of membership conditions and forms of political pressure. [16, p. 341] The national laws needed to be harmonized with the *acquis communautaire* before accession could finally happen. The harmonization also meant that interpretation of the harmonized rules should be the same as in the rest of the EU member states. Thus the argumentative style of the judiciary needed to undergo changes as well. The Council of Europe, on the other hand, used its soft law recommendations and resolutions which were to be adopted in the new member states due to their own commitments rather than under pressure of any sanctions.

6.1 Principle of Proportionality in Case Law

The principle of proportionality is a measure originally elaborated by the German Constitutional Court to compare the importance of two conflicting human rights which. Many continental constitutional courts, as well as the European Court of Human Rights, began to rely on it over time. It has also become one of the fundamental principles of administrative law. As such, it is intended primarily to address conflicts between public interests on

one side and private interests on the other. State interventions should be minimal and should be allowed for only when they are necessary in public interest.

The Czech Code of Administrative Procedure¹⁴ contains the principle of proportionality in Section 2 (3) which explicitly states that the administrative authority may intervene only to the extent which is necessary. Together with other principles it applies to the exercise of all administrative activities. For the purposes of this contribution analysis, the zoning plans which are issued in the form of a binding general measure,¹⁵ were chosen. Zoning plans are a particular type of administrative activity, which often results in interference with individual rights and interests. The owners of real estate property situated in the area covered by a zoning plan may often feel that their individual interest in using their property in a way they prefer is prejudiced by the land utilization prescribed in the zoning plan. On the other hand, the municipalities need to set mandatorily the areas that shall be used for different purposes in their territory. Thus, the conflict of an individual and public interest is inherent to the zoning plans and the administrative courts have to review the level of compliance with the principle of proportionality. Permissible might be only such changes in land use interfering with property rights which are necessary in order to protect public interests. Moreover, their impact may not exceed a reasonable rate.

Article 1 of Additional Protocol 1 to the European Convention on Human Rights (hereinafter referred to as "the Convention") protects individuals against infringements of property rights at the European level¹⁶. Therefore, at the European level, the judgments of the ECtHR substantially influence the perception of what constitutes an interference with property rights. The ECtHR does not prohibit states from interfering with property rights, it only requires that the measure resulting in such intervention successfully passes the test measuring the public interests and interests of the individual. The state has a relatively wide margin of discretion. [6, p. 514]

The ECtHR uses a five-step balancing-test for the interventions it assesses.¹⁷ The last and most important step of the test is the proportionality of state's intervention. Careful approach of the ECtHR is eminent to all the cases – the excess must be flagrant, thus the public interest should prevail, unless the intervention is manifestly not in accordance with the principle of proportionality. It can be generalized as the outcome of the ECtHR case law¹⁸ on breach of the ownership right through zoning plans and similar measures analysis that the ECtHR seeks answers to the following questions:

- Was a fair balance pursued?
- How flagrant is the excess?
- Did the individual have to endure excessive burden?

¹⁴ Act No. 500/2004 Sb., the Administrative Code, as amended.

¹⁵ A measure that is defining specifically the matter (the plots of land concerned) and abstractly the subjects (all current and potential future land owners). The procedure of their issuance is covered by Articles 171 – 174 of the Administrative Code.

¹⁶ The wording of Art. 1 "Protection of property" is as follows: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

¹⁷ The five step test comprises these questions: 1. Is it ownership within the meaning of Article 1 of Additional Protocol 1?; 2. Is it an interference with the peaceful use of property?; 3. Is it an intervention on a legal basis?; 4. Has the public been interested in the intervention?; 5. Was a fair balance between the public interest and the interference with the guaranteed right pursued? In particular, the proportionality of the intervention is monitored in this step.

¹⁸ *Pine Valley Developments Ltd v. Ireland* of 21st November 1991, App No 12742/87 (A/222).

- Were procedural guarantees granted?
- What was the level of the individual's uncertainty?
- To what extent was the approach arbitrary?
- Were the principles of Good Governance adhered to?
- How long did the interference last? A long lasting "tolerable" interference becomes not proportionate.
- Was a compensation offered? It does not need to be equal and the ECtHR does not require it, if the ownership right is only „restricted“.

Thus the presence of procedural guarantees seems to be most important. The test of proportionality is also applied by the Czech Supreme Administrative Court (hereinafter the "CSAC" only) in review of challenged zoning plans. Its application is analogical - the context is most important.

In its consistent case-law, the CSAC concludes that even intensive intervention is necessarily not be disproportionate if the principle of subsidiarity and the minimization of such intervention are respected.¹⁹ This consists in the cumulative fulfillment of the following conditions:

- The intervention serves a constitutionally legitimate objective which is supported by the aims pursued by statutory laws;
- The intervention is implemented to the extent which is necessary;
- The intervention is effectuated by the most gentle of the ways still leading to the intended goal;
- The intervention is conducted in a non-discriminatory manner;
- The intervention is accomplished with the exclusion of arbitrariness.

It may be concluded that the arguments evaluated by CSAC when balancing the individual rights and public interest are similar to those elaborated by the ECtHR. The inspiration is obvious, several decisions expressly quote the ECtHR case law.²⁰

6.2 Principle of Legality in Case Law

The principle of legality is mentioned in abounding numbers of CSAC decisions as breach of law is the sole reason for quashing of the contested decision. However, ECtHR case law is mentioned in the argumentation part of decisions most usually in connection with Art. 6 par. 1 of the European Convention. Adjudication on whether the trial met the conditions to be fair is most often connected with questions on sufficiency of the review, full jurisdiction and similar. Usually in cases with a difficult legal argumentation and when there has been no Constitutional Court decision yet.

Still, formalistic interpretation has not disappeared from decision of the administrative courts including the CSAC. This can be demonstrated on a case concerning thwarted demonstration against the visit of Chinese president. The

¹⁹ The extended chamber of CSAC in its leading decision No. 1 Ao 1/2009-120 of 21st July 2009 came to this conclusion: "IV. The condition of the zoning plan's legality, which the court always examines in proceedings under § 101a et seq. s., is that all restrictions on ownership and other substantive rights arising therefrom have constitutionally legitimate objectives and are only done inevitably to the extent necessary and in the most prudent of the ways still leading to the intended objective, in a non-discriminatory manner and excluding arbitrariness (subsidiarity and minimization of intervention). V. Assuming that the principle of subsidiarity and minimization of intervention is respected, a land-use plan (its change) may result in restrictions on the owner or others holders of rights in rem over land or buildings in the territory regulated by this plan, if they do not exceed the righteous peace; such restrictions do not require the consent of the proprietor concerned and the latter is obliged to tolerate them without compensation. "

²⁰ E.g. case No. 1 Ao 4/2011 of 31st August 2011.

Czech Constitutional Court in its decision No. III. ÚS 2634/18 of 15th January 2019 overruled the previous judgments of Prague Municipal Court and the CSAC which both dismissed an action against a decision on closure of roads. The action was filed by applicants who summoned a demonstration near the Prague castle. After they have announced the demonstration in accordance with the Czech statutory laws, the Prague municipality decided on closure of the roads and the Hradčany square. Later, police prevented the coming demonstrators from entering the square. The action was dismissed on rather formalistic grounds, as the claimants did not file an appeal against the decision on closure, even though according to previous CSAC case law the individuals notifying demonstrations were not in a position of participants in the administrative procedure discussing road closure. The Constitutional Court ordered the administrative courts to measure the public interest in national security and protection of lives and health of people on one side, with the right to gather and demonstrate on the other.²¹

7. CONCLUSION

The rule of law is a multifaceted legal principle. Normative impact thereof should not be underestimated. In difficult cases when the law cannot be interpreted solely on the ground of text analysis, but teleological argumentation becomes necessary, the rule of law together with other principles helps the proper interpretation of laws. However, the post-communist countries with the legacy of extreme legal formalism, find their way to using legal principles on regular basis in argumentation of ordinary (including administrative) courts with difficulties. The fastest way to introduce these principles into everyday decision-making of the CEE courts seems to be assuming the already existing western democratic countries legal theory and case law of the European courts building on the rule of law principle. The article tackles the question whether the ECJ and ECtHR judgments have provided fundamental standards used by the administrative courts in the Czech Republic. Due to the Czech understanding of rule of law being affected by the German legal science, mainly two sub-principles, the principle of legality and the principle of proportionality were chosen for the analysis. Judgements of the Czech Supreme Administrative Court quoting the case law of the ECJ and ECtHR were identified. However, the principles are not always stressed. There seem to be specific legal institutes (such as the review of zoning plans) where principles of legality and proportionality as control mechanism for review of administrative activities have become used on ordinary basis. Still, not just rarely, the more formalist approach can be detected in cases when judges tend to find any defect, however trivial, in the plaintiffs claim to avoid reaching the merits of the case. To summarise, impact of the European courts case law argumentation through general principles on Czech administrative courts was discerned mainly in the case law of CSAS. However, it is often difficult to distinguish whether this is due to direct impact of European courts case law, or because of similar arguments used by the Czech Constitutional Court.

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²¹ However, the case was more complicated as the type of administrative action selected by the claimants was also discussed. The Constitutional Court confirmed the opinion of administrative courts, that the claimants may not choose the type of action freely and the courts do not have a duty to inform the claimants which type of action is suitable for their case.

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