CALS 1 – Introduction „Contemporary Administrative Law Studies”

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Editorial

The following yearbook "Contemporary Administrative Law Studies" represents one of the outcomes of the project called "Procedural Modernization of Public Policy and Public Administration in the Czech Republic and in other EU-countries". Its first volume introduces the project team, whose members address in their papers selected problems of the process of public administration reform in the Czech Republic and refer especially to those problems, which they are within the above mentioned project implementation specialized in.

Prof. JUDr. Eduard Vlček, DrSc. focuses in his paper on the creation of the first Czechoslovakian Republic and the constitution of modern public administration in Bohemia, Moravia and Silesia and analyses also the special legal situation in Slovakia and in Sub-Carpathian Ukraine from both political and legal points of view.

JUDr. Monika Horáková, Ph.D. presents in this yearbook her article with the topic "The Service Act as One of the Elements of Public Administration Modernization in the Czech Republic", in which she focuses on the question of public service and the adoption of the new Service Act as one of the most important steps in the process of public administration reform in the Czech Republic. Her article covers also a brief description of the Service Pragmatics of 1914 as primary source of public service legal regulation in the Austrian-Hungarian Empire and later in the First Czechoslovakian Republic, which was one of the inspiration sources for the new Service Act of 2002.

JUDr. Olga Pouperová analyses in her paper one of up-to-date problems, i.e. public private partnership in the Czech law, defines the term "Public Private Partnership" and brings its characteristics in the Czech law with reference to the recently adopted Act. No. 139/2006 Coll., on Concession Contracts and Concession Proceedings (in the article referred to as trade permit contracts).

Mgr. Ivo Beneda concentrates in his paper on legal regulation of so-called public contracts, analyses their difference from private contracts and introduces all types of public contracts that exist under the Czech law.

JUDr. Ing. Filip Dienstbier, Ph.D. introduces in his article one of the new instruments of the modern Czech public administration so-called Measure of General Character, which has been implemented into the Czech Law by the new Administrative Code in 2006. The article contains the definition of the Measure of General Character,

its significant features and determines the possible benefits of having this instrument incorporated into the Czech legal order.

Mgr. Magdaléna Peterková focuses in her paper on active access to information concerning environment as one of the means of public administration modernization and emphasizes in this respect the principle of good administration according to which the public administration shall be convincing, open, transparent and helpful in relation to its addressees – citizens. In her paper she also specifies the relation of two Czech laws concerning the access to information, i.e. the Act No. 166/1999 Coll., on Free Access to Information and the Act No. 123/1998 Coll., on Right to Information on Environment.

JUDr. Veronika Vlčková concentrates in her article on Spatial Planning as one of the major instruments of the territorial development. Spatial Planning in the Czech Republic is regulated in the Building Act, i.e. Act No. 183/2006 Coll., on Spatial Planning and Building Code, which entered into force on January 1st, 2007. The adoption of the new Building Code is also considered as one of the major steps of the public administration reforms in the Czech Republic because the former Building Code was adopted 30 years ago in 1976. JUDr. Vlčková focuses in her article on the instruments of spatial planning and compares the Czech system with the Austrian system of the spatial planning instruments.

Doc. PhDr. Vlastimil Fiala, CSc. supplies the yearbook with the article from the field of political science and presents his research on the role of political participants in the process of decentralization in one of the EU member states – in the Dutch Kingdom analyzing one of the major features of the public administration reform, i.e. decentralization of public administration.

At the end of this short editorial I would like to thank to all my project colleagues for their co-operation on this first issue of the yearbook "Contemporary Administrative Law Studies" and to express my hopes of success of the whole project "Procedural Modernization of Public Policy and Public Administration in the Czech Republic and in other EU-countries".

JUDr. Monika Horáková, Ph.D.
Project Leader

Content

Some Aspects of Public Contracts Typology

Mgr. Mgr. Bc. Ivo Beneda

Public contracts are considered a modern form of democratic public administration activities. In order to achieve objectives of public administration, they enable a voluntary cooperation of two or more contractual parties instead of using a mandatory rule, which determines rights and duties of addressees, or an authoritative administrative act.

Although public contracts (as a progressive institute of the administrative law) have been enforced successfully in a lot of European countries, especially Austria, the Federal Republic of Germany, Switzerland or France, their regulation in a Czech legal order has been non-conceptual and incomplete for a long time. With the exception of one amendment regarding municipal proceedings (the Act No. 313/2002 Coll.), the specification of basic elements of public contracts and laying down a procedure regarding entering into these contracts were missing completely. Only the adoption of new Code of Administrative Procedure effective from January 1st 2006 (the Act No. 500/2004 Coll. – hereafter just the Code of Administrative Procedure, abbreviated as CAP) provided a general and a more or less complex regulation.

Public contracts were not, however, an unknown concept even in jurisprudence of administrative law of the Czechoslovak Republic. The concept was, however, very questionable. While public contracts were recognized in practice, "theoreticians were not uniform in this issue", as J. Hoetzel mentioned.[1)] A frequent argument in those cases was especially the emphasis on the very nature of public law which was that "the state and a citizen are not at the same legal level, that

1) In the Czech language see: Hoetzel, J. *Československé správní právo. Část všeobecná.* Praha : Melantrich, 1934. p. 253.

public law, as a subject of authoritative power, is superior to the citizen. As a result, the state shall not negotiate with the citizen about its supremacy."[2)]

J. Prazak was also sceptic about public contracts: "The agreement of participants is always a mere preparatory act, which is due to the nature of public Code. Ultimate decision is a result of authoritative proclamation of public power."[3)]

J. Hoetzel and A. Merkl[4)] even considered public contracts a kind of administrative acts.

The same opinion expressed J. Posvar in his post-war textbook of administrative law.[5)]

Not even the term "public contracts" is quite clear. In the past equivalent terms like "public contracts"[6)] or "administrative agreements", possibly "agreements of administrative nature"[7)] were used in the theory.

Professor Hoetzel dealt with "public contracts" in detail in the 1930s. In his opinion, their existence is determined by accumulation of the following features[8)]:

1. the consenting mind of at least two contractual parties,

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2) Hoetzel, J.: the above cited work, p. 254

3) In the Czech language see: Pražák, J. *Rakouské právo veřejné. Part 2*, *Rakouské právo správní. č. 1, Všeobecná část práva správního*. Praha : Jednota právnická, 1905. p. 112–113.

4) Compare in the Czech language: Hoetzel, J.: cited work, p. 255 and the following; and Merkl, A.: *Obecné právo správní. Part two*. Praha : Orbis, 1932. p. 21.

5) Compare in the Czech language: Pošvář, J. Obecné pojmy správního práva. Brno : ČSAS Právník, 1946. p. 82 and the following.

6) This term was used e.g. by Jiří Hoetzel. Compare Hoetzel, J. *Československé správní právo. Část všeobecná*. Praha : Melantrich, 1934. p. 253 and the following.

7) In detail see in the Czech language: Průcha, P. Správní právo procesní na rozcestí aneb „je tu nový správní řád". *Časopis pro právní vědu a praxi*, 2005, no. 3, p. 288.

8) Hoetzel determined the features of a public contract already in the 1930s without time restriction. More see in the Czech language in Hoetzel, J.: cited work, p. 255 and the following.

2. consents must be linked together, one consent is done in anticipation of another consent,
3. legal consequences of contracts relate to contractual parties, and
4. between participants to a contract a public relationship is established, altered or dissolved

Current theory of administrative law characterizes public contracts similarly as Hoetzel. A public contract is understood as a bilateral or multilateral legal act establishing, altering or dissolving rights and duties in the sphere of public law. The same legal definition can be found in the Code of Administrative Procedure in the § 159, sec. 1.

Although, from the formal point of view, public contracts have quite a number of common features with private contracts – both are bilateral or multilateral acts established on the basis of two or more consenting minds (the so called contractual consensus), P. Mates points out that " there are differences between them as public contracts are of a public nature and the rate of contractual autonomy of their participants is significantly limited due to the fact that the principle according to which everything is permitted unless prohibited by law is not applied."[9] This holds true even though the law may refer to the Civil Code or other private regulations in particular matters.

Fundamental criteria differing **public contracts** from private contracts are:

1) public contracts regulate public subjective rights and duties resulting from Code of administrative law;
2) there is no big freedom of contract when concluding public contracts as it is in private law (see § 51 of the Civil Code). A precondition of their conclusion is the existence of an express legal basis. The idea of a democratic rule of law is applied here when the state, namely its authorities, may act, i.e. perform the state power only under the law and within the manner established by law. (§ 2, sec. 3 of the Constitution);

9) In the Czech language see Mates, P. Veřejnoprávní smlouvy podle obecního zřízení. *Právní forum,* 2006, no. 7, p. 257.

3) the subject-matter of public contracts is to ensure the performance of public tasks (public administration tasks) which would not be assumed by the other party or would be assumed just partly due to their economic disadvantage;
4) they are usually concluded instead of the issuance of some administrative act as an authoritative act while preserving the authoritative character as an administrative act can be issued as a sanction (presupposed under the law)for non-performance of a public contract;
5) a basic feature which is usually mentioned is the determination of contracting parties where at least one of them is a party of public administration. However, it is not always like that.

The Types of Public contracts

Public contracts are traditionally divided according to contractual parties into two groups, namely **coordinating contracts** – concluded between entities of public administration and **subordinating contracts** – concluded between the entity of public administration and the addressee of public administration, i.e. natural or legal person against whom the execution of public administration is taking place.

Taking into account a prevailing current definition stating that one of the parties must be a public administration body, then the Code of Administrative Procedure regulate the so called coordinating public contracts in § 160, the so called subordinating public contracts in § 161 and newly in § 162 the so called public contracts regarding the transfer or manner of the execution of public subjective rights or public subjective duties[10] (between two private persons), often also defined as the so called public contracts of a mixed type.

As **coordinating contracts** can be defined, according to the provision of § 160 of the Code of Administrative procedure, contracts that can be concluded by

10) In the Czech language compare: Havlan, P. In Skulová, S. – Průcha, P. – Havlan, P. – Kadečka, S. *Správní právo procesní*. Praha : Eurolex Bohemia, 2005. p. 255.

the state, public corporations, other legal entities established by law, legal and natural persons in order to perform tasks of public administration, if they perform jurisdiction within public administration entrusted to them by law or under the law. These persons can enter into public contracts, whose subject-matter is the execution of state administration, if so provided by a special law and only with the consent of a superior administrative authority. Such consent is issued in the form of an administrative decision and the superior body considers a public contract and its content in accordance with legal regulations and public interest.

Territorial self-governing units can also enter into public contracts whose subject-matter is the performance of tasks resulting from their independent jurisdictions when enforcing public power, which is possible only if a special law so provides.

As for the coordinating contracts it must be pointed out that only a party having legal personality, i.e. the entity of a public administration, not an administrative authority acting instead of it with no legal personality, can be a contracting party. The exception is a provision of § 160 of the Code of Administrative Procedure presuming concluding agreements *sui generis* between administrative authorities which are not public contracts.[11)] This concerns situations when at least one of the contracting parties is an organizational unit of the state. The actions of the state are regulated in detail by the Act No. 219/2000 Coll. regarding the property of the Czech Republic and its acting in legal relations, as amended by further legislation.

A typical example of coordinating public contracts is a contract concerning the performance of the municipal police tasks concluded under § 3a of the Act No. 553/1991 Coll. regarding the municipal police, as amended by further legislation, or an agreement on consolidation of municipalities or joining one municipality to another municipality under § 19 of the Act No. 128/2000 Coll. on municipalities, as amended by further legislation.

Another type of public contracts is presented by **subordinating contracts** which may be concluded, in accordance with the provision of § 161 of the Code of Administrative Procedure, by an entity of public administration on the one

11) In the Czech language see: Vedral, J. *Správní řád. Komentář*. Praha : Polygon, 2006. p. 913.

hand with an addressee of public administration on the other hand, i.e. with a person who would be a participant in the proceedings under § 27, sec. 1 of the CAP, if the proceedings took place in accordance with part two of the CAP and also instead of the issuance of a decision. Subordinating contracts can be entered into, only if so provided by a special legislation.

A condition of the effect of such a contract is a consent of other persons who would be participants in administrative proceedings under § 27, sec. 2 or 3 of the CAP. In this connection Vedral points out that the consent of other potential participants in proceedings is also necessary under § 27, sec. 1, letter a) of the CAP, according to which also other involved persons are participants in proceedings and the decisions of an administrative authority shall apply to them because of the joinder of parties.[12)]

The addressees of public administration act as equal partners with the entities of public administration when entering into subordinating contracts.

The legal regulation and subsequent implementation of these contracts enable the entities of public administration to replace the issuance of an authoritative act (administrative act) in the form of a decision by a conclusion of a (non-authoritative) contract. Such a contract can be concluded even after the commencement of administrative proceedings.

A special consequence of a possible violation of duties established by a subordinating contract then logically consists in the fact that the entity of a public administration can replace a contractual provision by the issuance of an administrative act where the duties of a participant are specified again but thanks to the form of a decision already by an enforceable manner. This is where the authoritative prevalence of an administrative authority over the other party to a contract can be seen, which is inadmissible in private law.

Within this group of contracts belongs e.g. the agreement regarding the creation of a protected working place under § 75 of the Act No. 435/2004 Coll. on employment, as amended by further legislation, or the contract regarding preventive measures under § 39 of the Act No. 114/1992 Coll. on the protection of nature and landscape, as amended by further legislation. Vedral correctly points out that

12) Compare in the Czech language Vedral, J.: cited work, p. 921 and the following.

also a new Building Act effective from 1st January 2007 counts with the possibility of concluding a public contract. It is possible to conclude a public contract instead of a planning permit and also instead of a building permit.[13)]

However, the possibility to conclude public contracts between an administrative body and a private party might be risky unless the procedure of accepting a public contract is precisely regulated by a special legislation. In practice the applicant might present his purpose to potential participants in proceedings resulting in their consent with the content of the proposed contract. As the proposed contract does not solve problems in detail as it is common when a decision is issued, the conflicts might arise subsequently as they would not be solved transparently during proceedings.

As a condition of the effect of a public contract is, as I have already mentioned, a written consent of other persons who would otherwise be participants in proceedings under § 27, sec. 2 or 3 of the CAP, it is possible, if these persons are afraid of the abuse, to prevent the conclusion of a public contract, possibly to make a consent dependent on precise conditions of its content. These participants are in a much stronger position, when concluding public contracts, than in standard administrative proceedings directed at the issuance of a decision. Vedral even mentions the veto power. Without a written consent of these participants this sort of a public contract cannot be concluded, while in administrative proceedings they can only offer evidence and make other proposals (§ 36, sec. 1), which must be determined and adjusted by an administrative authority in the reasoning of a decision.

In general, however, a disagreement of these participants does not prevent an administrative authority from the issuance of a decision.

The third type of public contracts regulated in the Code of Administrative Procedure are the so called **public contracts regarding a transfer or manner of execution of public subjective rights or public subjective duties** (between two addressees of public administration). These contracts are in a legal theory sometimes defined as public contracts of a mixed type. In accordance with § 162 of the CAP, these contracts can be also concluded by those who would be partici-

13) See in the Czech language: Vedral, J.: cited work, p. 923.

pants in proceedings under § 27, sec. 1 of the CAP, if the proceedings took place in accordance with part two, possibly those, who are participants in such proceedings (provided the proceedings are taking place) and whose subject-matter is a transfer or manner of execution of public subjective rights or duties, unless this is excluded by the nature of a thing (e.g. inseparable link of a right or duty with a particular person) or except when otherwise provided by a special statute.

An example of such a public contract, whose subject-matter is a transfer or manner of execution of public subjective rights or duties, can be e.g. a contract concluded under § 11, sec. 3 of the Act No. 254/2001 Coll. regarding waters on the basis of which a person, having a valid permit concerning a disposal of waters, can enable the execution of his permit to a different person, unless provided otherwise by the Water Management Authority, or a contract concluded under § 27, sec. 7 of the Act No. 44/1988 Coll. regarding the protection and use of natural resources (the Mining Act), under which an organization can by contract transfer the mining area, which was established by the decision of a district mining authority, onto another organization, while the consent of a district mining authority is also necessary. Another example of such a public contract is an agreement on the transfer of registration under § 26b of the Medicines Act according to which the holder of the decision on registration can transfer the registration onto another natural or legal person subject to the consent of the State Institute for Pharmaceutical Control or the Institute for State Control over Biopreparations and Pharmaceuticals.

For the conclusion of a mixed public contract the consent of an administrative authority is always necessary. It examines whether the respective contract is in compliance with legislation and public interest. As the provision of § 162 of the Code of Administrative Procedure does not specify which administrative authority has subject-matter jurisdiction regarding entering into particular public contracts, we can agree with Vedral that this administrative body will be an administrative body having subject-matter jurisdiction over performance of administrative proceedings, if the public contract was not concluded but ordinary administrative proceedings took place.[14)] The consent is issued in the form of a reviewable administrative decision. As P. Havlan states: "A public contract is validly created only

14) In the Czech language see: Vedral, J.: cited work, p. 924.

after the consent of an administrative authority had been granted."[15] However, the consent is not required where an administrative authority joins a public contract between participants. Then it applies, under § 162, sec. 2, that the administrative authority granted a consent to conclude a public contract.

Although the law does not expressly say so, the administrative authority should issue a reasoned and reviewable decision regarding the accession to the contract; otherwise it would not be possible to check the reasons and correctness of the procedure replacing an administrative act, which would otherwise be issued in this matter. This situation is unacceptable in public administration as it would be contrary to the principle of predictability and protection of public interest.

A precondition of the effect of a contract directly concerning the rights or duties of other involved persons (i.e. affected persons or other participants under § 27, sec. 2 or 3) is a written permit of these persons expressing consent with the content of the contract. If this written permit is not obtained and the main participants in proceedings file an application, then the administrative authority is obliged to issue a decision in administrative proceedings instead of conclusion of a public contract.

Stasa reminds in this connection that the content of a contract can be both the transfer of public duties during the performance of public duties and conciliation or other agreement leading to the removal of variances or lack of clarity between parties.[16] Considering the procedural equality of participants, such contracts are coordinating contracts in this regard but only as far as the relationship between participants is concerned. Considering the authoritative power of an administrative authority enabling to approve or disapprove such a contract or accede to it, we speak about a subordinating relationship.

The three types of public contracts, their general specification as well as the embodiment of their principles in the new Code of Administrative Procedure create conditions enabling, at a general level, to enter into a public contract instead of the issuance of an authoritative act. The use of these public contracts should

15) In the Czech language see: Havlan, P. In Skulová, S. – Průcha, P. – Havlan, P. – Kadečka, S. *Správní právo procesní.* Praha : Eurolex Bohemia, 2005. p. 256.

16) In the Czech language compare: Staša, J. In Hendrych, D. a kol. *Správní právo. Obecná část*. 6th edition. Praha : C. H. Beck, 2006. p. 255 and the following.

ensure not only the simplification and effectiveness of the execution of public administration towards public, but the proper use of these contracts might result in a different and in most cases better opinion on authorities executing public administration, namely municipal and regional authorities.

Public contracts stand a chance to become a means of a more sophisticated effectiveness of the execution of public administration towards citizens.

Are Measures of a General Character the Tools of Modern Czech Public Administration?

JUDr. Ing. Fillip Dienstbier, Ph.D.

The modernization of public administration is, in the advanced democratic world, usually understood as the improvement of its effectiveness, rationality and transparency, often connected with a considerable use (as far as both the extent and systems is concerned) of information technologies.[1)] However, in a specific post-totalitarian setting also the strengthening of legality of public administration, i.e. introducing or specifying its legal regulation must be an integral part of modernization of public administration, which is especially in the interest of the persons involved whose rights are to be protected by administration.[2)] This is undoubtedly true also for the Czech Republic at the beginning of the 21st century.

The Czech public administration and its legal regulation, the administrative law, have undergone, as well as the whole Czech legal order, two extremely dynamic periods of its development (especially quantitative development). First, the period of 1990s for which the renewal of democratic conditions and reintroducing a state respecting the rule of law were typical. Immediately afterwards preparations concerning the admission of the Czech Republic to the European Union and the access itself followed. As a result, the duties of public administration regarding both the number of spheres of its operation and the types of measures exercised in these spheres by public administration have increased.[3)]

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1) In the Czech language see e.g.: Princl, P. Vliv IS/ICT na modernizaci procesů ve veřejné správě. In Louda, T. – Grospič, J. – Ostrá, L. *Modernizace veřejné správy*. Plzeň : Aleš Čeněk, 2006. p. 192 and the following; for the concept of modernization of public administration see e.g.: Grospič, J.: K otázkám transformace, reformy a modernizace veřejné správy, ibid p.13 and the following.

2) In the Czech language see: Grospič, J.: opus cit. sub 1

3) The protection of environment is not quite typical; nevertheless, the range of this legal regulation has increased about ten times.

This, almost a spontaneous, development of public administration and administrative law resulted in extensive entropy both in the area of organization of public administration and also as regards the forms of activities of public administration and their legal regulations. This results from the fact that unlike other legal branches, particular administrative regulations are prepared by numerous administrative authorities. Unifying mechanisms (whether interdepartmental comment procedure or, in particular, the activities of the Legislative Council of the Government) are obviously not satisfactory; speaking nothing of endless legislative activities of the deputies of the Parliament.

Public administration is to be reformed; it calls for a more rational arrangement.

The reform of the organization of public administration has undergone its third phase, namely the reorganization of central state administration and its bodies.[4] The question is whether this stage of the reform is going to be successful as it is prepared and is to be carried out by those bodies.

As for the activities of public administration and its legal forms, the adoption of new Code of Administrative Procedure[5] presents a great step forward. The Code of Administrative Procedure have not introduced any new legal forms of the activities of public administration, however established general procedural (not only) Code. This is a significant achievement which has enabled to classify diverse existing acts into basic forms of activities. The institute of the measure of a general character is a clear example of this situation.

A measure of a general character is considered the so called mixed administrative act[6]; it is a sort of transitional form between an individual administrative act on one hand and a decree on the other hand. Whereas the administrative act regulates (or declares) the rights of individually determined persons and only in

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4) Compare the Governmental Proposal of the Public Administration Reform, chamber publication No. 196 (3rd term of office)

5) The Act No. 500/2004 Coll., the Code of Administrative Procedure

6) In the Czech language see: Průcha, P. K tzv. Dalším úkonům správních orgánů. In Vopálka, V. (ed.). *Nový správní řád – the Act N. 500/2004 Coll., správní řád.* Praha : Aspi, 2005. p. 221.

a particular concrete thing[7)], the decree is on the other hand an abstract act aimed against the uncertain amount of persons in the uncertain number of cases of the same kind. The administrative body regulates the rights and duties of the uncertain amount of persons in relation to a particular concrete thing by a measure of a general character.[8)] In this regard the measure of a general character can be also understood as a special case of an administrative act.[9)]

With respect to the above mentioned facts, basic conceptual features of a measure of a general character can be defined as follows:

- the act of an administrative body (administrative act *sensu lata)*
- unilateral
- binding effect
- concreteness of the object
- addressability to the uncertain number of addressees (their number is determined by their relations to the object).

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7) This, in the past a theoretical definition, is nowadays positively reflected in § 65 section 1 of the Act No.150/2002 Coll., the Court Code of Administrative Procedure, further in § 9 of the Code of Administrative Procedure.

8) In some conceptions a measure of a general character can also be abstract as for the object and individual (concrete as for the addressees). In detail see in the Czech language: Hendrych, D. K institutu opatření obecné povahy v novém správním řádu. *Právní rozhledy,* č. 3/2005 s. II). The Supreme Administrative Court reasons why such an abstract and individual act is in its opinion a normative act – a legal rule in the Czech legal environment (in the Czech language see: rozsudek ve věci sp. zn. 1 Ao 1/2005-98, published as decision No. 740 in No. 1/2006 Coll. NSS).

9) Compare § 35 of the Code of Administrative Procedure of the Federal Republic of Germany from 23rd January 2003.

The Code of Administrative Procedure have introduced a concept of *the measure of a general character* as a unified general term of a particular form of an administrative action[10], not the legal form itself.[11] The acts of administrative authorities complying with the features of a measure of a general character had been incorporated in the Czech legal order long before the adoption of the Code of Administrative Procedure. In the absence of a general regulation of the elements of this form of action of public administration, it was necessary to regulate basic legal issues regarding all particular acts. The extent and quality of these regulations were and are very different. When the general legal regulation was adopted, legislators wanted for "*affected persons a guarantee of minimum procedural rights also in case the act of an administrative authority concerns their interests, even though it is not possible to specify the participants by name"*[12].

What is the present legal situation? A general regulation of the procedure of preparing and approving measures of a general character and possible ways of its reviewing (part VI. of the Code of Administrative Procedure, namely § 101a and subsequently of the Code of Administrative Justice[13]) has been adopted. The possibility of application of this regulation to particular acts of administrative bodies depends, however, to a large extent on the legal regulation of these acts in special statutes, namely in two directions.

Most importantly the question is what acts of administrative authorities are measures of a general character within the Code of Administrative Procedure

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10) *As P. Průcha reminds (opus cit. sub 7), this concept has already appeared in the A*ct No. 20/1966 Coll. on the health care. From the respective provision it is, however, apparent that it was not understood as a particular form of an administrative action but as a measure (in a general meaning of this concept, i.e. a sort of deed) of an administrative body of a general nature (in a broader sense); this is explained also by the fact that the term measure is used in the plural.

11) This is also admitted in the explanatory report concerning the governmental proposal of the Code of Administrative Procedure (chamber publication No. 201 in the 4th term of office); opposing opinion has e.g. n the Czech language see: Vedral, J. *Správní řád. Komentář*. Praha : Polygon, 2006. p. 966.

12) Compare the explanatory report to the governmental proposal of the Code of Administrative Procedure (chamber publication No. 201 in the 4th term of office)

13) The Act No. 150/2002 Coll., The Court Code of Administrative Procedure as amended by Act No. 127/2005 Coll. on electronic communications and on the change of some relevant legislation (the Electronic Communications Act) of § 171 of the Code of Administrative Procedure.

and the Code of Administrative Justice. Is it necessary to explicitly designate such act as a measure of a general character in a special statute or refer to respective provisions of the Code of Administrative Procedure or the Code of Administrative Justice? Or would it be sufficient if such an act complied with the above mentioned defined conceptual features of a measure of a general character, namely concreteness in the subject-matter and generality towards addressees? We will not find the answer in the Code of Administrative Procedure. The jurisdiction of part VI. relates to cases when *"a special law imposes a duty to issue a binding measure of a general character which is neither a legislation nor a decision"*.

A part of the theory inclines more to the formal interpretation.[14] As P. Prucha[15] well predicted the Supreme Administrative Court has, within quite a short time of its existence, quite vigorously expressed its opinion preferring the material interpretation[16], i.e. that the acts of administrative bodies are considered measures of a general character just in cases where the acts comply with conceptual features of this form of actions irrespective of their legal designation.[17] Paradoxically, this same court declared in a different decision that it would review also an act not complying with these features as a measure of a general character.[18]

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14) D. Hendrych obviously too: See in the Czech language: Hendrych, D. Opatření obecné povahy (zák. č. 500/2004 Sb., část VI.). In Vopálka, V. (ed.): opus cit sub. 6. s. 230.

15) See in the Czech language: Průcha, P.: opus cit. sub 6, s. 222.

16) Administrative courts have always more applied the material conception of administrative acts, e.g. when considering whether a particular act is an administrative decision (in the meaning of § 65 section 1 of the Code of Administrative Justice); compare e.g. the resolution of the Supreme Administrative Court No. 6 A 95/2002, published as the decision No. 12 in the Act No. 1/2003 Coll. of the Supreme Administrative Court, p. 25 and the following.

17) The Court declared a territorial plan of the municipality, approved under the Act No. 50/1976 Coll., a measure of a general character. It was approved by a municipality resolution and partly published in the form of local law (judgment No. 1 Ao 1/2006-74, published as a decision No. 968 in No. 11/2006 Coll. of the Supreme Administrative Court).

18) *"If a particular act is just formally designated as a measure of a general character but as for the material point of view it does not comply with its conceptual features (concreteness of the object, generality of addressees), the Supreme Administrative Court will cancel it upon the motion of the petitioner; if this insufficiency concerns*

Further, if we, on the basis of a material interpretation, arrive in a particular case at a conclusion that the respective administrative act is a measure of a general character, the advantage of substantive and procedural regulations of such act contained in a special legislation still exists.

Which acts of administrative authorities in valid law can be considered measures of a general character? And what about an act where the existing positive regulation prevents this act to be considered regulation of a general character even though as regards the typical features or actual consequences of this act the form of a general nature would be more suitable?

f the key conceptual features of a measure of a general character are concreteness in the thing and generality towards addressees, then this act of an administrative body relates to either some designated territory where a special legal regime is to be applied or it concerns some other regulation of local conditions predicted by law. Besides cases, already adjudicated by the Supreme Administrative Court (especially as far as the town and country planning documentation is concerned including documents adopted under the Act No. 50/1976 Coll.) the following examples can undoubtedly be considered the measures of a general character:

- the so called territorial measure regarding the building ban or sanitation of the territory (§ 97 a of the Building Act[19])
- restriction or prohibition of entry onto territories in national parks, national natural reserve, national natural monument, the first zone of nature reserves or caves if there is a risk of damage caused by excessive visiting (§ 64 of the Nature Protection Act[20])

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only some of its provisions, the court will cancel them upon the motion of the petitioner." A judgment No. 1 Ao 1/2005-98 (see note n. 9). It should be pointed out that the Supreme Administrative Court dealt in detail with a lot of aspects of this institute of the measure of a general character in the historically first decision of Czech administrative courts. The question is whether further development, especially the decision-making practice of the Supreme Administrative Court is going to change the attitude towards this issue.

19) The Act No. 183/2006 Coll. on territorial planning and building guidelines, the Building Act, in operation from 1.1. 2007

20) The Act of the Czech National Council No. 114/1992 Coll. on the protection of

- delimitation of flood areas, namely of their active zones (§ 66 and 67 of the Water Act[21])
- territorial energetic policy (§ 4 the Energy Management Act [22])
- restriction or no entry to hunting grounds, restriction of riding horses and draught dogs, restriction of other sport or interest activities *"especially in nesting season, at the time of laying and breeding young ones or during hunts"*(§ 9 sec. 3 of the Game Management Act[23])

In view of the wording of § 171 of the Code of Administrative Procedure it is not possible to consider the acts of administrative authorities having the form of a legislation (most often a decree or a statutory regulation) or decisions not even if this form was conferred on them expediently in the past for the lack of general regulations, the measures of a general character. In any case, a change *de lege ferenda* can be presupposed in these examples. Nevertheless, the amendment of the respective special acts is essential. The examples are as follows:

a) decision on protective zones (§ 83 of the Building Act),

b) decision of the Water Management Authority dealing with establishing or changing the protective zone of a water source where *"the Water Management Authority specifies, after the issue had been negotiated with respective authorities of the state administration, which activities damaging or endangering the yield, quality or perfection of water cannot be performed in this zone, which technical measures must be carried out in this zone, possibly the way and time limitation of the use of lands and buildings occurring in this zone"* (§ 30 sec. 8 of the Water Act),

c) decision of the authority in charge of nature protection proclaiming a territory a temporarily protected area. *"In the decision proclaiming a territory a temporarily protected area, such use of territory is limited which would cause a destruction, damage or interference with the development of the respective protected territory."* (§ 13 of the Nature Protection Act),

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nature and landscape

21) The Act No. 254/2001 Coll. on Water and the changes in some statutes (the Water Act)

22) The Act No. 406/2000 on energy management

23) The Act No. 449/2001 Coll. on game management

d) decision on temporary restriction or exclusion of entry into the woods by a state forest management authority *"on the grounds of forest protection or in the interest of health and safety of citizens"(*§ 19 sec. 3 of the Forest Act[24])[25]

e) and especially a lot of the so called conceptual instruments dealing with protection of the environment which were expediently given either the form of an administrative act or a legislation in the past. Also proclamations of some special territorial regimes, like protected landscape areas, safety zones etc. can be considered.

Especially in cases, where a special law specifies decisions (examples under letters a) to d), the possibility of implementation of a general legal regulation of a measure of a general character with consistent application of material interpretation of forms of administrative actions is not excluded. On the other hand we must not forget that the legal position of participants in administrative proceedings is much stronger than the position of affected persons when measures of a general character are issued. For this reason, if it is possible, in a particular case, to individually define persons affected by such administrative acts (even if the number is high), an administrative decision must be issued, rather than a measure of a general character.

Another example are management plans regarding national parks and other especially protected territories (§ 38 of the Nature Protection Act) which lack a binding effect at the current legal regulation. Taking into consideration a quite fixed decision-making practice of respective administrative authorities, according to which, however, these plans are binding on subsequent (e.g. decision-making) activities of nature protecting bodies, it would be more suitable to admit a binding effect of management plans also towards affected persons. "In exchange" the affected persons would be awarded at least minimum procedural rights.[26]

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24) The Act No. 289/1995 Coll. on forests and on the changes of and amendments in some laws (the Forest Act)

25) Here the question is whether the issuance of the decree of the municipality with ex tended jurisdiction which the law alternatively enables, is not a more adequate solution.

26) See the above cited explanatory report (note n. 12).

Now, what is the contribution of adopting a general regulation of a measure of general character for the Czech public administration?

Above all, if we accept a material interpretation of this type of an act, the new legal regulation may be applied to all acts complying with its conceptual features, unless a special law stipulates otherwise.[27] This would undoubtedly contribute (in many situations radically) to protection of rights and interests of the persons involved.

One example for all: according to existing legal regulation the delimitation of flood areas and their active zones is performed by a mere "administrative specification" upon the motion of a watercourse manager. The Water Management Authority then refers *"the topographical documentation to the affected building authorities"* (66 of the Water Act). This whole procedure is, however, determined by "a mere" implementing regulation of the Ministry of the Environment[28] without stipulating any participation of the owners of flooded real property, other affected persons or affected administrative authorities. In the active zone of flood areas it is, however, prohibited *"to place, permit or perform buildings ..., to extract minerals and mine earth in a way that would aggravate flowing off surface waters, to carry out field changes that would worsen flowing off surface waters, to store material that might be washed away, to erect fences, to grow hedges and to have other similar barriers, to establish camps and other temporary accommodation facilities"*. Outside the active zone, or if the active zone is not determined, the Water Management Authority can "set limiting conditions" for the performance of the above mentioned activities in a flood area. The same applies if the active zone is not delimited (§ 67 ibid).

Moreover, the existence of a general regulation shall enable its use when introducing new administrative acts of this kind or when amending legal regulation of current acts. This will undoubtedly contribute not only to clearness of legal regulation of public administration activities but it will also enable to fulfill the demand of appropriateness of its interventions to the legal sphere of affected persons, the addressees of public administration.

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27) § 1 section 2 of the Code of Administrative Procedure

28) § 66 section 4 of the Water Act, regulation No. 236/2002 Coll. on the manner and range of elaborating the proposal and delimitation of flood areas

The Role of Political Participants in the Process of Decentralization of the Dutch Kingdom

Doc. PhDr. Vlastimil Fiala, CSc.

Introduction

The Dutch Kingdom and its system of local government have many specific peculiarities which can not be found in other European countries. The roots of peculiarities of Dutch local government are necessary to look for in deep Dutch history during the formation of United Dutch provinces in 1680s where the municipalities, towns and provinces were the basic grounds of new state unit who's appointed or elected representatives represented the interests of provinces in the highest power bodies of the country.

The basic and main aim of the study is to define the position and the role of political participants in system of Dutch local government which is closely related to development of modern political structures, especially pressure groups and political parties.

The study analyses in detail the lobbying of pressure groups, especially of political parties at the local level and in provinces. Special attention is given to the process of appointing the mayors and royal officers which is the best example of political lobbying. The author tries to point out other aspects of the role of political participants at the local level especially in connection with the existence of local political parties and groups. This issue is on the edge of interest of Czech and European politics and it would deserve more attention in future.

Dutch local governments are characterized in two totally distinct models of political activities. There is a strong influence of non-party or so called municipally oriented system on one side and strongly political or party system of local government on the other.

Non-existence of local branches of national political parties at the lowest level, in municipalities or towns gives broad space to strong local personal authorities, pressure and interest groups or even to small local political parties that enter into local policy with very different to larger extent non-ideological programs aimed at solving topical problems of these small municipal units.

The systems of local government are the second most spread type of party character. Their characteristic feature is coalition character resulting from the power of political parties represented in local council. Mostly these are not coalitions based only on majority system but large quantity of municipal executive governments start from proportion system during their formation. Moreover generally spread consensus not only between political parties at the local level but also between their voters that the proportion system is the best method of forming coalition governments at the municipal level exists. For these reasons it is therefore necessary to distinguish so called proportion local systems and so called majority partial local systems, resulting from coalition agreement between several political subjects that have majority in local councils.[1)]

Assertion of proportion and majority systems during division of executive functions at the municipal government level to certain extent restrains enforcement of political aims and strategies of particular political parties at every cost. On the other hand in province system there is a clear effort to determine the functions, competence and duties of individual members of executive power and apparently clear political responsibility of individual members of executive board. This personal political responsibility of individual members is not so distinct in majority party local systems where rather collective responsibility is emphasized and the unity of coalition is much more presented.

Political parties and their eminent politicians in national as well as local level are regarded to be the central participants in most coalition theories.[2)] The situation in the Netherlands is more complex because there are non-party local political systems in some areas. By 1974 app. 25 - 30% Dutch local governments

1) Cf. Kuiper, W. - Tops, P. *Local Coalition Formation in the Netherlands*. p.222.

2) Cf. Mellors, C. – Brearey, P. Multidimensional Approaches to the Study of Local Coalitons: Some Cross-national Comparisons. In *Coalition Behaviour in Theory and Practice*. Edited by G. Pridham. Cambridge, 1986. p. 285.

were of municipal, i.e. non-party character[3]. Most of these municipal systems then elected independent candidates to be their councillors. This percentage of municipal systems dropped in 1986 to 12 %.[4] Most of these municipal systems were in southern areas of the Netherlands, where expressively Catholic national party was dominant. Nevertheless this party did not engage besides big cities in local elections in smaller towns and municipalities where broader space for non-party groups and independent candidates was left.

Most of these local elections then were of expressively personal character because political and ideological cleavages were suppressed. If any agreements or coalition are made in these municipal systems, then they have unclear features and they are unstable. For the above mentioned reasons it is clear that political parties in these municipal systems do not perform the role of main political participants that belongs to more or less distinct political personal authority or elite.

Not only political parties or strong or distinct political authorities play important role in municipal and province policy. As political practice in the course of appointing mayors and royal officers at the local level shows that no less important role of political participants is given to various legality pressure groups, e.g. business chamber, trade or employment unions, agriculture associations and other non-governmental organizations which use their economic, social or political influence during influencing the highest local officials.

In the following chapter the issue of the role of political participants at the province and local level and in process of appointing mayors will be analysed. The last chapter is devoted to the role of these political participants in the present process of decentralization.

In the course of preparing the preparatory study the author has dealt with three basic groups of scientific literature. He has started with historical literature devoted to Dutch history, and then he continued with the literature of politics and scientific literature devoted to Dutch local government. There is a wide range of principal monographs published in English. The most principal is the monumen-

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3) Dittrich, K.L.L.M. *Partij-politieke verhoudengen in Nederlandsee gemeenten*. Leiden, 1978. p.105-110.

4) Central Bureau voor de Statistiek. Statistiek der verkiezingen. The Hague 1987. Cited from Kuiper, W.-Tops, P. *Local Coalition Formation in the Netherlands*. p.224.

tal history of P. Geyla and there is very useful and well-arranged publication of I. Schoffer 1973, too. The Dutch historians bestow on so called golden area of the history of the Netherlands (17th century) distinct interest, a lot of expert publications were written in English as well as in Dutch.[5)]

Considerably extensive is the literature devoted to political development of the Netherlands, political system, political parties, party and electoral systems and other political institutions. A. Lijphart, H. Daalder, R. Andenweg and other Dutch authors have gained world politics fame and their works have been translated into English. A. Lijphart and H.Daalder became famous above all due to formulation of basic principles of consocial democracy. The classical work on consocial democracy is the monography "*The Politics of Accommodation: Pluralism and Democracy in the Netherlands"* by A.Lijphart from 1968 which has been translated into English in 1975 and in revised version as well.

H. Daalder has devoted to the issue of consocial democracy some basic works, nevetheless the most important is his study "*The Netherlands:Opposition in a Segmented Society*" from 1966 in which he thoroughly deals with historical roots of consocial democracy. Other his works also deal with various aspects of consocial democracy in political life of the Netherlands, e.g. "*Extreme Proportional Representation: The Dutch Experience*" or "*The Dutch Party system: From Segemntation to Polariuation - And Then?"*.[6)]

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5) Cf. Huizinga, J.H. *Dutch Civilisation in the Seventeenth Century.* London, 1935; Geyl, P. *The Netherlands in the Seventeenth Century. Part I, 1609–1648*. London, 1961; Geyl, P. T*he Netherlands in the Seventeenth Century. Part II, 1648–1715*. London, 1964; Geyl, P. *The Revolt of the Netherlands, 1599–1609*.London, 1962; Boxer, C.R. *The Dutch Deaborne Empire 1600–1800*. New York, 1965; Haley, K.H.D. *The Dutch in the Seventeenth Century*. London, 1972; Israel, J. *The Ducth Republic and the Hispanic World, 1606–1661*. Oxford, 1982; Parker, G. *The Ducth Revolt*. London, 1979; Parker, G. *Spain and the Netherlands 1559–1659: Ten Studies.* London, 1979; Of more general character are the publications of : Kossman, E.H. *The low Countries: 1780–1940.* Oxford, 1978; Schoffer, I. *A Short History of the Netherlands*. Amsterdam, 1973; Schama, S. *Patriots and Liberators: Revolution in the Netherlands 1780–1813*. New York, 1977, etc.

6) Cf. Daalder, H. The Netherlands: Opposition in a Segmented Society. In Dahl, R. A. (ed.). *Political Oppositions in Western Democracies*. New Haven, 1966. p. 188–236; Daalder, H. Extreme Proportional Representation: The Dutch Experience.

Theoretical concepts and especially consequences of consocial democracy were sacrified in range of political science issues 1980s.[7)] A. Lijphart responded to criticism of theoretical resources of consocial democracy in 1989.[8)]

While historical literature and politics publications devoted to development and analysis of political structures of the Netherlands are more or less available in English, then literature devoted to Dutch local government especially to its particular issues is mostly published merely in Dutch. Number of scholars in the Netherlands is considered with the problems of local government. Let s mention at least W. Derksen, R. Andeweg, A.F.A. Korsten, Th. H.M. de Beer and R.L. Morlan.[9)] Nevertheless some basic works and range of important particular

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In Finer, S.E. (ed.). *Adversary Politics and Electoral Reform*. London, 1975. p.221–278; Daalder, H. The Dutch Party system: From Segmentation to Polarization – And Then? In Daalder, H.: (ed.). *Party Systems in Denmark, Austria, Switzerland, The Netherlands and Belgium*. London, 1987. p.193–284. H. Bakvis is concerned in detail with the problems of Catholic part of Dutch society in his publication from 1981. Cf. Bakvis, H. *Catholic Power in the Netherlands*. Kingston, 1981.

7) Cf. Kieve, R. Pillars of and: A Marxist Critique of Consociational Democracy in the Netherlands. In *Comparative Politics*, Vol. 16, p. 315–334; Scholten, I. Does Consociationalism Exist? A Critique of the Dutch Experience. In Rose, R. (ed.). *Electoral Participation , A Comnparative Analysis*. London, 1980. p.329–354; Van Schendelen, M.P.C.M. (ed.). *Consociationalism, Pillarization and Conflict Management in the Low Countries. Special issue of Acta Politica*, Vol.19, p.1–178.

8) Lijphart, A. From the Politics of Accommodation to Adversarial Politics in the Netherlands: A Reassessment. In. Daalder, H. – Irwin, G.A. (ed.). *Politics in the Netherlands: How Much Change?* London, 1989. p.139–153.

9) Cf. *Public Policy and Administration Sciences in the Netherlands*. Edited by W.J.M.Kickert and F.A. van Vught. London, etc., 1995; Derksen, W. *Tussen loopbaan en carriere: het burgemeestersambt in Nederland.* Gavenhage, 1980; Derksen, W. – van der Drift, J.A. – van der Kleij, M.B. – de Beer, T.T.M. *De gekozen burgemeester benoemd*. Deventer, 1983; Derksen, W. – van der Sande, M.L. (ed.). *De burgemeester: van magistraat tot modern bestuurder*. Deventer, 1984; Faber, S. *Burgemeester en Democratie*. Alphen aan de Rijn, 1974; Andeweg, R.B. Om de Kleur van der burgomeester, politieke aspecten van burgemeestersbenoemingen. In *Acta Politica*, vol..4 (October 1975), p. 421–454; Schakel, M.W. *De Burgemeester in the Kleine Gemeente, de Man in de Binnenboch*t. Arnheim, 1963; Prinsen, C.A. *De Burgemeester.* Alphen aan de Rijn, 1969 and number of others.

studies devoted to various questions of local government in the Netherlands are available in English.[10] Particular studies in survey monographs devoted to European local governments, e.g. Management of Local Government edited by A.H. Marshall, were very important, too.[11]

1. **Political parties at the province and municipal level**

If we firstly concentrate on party local governments then their characteristic feature is that the highest party bodies of their own political parties give possiblity of making local coalitions. In the course of analysing present local coalitions we come to conclusion that big majority of local coalitions varies from government coalition in the highest level due to used proportion level or existence of other local political parties.

The only way how national political headquarters may influence local branches of the parties is the formulation of general directives. Nevertheless in the case of dissent there is no mechanism how to enforce them at the local level. For these reasons we can claim that local branches of political parties are the main participants in the process of making coalition formation.[12]

Gradual decomposition of consocial democracy and its replacement by rivalry of political parties under strictly determined cleavages has reflected not only

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10) Cf. Andeweg, R.B. – Derksen, W. The Appointed Burgomaster: Appointments and Careers of Burgomasters in the Netherlands. In *Netherlands Journal Of Sociology*, Vol. 14, p. 41–57; Doornbos, M.R. *The Burgomaster, Cuckoo-chicken in the Dutch Municipal Government*. The Hague, 1960; Gupta, B. P. The Dutch Burgomaster and the American City Manager, A. Comparative Study. In *Quarterly Journal of Local Self-Government*, vol. 13, p. 383–402 and vol. 39 (1969), p. 41–73; Morlan, R.L. Central Government of Municipalities in the Netherlands. In *Western Political Quarterly*, vol. 12 (1959), p. 64–70; Morlan, R.L. Cabinet Government at the Municipal level, the Dutch Experience. In *Western Political Quarterly*, vol. 17 (June 1964), p. 315–335; Oud, P.J. The Burgomaster in Holland. In *Public Administration*, 1953, p. 103–116 etc.

11) *Management of Local Government*. Edited by A.H. Marshall. London, 1974.

12) Kuiper, W.-Tops, P. *Local Coalition Formation in the Netherlands*, verbatim citation p. 225.

in national level but gradually in elections to local councils. In the last two or three decades we can monitor three basic trends in Dutch political system. In part the political parties lose their permanent favourers and large quantity of voters "pilgrim" from one political party to other, and there is an evident continuous decrease of voters of confess parties that was dominant in 1960s and 1970s and in fact it stopped at the national level in the beginning of 1980s.[13)]

The third distinct feature of elections in local level is the entry of national political parties even in smaller locations and municipal units which was apparent by decrease of number of so called municipal local systems in benefit of party ones. In 1950s and 1960s it was much more difficult for the local political parties and the independent to assert. Amalgamation of smaller municipal units in bigger ones where it is difficult for the independent to assert, is not the only reason, but next reason is that especially party local systems begin to copy election trends from national level.[14)]

All these trends are evident from below mentioned table which describes division of the mandates of deputies in local councils from 1946 to 1986. The results are prepared on the basis of data from 123 municipal units.

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13) R. B. Andeweg is concerned in detail with the issue of unstable voters and loss of votes of confessional parties. His outstanding publication of 1982 is worth of mentioning here. Andeweg, R.B. *Dutch Voters Adrifts: Explanation of Electoral Change*. Leiden, 1982.

14) Cf. *Wekgroep Lokale Politiek. Lokale Politiek in Limburg*. Maastricht, 1986, p. 39–40.

Division of mandates of deputies in municipal councils, 1946–1986 (in %)

	1946	1949	1953	1958	1962	1966	1970	1974	1978	1982	1986
PvdA	**23,3**	**22,6**	**24,2**	**23,2**	**24,9**	**20,8**	**20,0**	**24,6**	**25,9**	**22,1**	**28,1**
Other Left parties	**6,7**	**3,8**	**2,7**	**2,1**	**3,0**	**4,0**	**6,8**	**4,8**	**5,4**	**6,9**	**5,4**
CDA	**42,9**	**43,3**	**43,1**	**42,2**	**40,7**	**37,6**	**34,7**	**29,3**	**34,6**	**31,0**	**30,7**
Other confessions	**1,1**	**1,2**	**1,6**	**1,7**	**1,7**	**1,7**	**2,7**	**2,7**	**2,7**	**3,8**	**3,7**
VVD	**4,8**	**7,0**	**6,5**	**9,5**	**7,7**	**8,0**	**9,2**	**15,0**	**14,5**	**20,3**	**16,7**
The Independent	**20,8**	**21,9**	**21,4**	**21,1**	**21,8**	**24,1**	**25,8**	**23,0**	**16,5**	**15,5**	**14,9**
Other	**0,3**	**0,2**	**0,4**	**0,2**	**0,1**	**3,7**	**0,7**	**0,6**	**0,3**	**0,3**	**0,5**

PvdA - Labour Party, Other left - small left parties and coalitions of these parties, CDA Christian-Democrat proclamation or its predecessors Catholic national party, Antirevolution party Christian historical union, other confessions - small protestant parties (GPV, SGP, RPF) and coalitions of these parties, VVD conservative Liberal Party, Other - especially farm parties.

The source: Local Politics Data-base. Rijksunversiteit Limbug. Taken from Kuiper, W.-Tops, P. Local Coalition Formation in the Netherlands, p.226.

There is a clear fall of election results of confession parties in 1960s and 1970s at first sight, whereas it is interesting that other protestant parties in this period strenghten slightly their profits in local elections. Perhaps Liberal Party gained the biggest increase in the whole period. This party managed to get from original 4,4 % in 1946 to 20 % in 1980s. The profits of Labour Party (Partij ven de Arbeid - PvdA) and other left parties are nearly without changes and have permanent 25–30 %. The Independents record from the end of 1970s and 1980s gradual increase of election preferences. When the profits of individual parties are being compared, the differences are between 2 % and 3 %, nevetheless after 1966 this difference increased to 7,2 % and 10,4 % in elections in 1974. This is a new trend of fluctuating voters who regularly change their voter support.

It is interesting to follow the influence of so called proportion system of local government on composition of municipal executive boards. See the table mentioned below.

Proportion of municipal boards in party local systems (in %)

1946	1949	1953	1958	1962	1966	1970	1974	1978	1982	1986
81	79	81	69	79	75	74	71	78	82	70

The source: Local Politics Data-base. Rijksuniversiteit Limbug. Taken from (Kuiper, W.-Tops, P. Local Coalition Formation in the Netherlands, verbatim citation of p. 228.)

After the Second World War more than 2/3 of all municipal executive boards were formed on basis of propotion system. The statistics do not signify that different regions are located in specific areas or it is possible to look for distinctions between small municipal units and big centres. The whole average 77% of all these proportion executive municipal boards indicates that it is necessary to look for the explanation in broader context of political history of the Netherlands.

If we looked for the answer on that question in the composition of party system in local level according to representation in municipal councils, we would not find logical explanation. Nevertheless below mentioned table represents the composition of party systems in local level which has been counted in 123 municipal units.

The composition of municipal councils (in %)

	1946	1958	1966	1978	1986
Minority composition*	**12**	**19**	**23**	**45**	**62**
Block majority**	**38**	**35**	**36**	**12**	**14**
Majority of one party	**23**	**17**	**11**	**22**	**12**
Majority of non-party men***	**27**	**29**	**30**	**21**	**12**

**Nor one political party or block group of politically close parties was able to reach majority, municipal composition was divided into bigger amount of smaller political subjects these are usually block of left oriented parties and groups or blocks of confession parties*

***Majority was gained by local political parties or groups or the independent candidates without relation to political party*

**** Mentioned data are interesting from the point that there is a strong trend to form minority systems to the detriment of coalition or one- party systems. Even here we can identify the trend of decrease of non-party subjects of local political groups or independent candidates.*

Enforcement of proportion systems of local government is possible to interprete as manifestation of consocial policy at the local level. Nor decision of PvdA in the beginning of 1970s that if they acquire majority in local elections either themselves or in coalition with left parties they will staff also all places of councillors, did not overrule this political reality. Labour Party enforced in the half of 1970s trend that during pre-election campaign political programmes of possible coalitions at the local level were discussed. Even if Labour Party clashed with other main political parties, Christian- Democrat proclamation (Christen Democratisch Appel) and National Party for freedom and democracy (Volkspartij voor Vrijheid en Democratie, VVD) and this negotiations on future coalitions was realised in 1978 in 75% of municipal units.[15)]

Although there was such dramatic change in clarification of programme aims still before the course of elections, proportion composition of local governments is apparently in contradiction to these efforts of the government. Depolitization of important local problems seems to be needed more at the local level than at the national. The fact that the number of proportion systems of local government in 1980s remains at the same level as in the end of 1950s, it is evident that consocial democracy is accepted at the local level more than at the national where it was gradually left from the end of 1960s.

Although there is a release of stability of party voter base and significant weakeness of confession parties, Labour Party did not make any profit as could be seen at first sight. Formation of much more municipal councils without majority of one party or single block of political parties was very important factor of this election change. In these minority systems PvdA appeared in position dependent

15) Tops, P.W. De Bestendigheid van het Afspielingscollege. In *Collegevorming*. Edited by M. Herweyer. Groningen, 1986, p.6; Taken from Kuiper, W.-Tops,P. *Local Coalition Formation in the Netherlands*. p.230.

on political parties that roughly refused its idea of majority coalitions. To participate in executive power PvdA had to pragmatically agree with proportion system of local government.

It is not quite clear whether the wishes of chief executives of Labour Party are consistent with the attitudes of their local representatives. There was a research organized by Catholic University in Nijmegen aimed at the problems of local coalition formations. On the basis of questionnaire filled in by deputies of different municipal councils suprising results on the attitudes of local politicians of various political parties to local coalitions have been ascertained.

Attitude of local politicians to various kinds of local coalitions (in %)

	Proportion coalitions	Majority coalitions	On the basis of election results	The others
PvdA	**65**	**12**	**14**	**9**
CDA	**86**	**2**	**4**	**8**
VVD	**89**	**2**	**4**	**5**

The Source: Local Coalition Formation. Nijmegen, 1986.

If nearly 90 % support of proportion systems of local government by CDA and VVD is not suprising, then 12% for majority coalitions by Labour Party is minimal in respect to their policy presented from 70s for the benefit of this majority system. Their 65 % in favour of proportion system clearly indicates attitudes of local politicians of Labour Party different from their political chief executives. We can believe that the reason for this high number is not only refusing orders from the centre but pragmatic attitude towards given situation.

Pragmatic action of local politicians of Labour Party can be influenced also by important factors, e.g. position and tasks of the executive in the structure of local government, political decisions or concerns from election results. Local executive is the strongest power executive body at the local government level. Political party that participates in it, is totally excluded from political activity and decision-making at the local level. For these reasons local politicians of Labour Party are pragmatically prepared to withdraw from their theses of governing majority and

opposition minority and they accept without hesitation its proportion representation in executive.

Similarly nor political decison-making at the local level gives a lot of chances and space to politization of local problems. Competence of local government is minimal and they do not relate to key political issues. For these reasons ideological cleaveges between individual political parties are not primary for solving questions of local policy and instead of ideological confrontation traditional consocial solving of problems is preferred.

The pre-election determination of political parties that refuse after-election proportion coalition system may have negative impact on future coalition partners.

Distinctively different situation is in non-party systems of local government. These are especially smaller municipal units mostly in agricultural areas and peripheral parts of the country. If some experts at coalition theory believe that in non-party systems there is bigger space for consensus policy, example of the Netherlands is clear exception from this rule as the following table shows.[16)]

Consensus and conflict policy in non-party system of local government, 1946–1970 (in %)

	Minimal majority	Variances	Mostly unanimous	Unanimous	Together
Conflict	**55**	**8**	**0**	**0**	**63**
Consensus	**0**	**0**	**11**	**11**	**22**
Ambiguous	**0**	**0**	**0**	**0**	**15**

Data mentioned above clearly indicate that conflict solving of political problems prevails over consensus decision-making techniquues in non-party local systems. The whole non-party system is based on decision-making from the position of power more than under consocial democracy as we have mentioned in party systems of local government. Non-party system is more confrontational and

16) Cf. Mellors, C.-Brearey, P. Multi-dimensional Approaches to the Study of Local Coalitions: Some Cross-national Comparisons. In *Coalition Behaviour in Theory and Practice*. Edited by G.Pridham. Cambridge, 1986.

leans in range of cases against local clients. Elected councillors use their offices for the access to information; they use their local powers for satisfying their local clients who give countenance to them. Existence of this type of decision-making is common mostly in border areas where consocial democracy has not developed and is not typical for most of Dutch municipalities.

2. **Lobbying of political participants during appointing mayors**

The fact that professionally prepared managers with high organizational abilities that predetermine them for this type of position are chosen for the position of mayor is commonly held fact. Nevertheless nobody from official representatives of the government and the oppositon disguise the fact that besides professional abilities party belonging to main Dutch government and opposition political parties plays extraordinary importance.

Each of main Ducth political parties that have regular representation in Dutch Parliament, CDA[17], PvdA or VVD or some smaller ones, charge at least one of their deputies with the task to observe the process of appointing mayors at the municipality level.

The government has a duty to inform about the vacant position of mayor in official government bulletin and to address the biggest number of possible candidates.The deputies of political parties responsible for occupation of the position of mayor supervise the list of candidates, candidates of their political parties can not be missing. If a deputy of any political party claims to the vacant position of mayor on behalf of his party (e.g. former mayor was the member of that political party or their political party has majority in the municipality or is a stronger partner in local coalition majority) he must firstly address the Ministry of the Interior and competent province royal commissioner.

17) CDA was created in 1980 by merger of three existed confessional parties. But in elections in 1977 these three parties Catholic national party and two protestant parties, Antirevolutionary party (Gereformeerde) and Christian historical union formed hidden electoral federation which gained relatively great eletion success (31,9 %) in comparison with previous elections.

Hearing the opinions of the members of community council who express their wishes especially in the area of religion, age, special expert qualities and especially political belonging of the future mayor is the next step in the process of appointing mayor. The possiblity to influence the choice of mayor is given not only to local pressure groups, local branches of political parties but also the representatives of local unions, the chairman of Business Chamber and other important local personalities who represent certain interests in the municipality may address royal commissioner.

Royal commissioner then chooses from the list of all applicants for the position of mayor three most suitable candidates who are listed in his own preferences. He should follow the opinion of the members of municipal council and other pressure groups and he can consult his choice with his colleagues, important political representatives of the province and the royal commissioner even sometimes uses the possibility of consulting with the Minister of the Interior.

The list of three candidates is sustained to the Ministry of the Interior. The Minister discusses this motion with above mentioned deputies who are responsible to their political parties for the problems of choice and appointment of mayors, deputies whose candidates are in the list are preferred.If the deputy does not know the candidate or if the candidate does not obtain recommendation of the deputy, possibility to be appointed mayor is significantly lower.[18)]

The Minister of the Interior is often under pressure of the lobby groups that have already been involved in previous steps of the choice of mayor and sometimes even the queen enters into the process of choosing of mayor. If the Minister of the Interior assents to the first candidate according to the proposal of royal commissioner, he can ask the queen to appoint competent candidate to the position of mayor.

The Minister of the Interior can refuse the proposal of royal commissioner but it is very rare. Even if the queen must respect the Minister´s reccommendation, she can ask the Minister to explain why he refused "her" royal commissioner. Occured situation could cause undesirable political difficulties and public concern which is very sensitive on enforcing central political interests at appointing local mayors.

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18) Andeweg, R.B. – Derksen, W. The Appointed Burgomaster: Appointments and Careers of Burgomasters in the Netherlands. In *Netherlands Journal of Sociology*, vol. 14, p.44–45.

If the Minister of the Interior does not assent to the reccommendation of royal commissioner, he can ask him to elaborate "new" list of candidates which would better suit the preferences of the Minister of the Interior or Dutch government. Royal commissioners usually obstruct this political pressure especially if it is politically motivated. In that case the Minister must then decide whether he refuses the proposal of royal commissioner and he faces possible conflict with the queen or he confirms his candidate.

The whole government must express its opinion on the appointment of mayor in the capitals of the provinces and cities with population over 50.000. This mechanism gives further opportunity to deputies to influence appointment of mayor through their ministers in coalition government.The deputies who did not push their party candidate through the government can appeal to own party ministers for being more emphatic and to push interests of their political party. The deputies could express their dissatisfaction with appointment of mayor in written or oral form in parliament but this method is not in use.

Confirmation or disproof of hypothesis that the Ministers of the Interior support in appointment of mayor candidates of own political parties than others, is important theme of Dutch politics researches. Two Dutch political scientists and experts on local government, Rudy B. Andeweg and Wim Derksen have tried on basis of statistics data gained during sociological research realised by department of political science of University in Leyden and financed by Dutch Organization for Pure Scientific Research to form outline table that comprises in percentage the portion of the Ministers of the Interior in individual political parties in the whole appointing mayors from 1945 to 1970 and percentage number of appointing under party belonging of mayors.

The process of appointing mayors

Political competence of the Minister	Percentage of all appointments	Political competence of mayors VVD	ARP	CHU	KVP	PvdA
VVD	**27,5**	**48,5**	**28,2**	**23,1**	**26,3**	**25,5**
ARP	**18,4**	**10,6**	**21,4**	**18,7**	**19,2**	**17,0**
CHU	**28,5**	**16,7**	**19,8**	**18,7**	**29,5**	**32,6**
KVP	**28,3**	**24,2**	**30,5**	**38,1**	**25,0**	**22,7**
PvdA	**0,6**	**0,0**	**0,0**	**1,5**	**0,0**	**2,1**
Together	**99,9**	**100**	**99,9**	**100,1**	**100**	**99,9**
The numer of mayors	**792**	**66**	**131**	**134**	**308**	**141**

Taken from: Andeweg, R.B. – Derksen, W. The Appointed Burgomaster: Appointments and Careers of Burgomasters in the Netherlands. In Netherlands Journal of Sociology, vol. 14, p. 46.

Under this and similar scheme of above mentioned authors, it is interesting to follow that from 1945 to 1970 besides the number of mayors of VVD, practically the percentage portion of occupation of mayors in particular parties does not change. Catholic national party (KVP) has traditionally strongest representation among mayors from 35 % to 40 %. Antirevolutionary party and Christian historical union share the second place. The former was stronger especially at the end of 40s but there was a big watershed in 1952 and Christian historical union has got the second position of the party with the highest number of mayors.

In comparison with Catholic national party, both protestant parties have app. 20 %, plus or minus two points. In the whole number of mayors of both parties but protestant parties are sligthly prevailing over catholic orientated mayors.

Both authors clearly point to hypothesis that Ministers of the Interior who belong to liberal party push their party candidates when liberal Minister of the Interior Toxopeus from 1959 to 1965 considerably pushed candidates for mayors from members of his party.The authors argue that it was effort to achieve national proportionality at the level of mayors. Both authors came to the conclusion that under the rule no other minister there was any significant favouring of party candidates.[19)]

Fall of liberal National party for freedom and democracy is interesting. This party had in 1945 20 % of positions of mayors and at the end of 1940s fell down to ten percent and only in 1965 it increased this low limit but in 1960s it fell down again to 9 %. Long-term increasing trend is interesting to monitor in Labour Party which since 1947 (9 %) has reported slow permanent increase of mayors. In 1970 it became the second strongest party with representation among mayors with app. 19 %.[20)]

To lean only against given statistics data without looking at other factors influencing the process of appointing mayors can be misleading. I believe that it is not important here to lean against the results of elections and to present the situation by spread of powers in government coalitions but it is necessary to consider other circumstances, e.g. weakened position of younger and newly formed political parties at the end of 1940s (PvdA) or at the end of 1960s (Democrats 66) in enforcing their candidates on mayors, practically professionally unprepared candidates of PvdA and other new political parties for the execution of these positions for certain conservativelly historical continuity in appointing already attested professional mayors for range of them the position of mayor has become life-long career.

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19) Andeweg, R.B. – Derksen, W. *The Appointed Burgomaster*, verbatim citation of p. 45–47.

20) Andeweg, R.B. – Derksen, W. *The Appointed Burgomaster*, verbatim citation of p. 46.

The last argument could be clearly manifested in election result of Catholic national party that practically disponed with 40 % of all mayors during all after-war period. Elections profits of Catholic national party were in 1946–1963 about 30–31% from the smallest profit of 28,7 % in 1952 to 31,9 % in 1963. In following three elections KVP fell firstly to 26,5 % in 1967, to 21,8 % in 1971 and to 17,7 % in 1972.

This fall was stopped by merger of three confession parties into election federation in 1977 and their following merger in 1980 with Christian-Democrat proclamation strenghtened the position of CDA as important political power in the Netherlands. (See the table of Election Results from 1945). If we compare these election results of KVP with their whole proportion on the number of mayors that all the time stayed at 40 % and even since 1966 approximately in the period when KVP began to fall in the national level we can monitor increasing tendency to increasing number of mayors of KVP in municipalities (in 1966 app. 35 %, in 1970 already 40 %).

Similar argumentation and comparison could be used also for two other confession parties, Antirevolutionary party and Christian historical union, whose election profits were below 10 %, in case of CHU in elections in 1972 dropped to even 4,8 %. Nevertheless their percentage proportion of positions of mayors was always app.20 %. How to explain these matters objectively? Certain orientation point could be for solving thequestion composition of government coalition after 1945.[21)]

21) Tables with complete results are given in chapter n. 2

Comparision of parliamentary (1972) and municipal elections results (1974) in individual province (in %)

Provinces	Confession parties		Left parties		VVD		The others		Together
	1972	1974	1972	1974	1972	1974	1972	1974	
	PV	LV	PV	LV	PV	LV	PV	LV	
Groningen	29,9	32,3	51,6	48,0	11,9	11,9	6,6	7,8	100,0
Friesland	41,1	41,6	42,9	36	10,0	10,0	6,0	12,4	100,0
Drente	30,2	30,5	47,3	42,4	15,2	16,4	7,3	10,7	100,0
Overijseel	46,0	46,5	36,3	30,9	10,8	10,6	6,9	12,0	100,0
Gelderland	41,1	36,6	37,3	28,5	14,1	15,1	7,5	19,8	100,0
Utrecht	36,9	40,1	37,4	32,2	17,6	20,8	8,1	6,9	100,0
N-Hoalland	24,3	25,4	51,3	45,3	16,6	19,8	7,8	9,5	100,0
S-Holland	30,5	33,5	47,1	40,1	15,6	18,9	6,8	7,5	100,0
Zeeland	44,0	49,4	36,0	28,0	14,2	12,7	5,8	9,9	100,0
N-Brabant	45,9	67,9	33,2	14,8	13,5	9,9	7,4	7,5	100,0
Limburg	48,9	79,2	32,9	10,8	12,3	5,1	5,9	4,9	100,0
Netherlands	36,2	42,6	42,3	32,7	14,4	14,8	7,1	9,9	100,0

When we look at government coalitions we can quickly discover that Catholic national party as independent political entity or as a part of Christian- Democrat proclamation was permanently in government coalition after 1977, with exception of 1990s. Similar situation can be found also in Christian national union which was in government from 1948 to 1963 and later since 1967 as independent entity and later as part of CDA was in government coalition till the half of 1990s. Anti-revolutionary party participated similarly in government coalitons; it was also important coalition partner from 1952 to 1990s. Liberal VVD and Labour Party (PvdA) were difficult to assert. Labour Party registers increase of preferences since 1990s. Nevertheless municipal and province elections should have important value for influencing the process of appointing mayors.

3. The process of decentralization and the role of political participants

The concept of decentralised unitarian state in the Netherlands which has brought one of the first Dutch constitutions in the beginning of 19th century provided real autonomy position for local government only for a short period.

If the constitution on the first sight secured the province governments certain autonomy and powers in own territory then practical policy of Dutch ruler William I. quickly rectified. Practical impact of the Constitution from 1813–1814 especially central tax system and check of financing from ruler and later also countersignature of ruler under all decisions of province governments meant clear restrictions of province autonomy and their direct subordination to central government.

Only the lowest administrative units and towns designated as municipal units preserved certain degree of independence. If we talk then about decentralization unitarian state in the first half of 19th century, then that decentralization relates merely to municipal units while provinces are totally subordinate to centralization and check of ruler and his subordinate government.

The situation changed in 1840s when Dutch liberals presented requirement of liberalization of constitution and really they managed to enforce the revision of the constitution which has finished the transformation of Dutch Kingdom into parliamentary democracy and they enforced real decentralization of the country. The process of decentralization of Dutch Kingdom was intensified in the beginning of the 1850s by two new acts, so called Province Act (1850) and Municipal Act (1851) which are valid after some modernization in 60s till these days.

Both acts amended Dutch constitution from 1848 in issues on local government in province level as well as municipal one. If the constitution from 1848 presented general thesis that all administrative units have equal rights and duties and determined general rules of relations between various levels of state and local administration, then both following acts described in detail the issues on structure, composition, duties, rights, check mechanisms, financing etc. of province and municipal governments.

The main political participants who were interested in process of decentralization were the representatives of liberal powers at the province level. This pressure has been clear from the beginning of Dutch Kingdom when absolutistic tendencies of Dutch rulers William I. and William II. The liberals were successul in the beginning of 1850s thank to support of catholic provinces Limburg and North Brabant. Support of decentralization is therefore connected with effort to limit power of protestant religion in catholic dominant provinces with political aim to

give catholic clergymen power to decide their province matters without protestant supervision and check.

In 1850s nobody could anticipate the development of Dutch society, municipal organizations and new tasks of local government. Nobody could anticipate broad social problems of local government in 20 century. One of the main theses of both acts, Province and Municipal, was division of the process of decision-making and process of implementation of this decision.

The officials were responsible for decisions within the legal rules and according to public concern but technical realisations were vested in private companies delegated with rendering public services.

The process of centralization continued even after Second World War and the government had to look for certain allies that would support their centralization effort. Various pressure groups, e.g. influential employment or trade unions, became their main support. Dutch government adopted conception of corporation as one of possible variants of cooperation of government with pressure groups and that system was institutionalized by special act and was introduced into political practice. This decision did not only result from the government to get next social partner for enforcing its centralization policy but it resulted from long historical perspective.[22)]

The Netherlands and its power elite preferred during its historical existence cooperation with various institutionalized corporation groups and organizations. In the Middle Ages business groups, guilt unions, branching noble houses, bankers etc. belong to them. Most of previous Dutch governments preferred deliberation and negotiations with certain interest groups which were later asked for sup-

22) Akkermans, T. – Grootings, P. From Corporatism to Polarisation: Elements of the Development of Dutch Industrial Relations. In *The Resurgence of Class Conflict in Western Europe since 1968*, vol. I. Edited by C. Crouch and A. Pizzorno. London, 1978. p. 159–89; Wassenberg, A. F. P. Neo-Corporatism and the Quest for Control: the cuckoo game. In *Patterns of Corporatist Poliucy-Making*. Edited by G. Lehmbruch and Ph. Schmitter. London, 1982. p. 83–108; Wolinetz, S. B. Socio-Economic Bargaining in the Netherlands: Redefining the Post-War Policy Coalition. In *Politics in the Netherlands*. Edited by H. Daalder and G. A. Irwin. London, 1989. p. 79–98.

port and help. That system was often enshrined in range of Dutch laws, especially those that relate to administration of public sector.

Corporation system became deeper even in interwar period and it acquired its completion after Second World War when Public Legal Organizations Act was passed. By operation of this law some pressure groups have got legal status and government could formally transfer execution of some executive government tasks to them.The main nature of corporations, i.e. government recognizes existence of certain interest groups and assents to cooperation between state and corporations in solving some questions of public sector was legally institutionalized in the Netherlands. A lot of sector pressure groups and organizations exist in the Netherlands in addition to main national corporation organization Social economic board.[23)]

In the Netherlands nearly each area of government policy associates various consultant and advisory boards which intervene into government and they often create not clearly arranged system of decision-making. The execution of some tasks of public sector in communities, e.g. medical services and health care, education or social policy were from the Middle Ages vested in so called private initiatives. Even new unitarian character of Dutch state in the 19th century when state had no powers to intervene in this sphere of public administration at the municipal level, did not change it.[24)]

We can witness intensification of ideological thought streams and formation of its political parties (catholic, protestant, new-protestant, socialistic) and moreover we can identify the division of these public services among these differently thought groups of population. Catholic, protestant and public schools existed together in towns, similar situation was in university education, health care, culture, sports etc., as well.

The second half of 20th century is the period when practically the process of centralization of the Dutch state has come on top. The local government ceased

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23) Singh, R. *Policy Development: A Study of the Social and Economic Council of the Netherlands*. Rotterdam, 1972.

24) Van Schendelen, M. P. C. M. The Netherlands: from low to high politicisation. In *The Politicisation of Business in Western Europe*. Edited by M. P. C. M. van Schendelen and R. J. Jackson. London, 1987. p. 78–99.

to perform its main tasks and transformed into state authorities of cetral government. Government Ministries and their particular branches issue most of political decisions. The execution of statutory instruments and orders including financial means for their support is then under the constitution and by virtue of the law delegated directly to local officials. Only a small part of real political decision-making is left to competence of local authorities.

The process of centralization was enabled not only by prospective constitutional legislation (execution of government decisions and fulfillment of laws is given to local government, mayor and province royal commissioner who have a duty to supervise their complete performance from the local executive), but also by own character of Dutch municipal structure with strong local peciliarities, especially in the extension and distinction of local problems.

Dramatic growth of social services in connection with building and intensification of Dutch welfare of the state led after the Second World War to growth of number of private companies participating in safeguarding of new social services on one side and it also reflected on increasing the number of administrative officials. This whole system has drawn still more money from state budget and gradually has become more and more unclear which led to wasteful application of public subsidies, to bribery in state orders and corruption of officials.

Following one hundred years there was the process of slow centralization when the government and especially its Ministries gradually diversified their activities. The formation of new Ministries with range of specialist branches was the main result of government centralization and moreover new state administration began to enforce its central decisions in activities of province and municipal officials. Due to increasing central administration province and municipal officials gradually became enforcer of central decisions and their primary role of province and municipal officials enforcing local interests and needs declined.

In 1987 there was a research conducted in 15 big Dutch cities with population of 100.000–200.000 to find out the reasons which led to ineffectiveness of enforcing social policy and to find the methods for reorganization of administration. The results were crushing. The research has stated that there was total wiping off the differences between deciding and implementation aspects. The officials were

responsible not only for correctness of decisions and public concern but were also closely related to the process of their implementation into practice through various private companies or service departments of municipal authorities.

The report has notified the shortage of clear political directives in main issues of management of municipal bodies and pointed out to big defects in coordination of officials and manager and political level. Serious defects were found in the work of city managers who instead of management and coordination of given activity, were too involved into solving totally particular and unimportant problems. Weak communication between political and administrative branches appeared in the whole system of local government what was the result of wholly insufficient and weak management of municipal government.[25)]

In 1980s and 1990s there is a gradual growth of dissatisfaction of population with high centralization of the state on one side and formality and ineffectiveness in activity of local government on the other. The pressure of local political parties, non-party and lobby groups on central government to transfer part of their decision-making competences on local bodies is the result of this dissatisfaction.

That pressure made the members of Dutch governments listen carefully from 1990s to requirements of citizens presented by their local politicians. The governments make concessions in some traditional areas of decision-making in favour of local authorities and try to define again its position in society. The change of the style of its work is especially important when more or less the central method of management is changed into manager system of work. Together at the local level there is significant quantitative transformation when the local government strengtens its position in local community not only through its battle for gaining more competences from the centre in local decision-making but also by active access to solving new local problems.[26)]

Local governments act since 1990s more actively for the needs and requirements of its population and with the support of central government they participate in realization of new social programmes, e.g. specialization courses of

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25) Bekke, H. A. G. M. *Experiences and Experiments in Dutch Local Government*, verbatim citation of p. 128–129.

26) Bekke, H. A. G. M. E*xperiences and Experiments in the Ducth Local Government*, verbatim citation of p. 123–125.

increasing expert training of its citizens, they react to topical culture and recreational needs of local citizens, they improve the quality and effectiveness of social services and they spread their offers. Even at first sight such minor activities like improving lighting and cleanness in the streets, strengthening the feeling of security by increasing the number of policemen and some security announcers, telephones and cameras in the streets and public transport, active battle against graffities, help the teachers with educating children of new immigranst and their quick embodiment in Dutch society, bring big support from citizens and it put local government near to needs and help to solve their imminent problems.[27)]

The role of political participants in this process of decentralization is very considerable especially in political parties. Both local branches and central bodies of political parties are from 1980s under strong pressure of their voters who demand especially in middle and smaller conurbations, closer connection of administration of their communities to their citizens. Governing political parties moreover solve the problem of securing the financing of social policy when it turned out that in previous years financial means were used uneconomically because local governments can not distinctively influence their final and practical use.

Conclusion

Formation and development of local government and strong role of political participants in the Netherlands have deep historical roots. Unlike other European countries, original United Dutch provinces were created as federative or confederative state unit. Decentralization was enshrined in itself act of gaining independence and sovereignty. Individual Dutch provinces during the whole period of its existence from 1680s till 1895 strictly observed its competence and sovereignty and did not allow strengthening political centre, executive board or official head of state who was represented by some member of Orange-Nassau dynasty.

All principal political, economical, social, administrative etc. decision-makings were vested in local political participants who were represented by most

27) Idenburg, P.A. – Loo, van der H.R. Governing the Welfare System: Dynamics and Change. In *Public Policy and Administration Science in the Netherlands*. Edited by W. J. M. Kickert and F. A. van Vught. London, 1995. p. 326–327.

powerful and richiest business groups of individual towns or noble families in the province level. The poor and lacking means citizens, peasants or craftsmen were excluded from the process of decision-making.

Fundamental change of character of the state occured after Frech occupation in the half of 1790s when decentralized state was replaced by centralization unitarian system from France. Republican constitution entirelly removes traditional sovereignty of the provinces and partially of towns and transfers it to elected national assembly.

The Dutch Kingdom was formed in 1814 after the defeat of France during Napoleon wars. Its new constitution characterizes the Netherlands as the decentralized unitarian state but political practice indicates that it was rather centralistic unitarian state. Misusing royal powers led to review of the constitution in 1848 due to real grounds of parliamentary democracy were laid but above all the system of decentralization of the Netherlands was strengthened. In 1850s two very important acts on local government were passed, The Province Act (1850) solves the problems of position of provinces; The Municipal Act (1851) is devoted to municipalities. The nature of these laws with small modernization especially in language aspect is preserved even in nowadays political system of the Dutch Kingdom.

Both acts enshrined principles of decentralization in political structure of unitarian state when individual levels of state, provinces and communities their powers, rights and competences have been affirmed.Nevertheless both laws comprised also the roots of future deepening of centralization when both communities and the provinces had duty to supply position of state administration and to supervise implementation of national laws and government decisions.

In the second half of 19th century and especially in 20th century the so called slow centralization appeared when province and municipal governments are delegated more complex tasks of state administration that relate to the development of the state welfare, modernization of society, development of education etc. The state takes responsibility for previously typical local services, e.g. education; health care and local governments become only executors of administrative decisions from the centre.

Strong protest against this policy is on the increase that graduated in 1980s in effort of reorganization of local government and consolidation of powers. The pressure is so strong that governing political parties initiatively took the administration of reform initiative and together with the cooperation of local branches of their political parties try to take over the initiative. The 1990s are dominant effort to redefine position of government towards local governments and to transfer part of decision-making to local level where local political participants play an important role.

The Service Act as One of the Elements of Public Administration Modernization in the Czech Republic

JUDr. Monika Horáková, Ph.D.

Each state respecting democracy and the rule of law should establish an impartial and professional apparatus - bureaucracy for the actual implementation of the constitution and laws. The term bureaucracy, however, is very often used in a defamatory and pejorative meaning. This institute is often understood as incompetent, far from reality, overdeveloped, arrogant and superior. As regards the content of the word bureaucracy, it denotes "activities of officials" or "officials and their legal positions." With some exaggeration it is possible to state that both public and state service is realized through the bureaucratic machinery and its position is defined by special laws.

The state service is, as it was also in the past, connected with the necessity to guarantee an impartial professional execution of public administration. Accepting to service, professional advancement, remuneration etc. are to be based on the quality and efficiency criteria and the whole system of state service is to protect against the political favoritism and corruption.[1)]

Within the reform and modernization of the Czech public administration, the modernization of the execution of state service, whether regarding the regulation of state officials positions or the existence of state service itself and the regulation of its system and management, has been considered essential. This part of the reform was carried out through the adoption of "the Service Act", i.e. the Act No. 218/2002 Coll. regarding the service of state employees in administrative authorities and remuneration of these employees and other employees in administrative bodies. Unfortunately, this act has not been implemented yet, it has been amended

1) In the Czech language see: Čebišová, T. Modernizace služebních poměrů – evropské trendy a naše situace. In *Modernizace veřejné správy v Evropě a České republice*. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, 2006. s. 105.

several times and in accordance with the current legal condition its effect has been deferred as far as the 1st January 2009.[2)]

This legal regulation at least partly follows a historically valuable document, the so called Service Pragmatics, i.e. the Act No. 15/1914 of the Imperial Code regarding the service relationships of state officials and state servants (later state attendants). It was incorporated into the judicial code of the Czechoslovak Republic and it has remained, with some supplements resulting from the development of relations, a basic legal regulation within the state service until the 1950s.[3)]

Service Pragmatics as a Basis of Legal Regulation of the State Service

The legal regulation defined a public service relationship as a basic legal element. Its specific nature was, on one hand, determined by the state having a special position among employers and, on the other hand, by a special nature of service duties which corresponded with the needs of public administration execution. Personal needs of an employee were also considered.[4)]

The state, however, acted within the public service relationship as a superior entity, it established and imposed service duties in an authoritative manner. A state employee, on the other hand, accepted these unilateral, authoritatively imposed service duties. The breach of service duties by an employee resulted in service or disciplinary liability and criminal liability was preserved completely.

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2) Čebišová, T.: Ibid, s.104.

3) See Act No. 269/1920 Coll. regulating the relations of officials and attendants in state authorities and institutions of the former Hungarian Lands, see also the Act No. 103/1926 Coll., the so called Pay Act, further the Act No. 147/1933 Coll. on the prosecution of antistate activities of state employees, the Act No. 131/1936 Coll. on the state defense and the Act No. 66/1950 Coll. on working and pay relations of state employees.

4) In the Czech language see: Krejčí, V. Zaměstnanci veřejní. In *Slovník veřejného práva československého*. vol. V. p. 592–602.

Service Pragmatics related to state officials ranked into seniority classes and state attendants who were classified into the categories of sub-officials and servants. Service Pragmatics also regulated the positions of trainees and candidates.

Service Pragmatics also established prerequisites necessary for the admission to the state service[5], qualifying procedure, contained a stipulation concerning the course of service and duties of state officials[6].

In this connection it is necessary to expressly mention the duty of allegiance and obedience to the government of the republic and a duty to follow the constitutional and other laws. The official was obliged to perform his service "fully and diligently" and fulfill the duties of his office "conscientiously, impartially and selflessly". A fundamental task was the protection of public interests and a necessity and duty to refrain from everything that might damage a due course of public administration – the so called general duties.[7] The official was also obligated to perform concrete duties, called service duties, e.g. a duty not to disclose or pledge of confidentiality.[8] The state official was also obliged to personally perform service on a regular basis, to announce the place of residence and e.g. a duty to announce the solemnization of marriage was imposed as well. The state official also had to notify personal data and information while the state guarded his behavior so that he would not diminish the reputation of state administration by his conduct and the way of life in his personal and private life.

One of the state official´s duties was a disciplinary duty which was defined as a disciplinary duty for the breach of professional and service duties.[9] The state official could be warned by a service superior which was a form of a procedural punishment or it was possible to impose a disciplinary punishment within disciplinary proceedings before a commission, the most severe punishment was a dismissal from the state service. The most usual forms of punishments towards

5) see the so called Establishing Act in Service Pragmatics, § 1–7.

6) see Service Pragmatics, § 14 and the following, § 21 and the following

7) see Service Pragmatics, § 21

8) see Service Pragmatics, § 23

9) see Service Pragmatics, § 87 and the following

subordinated officials were reprimands regarding "improprieties" in their office work.

A part of Pragmatics formed, of course, also the rights of state officials that were, in comparison with the private regulation, interpreted "more favorably". The most important right was the permanency of the service relationship of the state official, the so called security of employment. Both the state and the employee were bound by the law, it was virtually impossible to terminate a service relationship within a typical course of a service relationship and faultless conduct of the employee. Another prominent right was a right to salary and time advancement into the salary of a higher level, later time advancement within the wage scale.[10] Further rights of a state official included the right to a rank, retirement gift, survivors were entitled to charitable pays, the state official could also claim redeployment and temporary or permanent retirement.[11]

Service Pragmatics enforced a high rate of service relationship stabilization, its permanency and irrevocability, which caused its rigidity and inability to adapt to rapidly changing circumstances. After the formation of Czechoslovakia some provisions were re-evaluated and changed. The basis of "bureaucracy" was formed by officials established on the territory of a new state, provided they applied for the service by April 1919 and swore an oath. A special privileged position was held by a group of legionnaires for whom the service positions were reserved. Issues concerning salaries were regulated as well. Public administration, influenced by external influences, was increasing excessively, therefore it was necessary to carry out reorganization and perform austerity measures. In 1924 the Act No. 286 Coll. regarding austerity measures in state administration and two years later the Pay Act were adopted.[12] The following years brought changes characteristic for the protectorate, racial discrimination policy and the legal regulation of the first post-war years responded to the respective decrees of the President of the Republic. It was assumed, in general, that a new regulation of the state service would be created in the near future. This happened, however, as late as 2002 when the

10) see Service Pragmatics, § 45 and reference 3, from the Act No. 103/1926 Coll.

11) see Service Pragmatics, §§ 75–80.

12) from the Act No. 103/1926 Coll.

so called Service Act was adopted. (Note: I deal with these problems in detail in: State Service, MU Brno, 1997).

The Service Act as a Basis of Legal Regulation of the State Service

The Act No. 218/2002 Coll. regarding the service of state employees in administrative authorities and remuneration of these employees and other employees in administrative bodies (the Service Act) regulates especially legal relations of state employees, the service itself, preparation of natural persons for the service, service relationships of state employees in administrative authorities, remuneration of these persons, unless a special law provides otherwise, proceedings concerning the service matters, etc.[13)]

According to D. Hendrych the basic concepts are the state service, the field of service and the service position. The employee performs the state service in a certain service position and in that field of service to which he was appointed. The field of service is understood as the activities of the service office, i.e. the administrative body where the employee performs service resulting from his competence established by law. The fields of services are determined by governmental decrees.[14)]

The basic element of the execution of office is a service relationship.[15)] It is constituted with regard to the state, i.e. the Czech Republic on the basis of appointment to the service position in a particular field of service. The service is in principle drafted as a service for an indefinite period of time, so it can be inferred that the Service Act specifies the system of state service in the Czech Republic as a career system. The term security of employment is not used as it was in the case of the Service Pragmatics; on the contrary the law establishes a definite period of service in some offices, i.e. a service for a definite period of time. In spite of this

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13) see the Service Act, § 1

14) In the Czech language see: Hendrych, D., a kol. *Správní právo, obecná část*, 5. rozšířené vydání. Praha : C. H. Beck, 2003. p. 443.

15) see the Service Act, § 28

fact it is possible to speak about quite a sure permanence of the employment even though the service relationship can be terminated by the authority as a result of reorganization connected with the reduction of state employees.[16)]

The Service Act defines the service as the execution of state administration in administrative authorities and it is performed by state employees, i.e. those persons who were duly appointed to the service and took an oath. Persons whose service relationship is regulated by a special legislation, employees of administrative authorities carrying out maintenance service, auxiliary and manual works, members of the government etc. are exempted from the application of the law.[17)]

State employees are divided into ordinary and superior employees. The service is headed by the director-general.[18)] In this connection I would like to mention reintroduced service titles which can be heard in the films for surviving contemporaries or literature, e.g. a coordinator of activities, an alderman, the chief ministerial counselor, the state or governmental council for university educated state employees etc.[19)]

The Service Act specifies the preparation for service as a period lasting twelve months (one year) when the applicant (called expectant by law), supervised by an instructor, is preparing to master the basic execution of service in a particular area of service which he has chosen. The period of preparation is finished by passing the examination on civil service. The Service Act further deals with the problems of appointments to service, its course including a duty to take an oath.[20)] "To appoint a natural person to a service position is possible provided the position was created in accordance with the approved systematization and is unoccupied."[21)] From the

16) In the Czech language see: Hendrych, D., a kol. Správní právo, obecná část. 5. rozšířené vydání. Praha : C. H. Beck, 2003. str. 444.

17) see the Service Act, § 2

18) see the Service Act, § 9

19) see the Service Act, § 7

20) see problems concerning legal rules on classified information and the act dealing with classified information

21) see the Service Act, § 31

letter of the law can be inferred that the state employees already included into the service are favoured.

A generally valid principle is the prohibition of discrimination and the emphasis on the protection of democratic nature of state service. A competitive examination is held in order to choose a proper person to the service position, the appointment to the service is performed by a respective service authority decision. The service relationship itself, created upon appointment, arises on the day when the service oath is sworn and is terminated after the expiration of time if the service was for a definite period of time or upon the death of a state employee, or upon the application of the state employee or upon conditions set by law (e.g. final conviction for an intentional offence or completion of the age of 65).

A comprehensive part of legal regulation is devoted to the rights of state employees.[22)]

Duties are elaborated in detail, e.g. the state employee is obliged to remain loyal to the Czech Republic while performing the office, has to carry out this service impartially within his authority and may not give cause to possible doubts regarding the impartiality of decisions and thus endanger the confidence in decisions. Further, the service must be performed personally, duly, in time, on a particular service place and the service discipline must be observed.

When performing the office, the persons in a service relationship are obliged to follow the legal and service regulations, provide information on the activities of the service body under the act on free access to information and further educate themselves in accordance with the service authority instructions.

A duty that cannot be omitted is a duty to keep silence in service matters. The state employee must not act in a way that might result in conflict of public interest with personal interests and he must not misuse the information. The state employee is obliged to behave in a decent manner during official negotiations and observe ethical rules issued by the service legislation. I have mentioned only basic duties of a state employee, the complex specification can be found in articles 61 and 62 of the Service Act. To conclude, I would like to point out that the above mentioned duties must be observed by the state employee also when he is not performing his office.

22) see the Service Act, part four.

The basic rights of state employees include the right to promote the service office when performing office, right to education, right to use the office title publicly, right to obtain the texts of legal regulations, international treaties, service legislation, etc.

Another right is the right to a salary and wage promotion when the pay level must always correspond with the position in the field of service to which the state employee was appointed.[23)]

The Service Act expressly establishes the possibility to limit some rights. Primarily, there is incompatibility of the service relationship with the performance of offices in political parties and movements.

Further, the state employees may not be members of executive and control bodies unless they were sent into these bodies by the service office. In this situation they act as representatives of the Czech Republic, they are obliged to enforce its interests and may not be remunerated from a legal person. They can neither be members of the bodies which, under special legislation, perform the state administration.

State employees may not perform any other gainful activities except for the state service. The prohibition does not apply to scientific, pedagogical, journalistic, literary or artistic activities, to the activities of an expert or interpreter performed for the court or administrative authority and to the activities in advisory bodies of the government.

The administration of personal property is allowed.[24)]

In this relation I would like to remind that superior officials are not entitled to strike.

In this place I would like to mention the problems of "compensations" established by the Service Act as a counterbalance to increased duties and a necessity to suffer the limitation of some rights. This concerns especially remuneration and social security. The state employee is entitled to a salary[25)] based on a salary scale for particular pay levels, he is also entitled to additional allowances, e.g. the allowances

23) see the Service Act, § 63

24) see the Service Act, § 65

25) see the Service Act, § 133 and the following

for the service, supervision, substitution, service overtime, at night, during holiday, on Saturdays and Sundays etc., and he can also receive a special allowance, personal allowance and bonus payment. In the sphere of social security the Service Act introduces e.g. the gratuity bonus granted when the state employee is withdrawing from occupation due to eligible retirement age, and the allowance to the pension for the years spent in the state service.

The last institute, I would like to deal with, is the institute of liability. Liability is divided in the Service Act into disciplinary liability, liability for damage and criminal liability.

Disciplinary liability is based on liability for disciplinary violation, i.e. for intentional violation of service discipline.[26] The state employee may be reprimanded or under conditions established by law his salary may be reduced, or he may by dismissed from a superior position, or discharged from the service relationship. However, minor faults in the service can be just "reproached".

Liability for damage is subject to the Labour Code whether it concerns liability of a state employee or a service body. A special act[27] establishes also liability for damage caused by illegal decision or maladministration.

There is no immunity from criminal liability.

In order to have the full picture, I would like to point out that the Service Act also guarantees the right to participation in the administration of service in the form of right to information and debating matters regarding performance of office and conditions of its execution. The Service Act further guarantees protection of rights of state employees both in a service line, as the institutes of the application and complaint are incorporated into the Service Act, and in the form of right to judicial and other legal protection.

Nevertheless, the process of modernization of service relations is not finished by the adoption of the Service Act. The act itself has not become effective yet and has been amended several times. It is necessary to ask a question whether in 2009 its content is going to comply with the purpose for which the act was created and

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26) see the Service Act, § 71 and the following

27) from the Act No. 82/1998 Coll. concerning the liability of the state for damage caused by illegal decision or maladministration

adopted. As I have already mentioned above, the main purpose of the Service Act is to ensure an impartial and professional execution of public administration. However, even nowadays we can outline some questionable areas where it will be necessary to find optimum solutions so that the reform could continue. T.Cebisova mentions the following problems:

1. the reform of public administration is not caused by economic reasons only
2. reforms of public service cannot be assessed separately from the reform of public administration
3. the personnel must be prepared for initiative solutions of complex situations
4. the new public service must gain respect and win trust both by its performances and results, and also by impartiality and reliability. The ideal is not "blind justice", i.e. formal observance of the law, but optimum solutions within the law
5. public administration needs far-thinking, initiative and leading types capable of good communication on key leading positions
6. the officials cannot be leveled, differentiation in terms of salary is important, the so called superior officials are in leading positions[28)]

However, the procedure of public service reform is full of contradictions. As regards the general developmental trends, the current Service Act will have to be further changed and modernized. The question is now whether changes in the act present a proper solution, if it is not more suitable to create a completely new, modern legal regulation that would react to the above outlined problems of the public administration execution and public service and thus would approach modern European trends.

28) In the Czech language see: Čebišová, T. Modernizace služebních poměrů – evropské trendy a naše situace. In *Modernizace veřejné správy v Evropě a České republice*. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, 2006. p. 106–107.

Active Accessibility of the Information on the Environment as One of the Means of Modernization of Public Administration

Mgr. Magdaléna Peterková

The Initial Information

The questions of modernization of public administration are very topical at present. The post-communist public administration has already been greatly reformed as it was not possible to execute it according to the rules worked out by the totalitarian regime. Modernization of public administration is essential especially in connection with the admission of the Czech Republic to the European Union when it is necessary to approximate the operation of the Czech public administration to the operation of other Member States. European states have undergone the process of Europeanization of public administration as results from the documents of the Council of Europe.[1)] The following text points out that the directives and regulations of the European law play a key role in modernizing public administration and their influence in providing information is very strong.

Access to information is regulated in the Czech legal order by two laws, namely by the Act No. 106/1999 Coll. on free access to information as amended by later regulations and by the Act No. 123/1998 Coll. on the right to environmental information as amended by later regulations. Of course, the constitutional embodiment of the right to information cannot be left out. Both mentioned legal regulations, however, are based on the respective articles of the Charter of Rights and Freedoms[2)] and therefore we presume this embodiment.

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1) In the Czech language see: Grospič, J. K otázkám transformace, reformy a modernizace veřejné správy. In Louda, T. – Grospič, J. – Ostrá, L. Modernizace veřejné správy v Evropě a České republice. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, 2006. p. 13.

2) See article 17, section 1 of the Charter of Rights and Freedoms

If we want to further enumerate legal regulations that regulate providing information concerning the actual problems of the environment, it is important to point out why the regulations are adopted and what is the purpose of the provisions concerning the awareness of the public.

First, we would like to emphasize that the protection of the environment is a very topical issue and it should be in the interest of everyone to actively participate in the protection of the environment.

Second, it is necessary to point out that it is not possible to actively and effectively help with the protection of the environment if there is not sufficient information on how this protection might look like, why it is important to strive after such protection and what an individual may achieve while being active. Sufficient information concerning the protection of the environment is, however, just one part of the problem. Another crucial issue is the protection from danger which may be caused by some component of the environment. This concerns the protection aiming at prevention of loss of lives or health of people, possibly animals. A citizen of a modern state must know what to do in case of floods or in case of a disaster caused by chemical agents, which are examples of situations when providing information is essential. The third and the last reason why providing information is crucial for environmental law is that citizens must know the state of the environment, which is also one of the fundamental human rights that have been mentioned above. With the development of modern technologies and procedures the risks of endangering or damaging the environment have increased. We consider these increased risks a by-product of modernization. Modernization and the development of new methods and procedures should be supported if maximum protection of environment is ensured. Nevertheless, each coin has two sides. Although on the one hand our lives are easier thanks to much progress, on the other hand we have to face growing global problems which need not be enumerated in detail. Global problems are precisely the reasons why citizens should know what situation they are in as far as the environment concerns. They must know how risky it is for them to live nearby the waste incineration plant, they must know whether the road, which is to be next to their garden, is really necessa-

ry and is going to serve the purpose for which it is to be built … and these are just a few examples when citizens deserve timely and complete information to be able to protect their favorable environment.[3)]

Let's now have a look at some further regulations embodying a duty to provide information on the environment. In order to avoid a mere citing of respective provisions of legal regulations, we will mention just the areas of the environment involved and focus on a general regulation on providing information relating to the environment. The provisions regulating providing information can be found in the legal regulations on the protection of waters,[4)] atmosphere,[5)] nature, landscape[6)] and land.[7)]

Although there are no particular provisions regulating access to information in other legal regulations regulating the protection of other parts of the environment, it cannot be said that it is impossible to get such information. Citizens interested can apply the provision of the law concerning the right to obtain information on the environment. This is possible as the definition of the concept "environmental information" is so broad that almost everything concerning the environment belongs to it.[8)]

At the end of this introductory part we would like to point out that the right to obtain information is very often used by various NGOs in whose codes of rules the protection of the environment is embodied. NGOs present one of the forms of

3) Compare Art. 35, section 1 of the Charter of Fundamental Rights and Freedoms.

4) See provision § 115, sections 6, 7 of the Act No. 254/2001 Coll., the Water Act, as amended by later regulations.

5) See e.g. the provision of § 7, section 7 of the Act No. 38/2002 Coll. on the protection of the atmosphere, as amended by later regulations.

6) See the Act No. 114/1992 Coll. on the protection of nature and landscape, as amended, namely its sixth part, title three.

7) See the Act No. 156/1998 Coll. regarding fertilizers, agrochemical tests and information about their results.

8) Compare the provision of § 2, letter a) of the Act No. 123/1998 Coll. on the right to information on the environment, as amended by later regulations.

participation of the public in the protection of the environment.[9] In our opinion these civic associations know very well how to exercise the right to obtain information and from the results which are presented on web-sides[10] by a lot of them it is clear that they can also exploit the information very well.

Accessibility of Information and Principles of Good Administration

The principles of good administration are contained in the Public Defender of Rights Act.[11] However, the principles of good administration are not defined anywhere, therefore the Czech ombudsman JUDr. Otakar Motejl called a work conference whose aim was to define and explain these principles.[12]

If we are to speak about modernization of public administration we can include into this process also the definition and clarification of the principles of good administration as well as their observance. If the Czech public administration did not observe these principles it would result in arbitrariness of officials and harassment of those contacting the administrative authorities, which is inadmissible and cannot be tolerated.

We consider the active accessibility of information the manifestation of three principles of good administration, namely the principle of persuasive force, the principle of openness and the principle of helpfulness.[13]

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9) In detail see in the Czech language: Damohorský, M. a kol. Právo životního prostředí. 1. vydání. Praha : C. H. Beck, 2003. p. 210 and the following

10) See e.g. Environmental Law Service, www.eps.cz

11) See the provision of § 1, section 1 of the Act No. 349/1999 Coll. on the Public Defender of Rights, as amended by later regulations.

12) In this connection see conference proceedings: In the Czech language see: *Principy dobré správy*. Sborník příspěvků přednesených na pracovní konferenci. Masarykova univerzita v Brně, 2006.

13) For detailed characteristics of individual principles see p. 16–17 of the conference proceedings mentioned in reference n. 12.

As regards the principle of persuasive force, the authorities are obliged to provide participants in proceedings with information on procedural rights and duties, they have to inform a participant about the reason of issuing a particular decision by a respective authority and the participant is not obliged to ask for it.

If the public administration publishes particular information it becomes more legible for a citizen, which enables him a better orientation in acting with particular authorities. This is how the principle of openness could be understood.

The principle of helpfulness concerns handling of submissions, especially petitions. Officials should try to meet the demands of persons who trust them. It is questionable what the willingness to oblige someone means as different people have different criteria. No one should, however, leave the authority with a feeling that the principle of helpfulness has not been met.

In this part of our article we have mentioned providing information by public administration. We would like to add that in our opinion it is not very important whether the information concerns officials of administrative authorities or information regarding the decision issued in a particular case or information concerning the activities of a respective body. Each piece of information is a piece of mosaic which can be seen in manifestations of the above mentioned principles. The more such pieces the public administration enables to use, the better the whole mosaic will be created and it will be possible to claim that the principles of good administration are being fulfilled.

Active Accessibility of Information in Accordance with the Act No.123/1998 Coll. on Right to Environmental Information

We now get to the essential part of our article which is the active accessibility of information concerning the environment. The Act No. 123/1998 Coll. on right to environmental information contains, unlike the Act No. 106/1999 Coll. on free access to information, a particular provision titled as " active accessibility of infor-

mation"[14] which we consider a very good step towards approximation of public administration in the field of the environment to citizens.

This provision was incorporated into the Act N. 123/1998 Coll. on the basis of two very important documents. The first one is the Convention on the Access to Information, Participation of the Public in Deciding and the Access to Legal Protection in Environmental Issues (hereafter just the Aarhus Convention[15]), the second document is the Directive 2003/4/EC of the European Parliament and the Council on the accessibility of information regarding the environment.

As far as the Aarhus Convention concerns, it distinguishes two types of accessing information. The first one is passive, i.e. providing information on the basis of a petition, and the second one is active, when the obliged entities, administrative authorities[16], issue selected information via communication device.

The Aarhus Convention demands that authorities of public administration should have information on the environment concerning the execution of their functions at their disposal, they should update the information[17] It also demands that systems ensuring supply of information concerning activities influencing the environment[18] to administrative authorities should be established. It further demands that information which may help to make preventive measures if human health or environment is imminently endangered should be transferred without delay to persons who may be endangered. We would like to highlight the construction "may be endangered", i.e. the authority of public administration is obliged to consider a probable impact of the activity posing a threat and accordingly determine a number of persons entitled to obtain information. The Aarhus Convention further urges the legislators of

14) See the provision of § 10a of the Act N. 123/1998 Coll. on the right to information on the environment, as amended

15) The Announcement of the Ministry of Foreign Affairs No. 124/2004 Coll. from 29.10. 2004

16) See article 2, section 2 of the Aarhus Convention

17) See article 5, section 1, letter a) of the Aarhus Convention

18) See article 5, section 1, letter b) of the Aarhus Convention

individual signatory states to ensure, within the framework of their legal regulations, transparent and really accessible information concerning the environment. The accessibility is to be ensured as follows:

- by providing the public with sufficient data to be able to get the information concerning the environment, time-limits, conditions and procedures necessary for its obtaining,
- by introducing practical measures, especially registers available to the public, lists and collections of data, the obligation of officials to support the public in their efforts to obtain information, by determining contact places where respective information can be obtained
- by enabling a free access to information on the environment which is contained in the above mentioned registers, lists and collections of data[19)].

In connection with registers and lists available to the public it is necessary to mention that the Aarhus Convention also imposes a duty to introduce and make accessible the state registers of pollution. These registers concern selected installations and show what impact respective installations have on the environment. An example of such register in the Czech Republic is the Integrated Register of Pollution[20)]. It is managed by the Ministry of the Environment and it was first published on 30th September 2005. It contains data showing what toxic agents are released into the atmosphere and in what amount. This enables the public to be informed about the quality of the atmosphere in the place of their residence or in the near surroundings.

We believe that registers, lists and collections of data available to the public via public communication networks present a great step forward as far as the awareness of the public is concerned. The interested citizens but also various scientific institutions and non-governmental organizations can access the data in which they are

19) In detail see article 5, section 2 of the Aarhus Convention

20) For details regarding the Integrated Register of Pollution see: http://www.irz.cz

interested easily and they can get them immediately, i.e. without a time-consuming procedure of filing an application.

Another important document which was incorporated into the Act No. 123/1998 Coll. on right to environmental information is the Directive of the European Parliament and the Council 2003/4/EC about the access of the public to the information on the environment (hereafter just "Directive"). Even the preamble states that the authorities of public administration are obliged to try hard to provide relevant information concerning the environment in formats which are reproducible and accessible by electronic means and at the same time this information is to be effectively and easily accessible to the public via public telecommunication networks[21]. As the problems of the protection of the environment are very topical, a great emphasis is put on the question of education of public in the EU law. To improve the education, which would have a positive impact in the sphere of the environmental protection, the Directive demands that respective information should be made accessible and spread via computer communication or electronic technologies[22].

The problems of the Aarhus Convention would, in our opinion, deserve further elaboration in a separate article. However, as the active availability of information according to the act on the information concerning the environment is crucial for our article,we believe that the above given information was sufficient for the approximation of the two documents. Still, we would like to emphasize again that the Aarhus Convention and the Directive play a dominant role in the issue of providing information on the environment and therefore it is necessary to turn attention to them whenever the environment is being discussed.

Let´s now turn our attention to the key provision of the Act No. 123/1998 Coll. on right to environmental information and its active accessibility[23].

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21) For details see the preamble of the Directive of the European Parliament and the Council 2003/4/EC on the access of the public to the information on the environment, points 14, 15

22) For details see the preamble of the Directive of the European Parliament and the Council 2003/4/EC on the access of the public to the information on the environment, point 21.

23) See the provision of §10a of the Act No. 123/1998 Coll. on right to environmental

Active accessibility is, according to the wording of the law, providing information to the unlimited number of persons without the necessity of filing an application. It means that if the entitled person files an application and the obliged entity[24] reacts, we speak about passive supplying with information as has been mentioned above.

The provision on active rendering information is based on, as has been indicated above, the article 7 of the Directive and the article 5 of the Aarhus Convention[25]. The information concerns first of all the environment but at the same time it is also related to the jurisdiction of the obliged entity. It means it is not possible to ask the obliged subject to create electronic databases of information relating to the activities of a different entity. Databases, which must be gradually worked out and published by the obliged entities, are of electronic character and they are to be made accessible via devices enabling distant approach.

The Act on Environmental Information gives a demonstrative enumeration of the information which is to be the subject of active accessibility. On the one hand information of a general character, e.g. various strategies, conceptions, policies and news is given, on the other hand the enumeration contains also information of a specific or concrete character[26], e.g. administrative decisions conditioned by issuance of an opinion considering impacts of carrying out plans relating to the environment according to the Act No. 100/2001 Coll. on environmental impact assessment (EIA Act) or documents made in the course of assessing the impacts on the environment in accordance with the EIA Act.

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information, as amended by later regulations.

24) For the qualification of the obliged entities see the provision of § 2, letter b) of the Act No. 123/1998 Coll. on right to environmental information, as amended by later regulations.

25) Compare in the Czech language: Korbel, F. a kol. *Právo na informace. Komentář.* Praha : Linde, 2005. p. 307.

26) Compare in the Czech language: Korbel, F. a kol. *Právo na informace. Komentář.* Praha : Linde, 2005. p. 309.

It should be emphasized that by active accessibility is understood not only giving information via the internet but also editorial and publishing activities of the obliged entities. This form of rendering information is also very important, namely for those interested persons who do not have an access to the internet or this way of obtaining information is not comfortable for them.

In order the obliged entities knew what scope of information they are obliged to make accessible and the interested persons knew where to get the relevant information, the Ministry of Environment provides a list containing these data. On the website of the Ministry of Environment[27] can, besides other things, be found also legal regulations relating to the environmental law, namely regulations at international, Community and state level, which is also required by the provision 10a, section 6 of the Act No. 123/1998 Coll. on right to environmental information.

Conclusion

The article deals with the question of active accessibility of information. The aim of the article is to show that active rendering of information is a real step forward as far as modernization of public administration is concerned. The internet has become an important part of everyday lives, makes a lot of areas of our lives easier and one of these areas is also giving and accepting information. It is very good that public administration keeps up with the times and gradually makes information on the environment accessible. We believe that if the access to information on the environment is made easier, the public will use this information more. This will increase the knowledge of citizens about the environment, which will subsequently influence the quality of its protection. We think that the forthcoming aim and a general trend of public administration should not be a mere observance of the norm imposing a duty of active accessibility of information but also improvement of public's education to learn about the possibility of active accessibility of information and get the best of it.

27) www.env.cz

Public Private Partnership in Czech Law

Mgr. Olga Pouperová

1. Public administration as a service for the public

The activity of the public administration is used to be characterized as the activity to order.[1)] Nowadays there is a trend to understand more activity and impositions of the public administration as the service for the public and to direct it more at addressee of the public administration. In this regard the public administration is near to private sphere. The modification of the marketing principle to focus on the customer, which is typical for the private sphere of rendering services , has already been established legally positive also for the public administration.[2)] The range of non-authority instruments, that are at disposal of the public administration to effectively fulfill its determined tasks and its activity to be public service not only *de iure* but also *de facto* and to be perceived by the addressee in this way, is also spreading. So called public private partnership is a new legal instrument or more precisely an instrument newly regulated by special legal regulation).

2. Public private partnership (Public Private Partnership - PPP) generally The elements of public private partnership

1) In the Czech language see: Průcha, P. a kol. *Správní právo. Obecná část*. Brno : Masarykova univerzita v Brně, 2003, s. 29 see also Hendrych, D a kol. *Správní právo*. 6th edition, C. H. Beck, Praha, 2006. p. 3–14.

2) See §4 par.1 Act No .500/2004 Coll., Code of Administrative Procedure, in valid wording:“ The public administration is a service for the public…everybody who performs the tasks resulting from competence of public administration body, has a duty … to meet demands of affected person.“

The concept of PPP is not a concept of law, it is used in practice as the designation of obligation relationship arisen between public (the so called public client[3]) and private (the so called licensee[4], could be a legal entity[5] or a natural person) entities based on the contract by which the party of the public administration transfers the performance of certain service traditionally rendered by public entity to private entity. Private entity invests its financial means (apt. financial means from its bank credit) in realization of PPP project and then he gets from public entity agreed consideration for the rendered service, or he gains means directly from final user of the service.[6]

The most common form of public private partnership are so called BOT projects (build – operate – transfer), private entity invests financial means in publicly beneficial building which he carries out in the course of the partnership, he operates it, keeps and administers and after termination of the partnership he transfers proprietary rights to this publicly beneficial building on public entity.[7]

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3) Under § 2 of License Act, public client may be the state or territorial self-governing unit, or state institution receiving contributions from the state budget, contributory institution, where the function of incorporator is performed by territorial self-governing unit or other legal entity, in case it was formed or established for the purpose of satisfying the needs of public interest that have no industrial or commercial nature and it is financed mostly by the state or other client or it is controlled by the state or other client or the state or other client appoints or elects more than half of the members in one of its bodies.

4) See § 5 par. 1, pro. § 12 par. 1 of License Act

5) See § 32 par.2 letter b) and c) of License Act

6) See e.g. What is Public Private Partnership?, http://www.businessinfo.cz/clanky/public-private-partnership-ppp/co-je-to-public-private-partnership, in the Czech language see also Johanek, T.: PPP: Čekání na koncesní zákon, http://www.profit.czuprint.php?iArt=16100
R. Jurcik gives that the concept of PPP is understood in various states differently - from privatization of state owned enterprises, through public orders and license contracts to private manipulation with public corporation property. In the Czech language see: Jurcik, R. Nová právní úprava veřejných zakázek a koncesí. *Právní zpravoda*j, č. 4/2006. s.12.

7) PPP project in the form of BOT is e.g. Project of highways D3 in the part of Tabor – Sobeslav – Bosilec of the Ministry of Transport, whose aim is to ensure the building-

A few notes on the definition of public client

The European Court of Justice expressed its opinion on the interpretation of the concept of the state in definition of the public client in preliminary question proceedings in dispute between Gebroeders Beentjes BV and Dutch Ministry of Agriculture and Fishing.[8)]

For the purposes of the directive (directive 71/305/EHS) whose aim is to coordinate procedures of sending in public orders on engineering works, the concept of state must be interpreted in functional meaning. The aim of the directive which is to ensure the freedom of settlement and freedom to render services in relation to public orders on engineering works would be endangered if the provisions of the directive should be non-applicable only for the reason the public order is set in by entity, or more precisely its body was established for the realization of certain tasks that are entrusted by legal regulations, in formal meaning is not part of the state administration.

The breach of the EC Treaty proceedings according to article 169 (article 226) TEC, the Commission of European Communities versus Belgium Kingdom[9)], ECJ has declared that the concept of the state in the definition of public client comprises state as the original entity of public power and all its bodies as executors of public power, i.e. bodies that execute judicial, executive and legislative powers.

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up, maintenance and operation of the part of highway D3, see resolution of the government n. 1017 of August 17, 2005 or the project AirCon (Airport Connection) whose aim is the modernization of the railway lines from Prague to Kladno and the building-up of the part to Airport Prague , including the operation of the line and railway traffic on this line, see resolution of the Czech government n.76 of January 19,2005, see also http://www.mdcr.cz/cs/Core

8) The decision of ECJ in the case of Gebroeders Beentjes BV versus Dutch Kingdom of September 20, 1988, n.C – 31/87, available in http:// eur-lex.europa.eu

9) Decision of ECJ in the Commission of EC v. Belgium Kingdom of December 17, 1998,n. C-323/96, available in http://eur-lex.europa.eu

The breach of the EC Treaty, the Commission of European Communities versus Ireland[10], ECJ has ruled private company is necessary to be considered as a public client within the intention of the directive whose majority not absolute owner is the state. Such a company will be regarded by virtue of directive as so called other public entity whose public orders on delivery are directed by the state. In this specific case it was the company created by the state which charged it with specific tasks namely the administration and management of national forest, and rendering defined public services and facilities.[11] The state (through the Ministry of Power Supply) approves the by-laws of the company and appoints the board of directors. Besides that the Ministry is entitled to grant the company instructions concerning the conformity with forest policy.[12]

Disadvantages and advantages of public private partnership

The advantage of public private partnership is that it enables to use private financial resources in public sector. It enables to solve the lack of finances in public budgets on one side and urgent need of investments in infrastructure by compromise on the other. The following idea that is used by PPP projects is that the private entity is interested in the result of the activity, in the quality of the rendered services and it has better presumptions to be more successful manager and to handle the risks better, operatively and with lower costs. The private entity can make profit from observing agreed terms which ensure long-term income of realized project. The projects of public private partnership presume that private entities have more experience with realization of defined subject matters of the contract. Nevertheless the public entity does not lose control over the realization of the project. On the other hand the partnership with private entity may be connected with the risk of bad discipline of private entity.

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10) Decision of ECJ in Commission of EC v. Ireland of December 17, 1998, n. C-353/96, available in http://eur-lex.europa.eu

11) Coillte Teoranta Company owns national parks, administers them and operates sports, recreation and similar facilities.

12) Cf. § 2 of License Act

The realization of PPP projects is one of the methods how to realize the tasks of the public administration and to render certain services without shock overburden of public budget.

3. Act No. 139/2006 Coll., the trade permit contracts and the trade permit proceeding (the Trade Act)

A brief summary of legislation

The trade permit contracts and the Trade Permit Proceeding Act of March 14, 2006, has come into force on July 1, 2006 and it transposes the directive of European Parliament and Commission 2004/18/EC on coordination of procedures at setting in public orders on engineering works, deliveries and services, which imposes the member states the obligation to implement till January 31, 2006 the legislation of the so called excessive limit of trade permit contracts on engineering works.

The directive leaves the public client maximum of free choice of selection of licensee, it determines only the requirement for the client who is going to grant excessive limit of trade permit for engineering works to publish its intent in a prescribed manner.[13] In the course of selection of the licensee, the clients have a duty to follow the principle of transparency, equal treatment with applicants and prohibition of discrimination.[14]

The Trade Act stipulates the legal framework for the realization of the PPP projects and the basic rules for the cooperation of public and private entities. It determines the institute of trade permit contract, regulates the preparation and approving the so called important trade permit projects, feasibility study, determination of public sector entities in the course of preparation and realization of trade permit projects, trade permit dialog as a special procedure for the selection of licensee, institutional support for the preparation and realization of the trade

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13) Touska, M. *Více jistoty pro PPP projekty*, http://www.asociaceppp.cz/index.php?cnt=novinky action=264

14) In detail prov. of art.2 Directive 2004/18/EC

permit projects, special regime for the case of bankruptcy, determination of project company and the register of trade permit contracts. [15)]

Transparency of the proceeding and the prohibition of discrimination

The ECJ has expressed opinion on the principle of transparency and the prohibition of discrimination, e.g. in the case of Teleaustria Verlags GmbH versus Telecom Austria AG (2006) [16)] in the answer on the preliminary question according to article 177 (art.234) of the EC Treaty. The duty to ensure transparency of the whole proceeding results from the principle of non-discrimination. The transparency states the possibility to review impartiality of contractual proceeding. The duty of non-discrimination comprises among the others the duty to ensure such degree of advertisement which would enable the participation of any potential applicant. The Czech Trade Act is in comparison with the general legislation contained in mentioned directive more detailed and it regulates all relations of public private partnership which accomplish elements stipulated by Trade ct, not only the relations based on trade permit contracts on engineering works.

4. The trade permit and the trade permit contract

The trade permit *de lege lata* has been regulated by the Land Communications Act[17)] and Public Orders Act[18)] till the adoption of Trade Act and the concept of trade permit is used by the Trade Act[19)] as well. The relations corresponding to

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15) In the Czech language see:
Marek, K. *K připravovaným zákonům o veřejných zakázkách a veřejných soukromých partnerstvích*, ASPI: 26421

16) The decision of ECJ in the case of Teleaustria Verlags GmbH versus Telecom Austria AG of December 7, 2000, n. C-324/98, available in http//eur-lex.europa.eu

17) Act No.13/1997 Coll. on Land Communication as amended by later regulations

18) Act No. 40/2004 Coll. Public Order, reversed by Act N. 137/2006 Coll. public orders effective on 1 of July 2006

19) Act No 455/1991 Coll. Trade Permit Act as amended by later regulations. "Trade

relations of public private partnership could be before July 1, 2006 made in the regime of the Commercial Code within the intention of the provision § 261 par. 2[20)], which stipulates that the relations between the state and self-governing unit may also be commercial obligations on one side and the entrepreneurs on the other side if they are concerned with ensuring the public needs.

The Land Communication Act enables the state to transfer the execution of some rights and duties in connection with building – up, operation and maintenance of highway to legal entity (so called licensee) chosen by the procedure stipulated by the Public Orders Act.[21)]

The Trade Act does not derogate already existing legal legislation of the relations of public private partnership contained in special legal regulations, nor reverses the legal legislation of trade permit contracts contained in the Land Communication Act.

The legal theory understands the concept of trade permit as an administrative act qualified for certain activity but there is no legal right to get it. If any qualification has arisen on the basis of trade permit, it is upon the administrator of public administration to consider whether such qualification would be admitted. Administrative consideration in this respect is not unlimited; the act usually stipulates criteria, which are followed by the administrative body while deciding the trade permit. The trade permit is near the permission[22)] especially in cases when there is an indefinite concept used for issuing the permission in some substantive presumption.[23)]

Permit to undertake permitted trades becomes effective by the date of coming into force and granting the license." - see §10 par. 1 letter b) Trade Permit Act

20) Act No.513/1991 Coll. Commercial Code as amended by later regulations

21) See prov. § 18 and the Land Communication Act

22) Permission is an administrative act that is issued for certain activities which are not commonly prohibited. It is a modification of general principle that what is not prohibited is allowed. See prov. art.2 par. 4 of the Constitution and prov. art.2 par.3 of Declaration and in the Czech language see: Hendrych, D. a kol. Správní právo. Obecná část. 5. enlarged edition. Praha : C. H. Beck, 2003. p.125–126.

23) In the Czech language see: Hendrych, D.a kol. *Správní právo. Obecná část*. 5. enlarged edition. Praha : C. H. Beck, 2003. p.126.

The state power or the execution of certain expert activity may be delegated by the trade permit on private entity. Such entity then becomes indirect administrator of public administration.[24)]

The trade permit in above mentioned meaning is a specific individual administrative act issued by operation of law, i.e. by an act issued by administrative body which decides about the rights and duties of non-subordinate entities unilaterally and authoritatively.

The trade permits in the public qualification meaning however are not issued under the trade act. The trade permit act does not use directly the concept of trade permit instead it works with the concepts of trade permit contract, trade permit proceeding, licensee etc.

The trade permit contract under the trade act is a bilateral legal act made by entities in equal status. It is in fact a contract not authoritative unilateral act namely private contract, not a public one.[25)]

5. Public private partnership under the Trade Act

By virtue of the Trade Act the cooperation that fulfils other defined elements, between public clients and other entities is a public private partnership. [26)] Certain provisions of the Trade Act are to be applied also on the relations arising during realization of excess public orders under the Public Orders Act,[27)] if the contract

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24) In the Czech language see: Hendrych, D. *The general part 5, enlarged edition*. Prague : C. H. Beck, 2003. p.408.

25) ”Public contract is a bilateral or multilateral legal act that establishes, alters or annuls rights and duties in the area of administrative law.” – see prov.§159 par.1 and act n.500/2004 Coll., Code of administrative procedure in valid wording.

26) “Through the public contracts there may be the transfer of the operation of powers of public administration entities or there may be legislation for the method of its execution – performance of the tasks of the public administration.” – in the Czech language see: Hendrych,D.a kol. Správní právo. Obecná část 5, enlarged edition. Prague : C. H. Beck, 2003. p.161.
see § 1par.1 of the Trade Permit Act

27) Act No.40/2004 Coll., public orders, with effect from July 1, 2006 cancelled by Act No.137/2006 Coll. public orders

on the basis of which the public order is being realized is made for fixed period, at least of five years and the contractor bears economic risks, that usually are on the client, connected with the realization of this public order.[28)]

The trade permit contract is a contract under which a licensee undertakes to render services or to perform work and the client undertakes to enable the licensee to take benefits resulting from rendering the services or from using work done, if need be together with partial financial consideration. The substantial part of risks connected with taking the benefits resulting from rendering the services or using work done is taken by the licensee.

The Trade Act however forms only general legal framework for the realization of the public private partnership projects. The substantial part of commercial obligation arisen on the basis of the trade permit contract and its content, rights and duties of participants of commercial obligation occurred on the basis of the trade permit contract are regulated by competent provisions of the Commercial Code, most often by the provisions of the contract for work done.[29)]

The Trade Act explicitly emphasizes that the client may transfer the right to take fees from users for rendered services only if the client has a right to take such fees which is the principle known already in Roman law "Nobody may transfer more rights on other than he himself has".[30)]

The provision of article 11 par. 5 of the Charter[31)] institutes the possibility to impose taxes and fees only by virtue of law. For the purposes of public private partnership it is necessary to distinguish between the charge and fee for rendered service the user has no legal right and to demand the fee for such rendered service is legal.[32)] In case the fee would be regarded as the charge by virtue of Art. 11 par.

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28) see §1 par.2 of the Trade Permit Act

29) see §16 par.6 of the Trade Permit Act

30) *Nemo plus iuris ad alium transferre potest quam ipsa habet. (Ulpianus Dig. 50, 17, 54)*

31) resolution of CNB n. 2/1993 Coll. on Declaration of the Charter of Rights and Freedoms as the part of the constitutional order of the Czech Republic

32) In the Czech language see: Touška, M.: Více jistoty pro PPP projekty, http://www.asociaceppp.cz

5 of the Charter, it would be possible to determine its amount and to take it only under the special law.[33)]

The law also stipulates the power of the Office of the protection of economic competition to supervise the observance of trade act and the powers of the Ministry of Finance in the area of budgetary supervision. For the realization of the budgetary supervision it is not determined whether the specific project is the public private partnership project but whether it fulfils the criteria determined by the Trade Act.

The realization of the public private partnership project is to contribute to more effective allocation of public funds and surety of public services to a larger extent and better quality and to contribute to economic growth and growth of direct foreign investments by the support of private investments in public services.[34)]

6. Is a contract to make public private partnership a public order?

The public private partnership made under the trade permit contract by operation of the trade act in fact is a modified public order.[35)] The Trade Act and Public Orders Act define the public client consistently. The public private partnership based on the trade permit contract under the trade act distinguishes classical public order in several elements.

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33) For example the Land Communication Act qualifies for fees use of some categories of land communications. See § 20

34) see Material intent of the Trade Permit Act, p.1

35) By operation of Act No. 137/2006 Coll. on public orders with effect from July1, 2006. With respect to the fact that trade permit act and new act on public orders were prepared and adopted together and they take effect in the same day, I compare public private partnership under the Trade Permit Act with public orders under new act on public orders.

The public order is an order realized on the basis of written contract between the submitter and the contractor whose subject matter is paid rendition of engineering works or deliveries. See §7 par.1 of Public Orders Act.

The transfer of risks connected with the functioning of the subject matter of the project on the licensee is typical for the relations arising on the basis of the trade permit contract which distinctively differentiates it from classical public orders. If the payment of costs guaranteed by client is without the risk connected with the realization of the project, the contract should be qualified as the public order within the intention of the Public Orders Act more than the trade permit contract. If the licensee obtains in the course of duration of the partnership or after its termination from the client the payment comprising the loss, the basic elements of public private partnership (the transfer of substantial part of the risk to licensee and structuring the payments as the fees for services) are not fulfilled and the contract no longer may be regarded as the trade permit contract within the intention of the trade act.[36)]

The projects which are too risky for the private entities and which have no economic return are not suitable for public private partnership.[37)]

The legislation of trade permit proceeding is in comparison with the legislation of contractual proceeding under the public orders act more simple and more uniform and the trade permit proceeding should be more transparent. The trade act determines the client duty to ascertain presumed value of the trade permit contract and presumed total income of the licensee which results from the realization of the trade permit contract before the commencement of the trade permit proceeding. Prospective provisions of the public orders act are similarly used e.g. in submitting period, technical conditions, classification of the subject matter of trade permit contract, providing permit documentation to contracts, additional information about submitting conditions and the inspection of the place of consideration, submission of the offers and their content, opening envelopes with offers and evaluating commission and to assessment and evaluation of the offers with the distinction that economic advantage of the offer is the only criterion for the choice of the licensee.[38)]

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36) Jurčík,R. Nová právní úprava veřejných zakázek a koncesí, *Právní zpravodaj*, 4/2006. p. 12.

37) Valová, I. *Koncesní zákon II.*, http://www.zakony.idnes.cz

38) See § 8 par. 3and 4 and prov. § 11 par. 1 and 2 of the Trade Permit Act

The relation occurred on the basis of the trade permit contract is the private relation, public and private entities have equal status. The Trade Act stipulates the trade permit contract an obligatory written form and determines also its essential elements, but for the legislation, it refers to the Commercial Code, in doing so, the private character of the trade permit contract has been confirmed.

Note

The theme was originally prepared for the international conference held in June 2006 at the Law Faculty of Palacky University in Olomouc. This article was formed as the supplementary and amendment to June article.

The Formation of the Czechoslovak Republic and the Beginning of Its Public Administration

Prof. JUDr. Eduard Vlček, DrSc.

1) The formation of public administration in Bohemia, Moravia and Silesia.

The World War One resulted from the whole complex of conflicts between two power blocks: The Triple Alliance (represented by Germany, Austro-Hungary, Italy and later supported also by Turkey and Bulgaria) on one hand and countries of the Alliance (represented by Russia, France, Great Britain and later supported by several other states)[1)] on the other hand. In Austro-Hungary itself both political and economic disintegration started to reach its peak from the beginning of 1918. Towards the end of the World War One the situation in Austro-Hungary was sustainable neither from the military nor from the political point of view. Even if Austro-Hungary submitted very generous offers to the oppressed nations or even if these nations had not been interested in disintegration of the Alliance, the situation was still unbearable.[2)] Strengthened by the political development in Russia, the General Assembly of Deputies of the German Empire Council and provincial assemblies of the Czech Kingdom met in Prague in the Municipal House on January 6, 1918. Here the Declaration of Epiphany was adopted proclaiming as a guarantee of lasting peace implementation of the right of nations to self-determination, the right of the Czech nation to its independent state existence with full adjudication of rights for national minorities and unconditional embodiment of integration of Czechs and Slovaks into one state.[3)]

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1) In the Czech language see: Kolektiv autorů. *Dějiny zemí koruny české II*. Praha : Nakladatelství Paseka, 1993 p. 139.

2) In the Czech language see: Klimek A. *Velké dějiny zemí Koruny české*, sv. XIII (1918–1929). Praha : Nakladatelství Paseka, 2000. p. 15.

3) In the Czech language see: Schelle, K. *Organizace veřejné správy v letech 1848–1948*.

Abroad preparations for the independence of Czechoslovakia were gradually culminating from the spring of 1918. In May 1918 an agreement between representatives of Czech and Slovak associations of compatriots in the United States of America with participation of T. G. Masaryk was concluded where consent with political programme of the Czechoslovak National Committee in Paris aiming to integrate Czechs and Slovaks into one common state was given. The Czechoslovak National Council was recognized by France on June 29, 1918, by Great Britain on August 9, 1918, by the Government of the USA on September 3, 1918, by Japan on September 9, 1918 and by the Government of Italy on October 3, 1918. On October 18, 1918 T. G. Masaryk delivered the so called Washington Declaration to the President of the USA W. Wilson containing the declaration of Czechoslovak independence and recognition of the Czechoslovak National Council as temporary government of the Czechoslovak Republic by the states of the Entente.

At the time when the Czech National Council was negotiating in Geneva particular procedures of state establishment with the delegation of the Prague National Committee headed by Karel Kramar, the republic was proclaimed spontaneously in Prague on October 28, 1918.[4)]

The new state was formed as a Czechoslovak national state but besides Czechs and Slovaks it included a lot of various national minorities: 28 % Germans, 8 % Hungarians, 3 % Ukrainians, 1 % Poles and 1 % Jews.

The National Committee, which had been reestablished not even four months (13. 7. 1918) prior to the proclamation of the republic, was at the head of the political activities. Political parties were represented in the National Committee at the same ratio as determined by the results of elections to the German Empire Council in 1911.[5)] K.Kramar was elected the chairman, an agrarian A. Svehla was elected a vice chairman together with a Czechoslovak socialist V. Klofac and a

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Brno : MU, 1993. p. 103.

4) In the Czech language see: Kolektiv autorů. *Dějiny zemí koruny české II*, Praha : Nakladatelství Paseka, 1993. p. 155.

5) In the Czech language see: Schelle, K. *Organizace veřejné správy v letech 1848–1948*. Brno : MU, 1993. p. 106.

social democrat F. Soukup became a secretary. On October 28, 1918 V. Srobar joined the National Committee. The National Committee has become the central authority with legislative and executive powers for the whole Czechoslovak state. It possessed these powers until November 14, 1918.[6)]

Although already at the beginning of 1918 it was apparent what would be the development of war events and it was also possible to predict the fate of Austro-Hungary, preparations for the formation of an independent Czechoslovak state were not as intensive as one might expect. Approximately from April 1918 preparations of political and economic programmes began. The work was completed in September 1918 and resulted in working out two outlines of laws. The first outline was a proposal of an Economy Act elaborated by J. Preiss which was supposed to ensure independent financial economy and independent currency. Another proposed law drafted by F.Panticek was the so called Political Act or the Act on Temporary Government of the Czech Empire which contained 29 articles and was to serve as a temporary constitutional instrument.

As the final disintegration of Austro-Hungary was expected as late as spring 1919, the first law of the Czechoslovak state has become neither of the above mentioned bills but A. Rabin condensed Panticek´s proposal and it was then adopted by the National Committee already on October 28, 1918 as the so called "Reception Act", later published under No. 11/1918 Coll., as The Act on the Establishment of Independent Czechoslovak State which stressed the continuity of legal order and administration and did not determine the state form of the new state.[7)]

In the course of the first three days of the existence of the independent Czechoslovak state, public authorities as well as police and judicial institutions have gradually become subordinated to the National Committee. On October 30, 1918 the National Committee firmly controlled the vast majority of former Austrian administration.

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6) In the Czech language see: Klimek A. *Velké dějiny zemí Koruny české*, sv. XIII (1918––1929). Praha : Nakladatelství Paseka, 2000. p. 26.

7) In the Czech language see: Schelle, K. *Organizace veřejné správy v letech 1848–1948*. Brno : MU, 1993. p. 105.

Further institutions enforcing the revolutionary character in administration after the formation of the republic were in addition to national committees also the less known civil boards. Civil boards came into existence mostly at the end of 1918, i.e. at the time when national committees were gradually dissolved. Some tasks of public administration were transferred to district demobilization committees, multistage system of economic councils, housing authorities and workers´councils.[8)]

One of the last deeds adopted by the National Committee was a temporary constitution of the Act No. 37/1918 Coll. This enabled to regulate the system of supreme bodies of state power represented by the National Assembly (called Revolutionary), the President of the Republic and the Government.[9)]

In Moravia the situation in public administration had been developing similarly as in Bohemia. The National Committee was established and supplemented by further members of political parties before the formation of the state itself. Also the local National Committee in Brno was instituted. Moravian members of the Prague National Committee who had not become members of the Prague National Committee before October 28, 1918 were then members of the Moravian National Committee in Brno.

The formation of an independent Czechoslovak Republic was celebrated in Moravia a day later, i.e. on October 29, 1918. The National Committee assumed the administration of Moravia from the Moravian governorship. It has become the administrative centre of Moravia despite establishing the Moravia-Silesian Office of the National Committee headed by K. Englis. The representatives of the Brno National Committee visited on October 29, 1918 a Moravian governor dr. Karel Heinold with a demand to hand them over the state administration. He complied with their demand after consultations with the Minister of Interior. It was also agreed that the public administration should be ensured by the governor in cooperation with the administrative commission set up by the National Committee.

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8) In the Czech language see: Janák, J. – Hladíková, Z. *Dějiny státní správy*. Praha, 1989. p. 390.

9) In the Czech language see: Malý K. Dějiny českého a československého práva do roku 1945. Praha : Nakladatelství Linde, 1999. p. 272.

The members of the commission have become: a constitutional democrat H. Bulin, an agrarian K. Sonntag, a member of the People´s Party J. Sramek and a social democrat K. Vanek.[10)]

A former district commissioner and later the chairman of several caretaker governments J. Cerny has become the governor. On the following day it was pointed out that *"The organization and jurisdiction of political authorities remain territorially and materially unchanged. Political authorities at present composition serve for issues belonging to political administration: It would thus be incorrect for authorities or parties to consult the National Committee in these matters which would assign these petitions onto the governorship which would cause delays."*[11)] The members of the Moravian National Committee have become only the representatives of political parties who were at the same time also the members of the National Committee in Prague and lived in Moravia or Silesia. The Prague National Committee issued a proclamation stating that it did not know any Moravian National Committee but only members of the Prague National Committee who decide on behalf of its name and asked only these members to vote during the decision-making process.

However, the Moravian National Committee continued to act as an independent central body in Moravia without noticeable differentiation of its activities from the Prague National Committee. Nevertheless, the fast course of events in Prague forced the members of the Moravian National Committee on November 5, 1918 to finally resign their offices. On the same day a governmental commissioner for the administration of the city of Brno upon agreement with the National Committee was appointed a Moravian governor.[12)]

During World War One there were extensive talks in the exile between Czech and Polish politicians about mutual relations of future states and the arrangement of Silesia and Tesin area. The necessity of postwar cooperation between future states was declared. From the autumn of 1917 but especially from the beginning

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10) In the Czech language see: Schelle, K. *Organizace veřejné správy v letech 1848–1948*. Brno : MU, 1993. p. 105.

11) Ibid, p. 108.

12) In the Czech language see: Schelle, K. *Organizace veřejné správy v letech 1848–1948*. Brno : MU, 1993. p. 109.

of the year 1918 the Czech and Polish opposition groups began meeting and were preparing for the victory of the states of the Entente.[13)]

The Polish national efforts resulted in establishing the Provincial National Council of Tesin Principality on October 19, 1918. The Council presented the supreme representation of the Polish policy in the Tesin region. First it did not declare its support for annexation of the Tesin region to Poland but already on October 29, 1918 it issued a declaration announcing that it took over the administration and that the Tesin region was annexed to Poland except the Frydek district.[14)]

The Czechs waited for the information on the formation of Czechoslovakia and then they initiated organizational activities. On October 29, 1918 the temporary National Committee for Silesia in Opava and district national committees in Polish Ostrava, Orlova and Frydek were established.

The representatives in Opava announced that authorities should make no decisions without informing the National Committee. At the same time they urged citizens to establish national committees in all districts and municipalities. The local national committees were to be established especially in "endangered places". On October 31, 1918 the Provincial National Committee for Silesia with its seat in Ostrava was established, composed of representatives of seven political parties, as the supreme authority of the Czech nation and the executor of the Prague National Committee power. On November 1, 1918 the information on the formation of the Czechoslovak state was published in Opava newspaper. Prague was immediately informed about the foundation of the Provincial National Committee.[15)] Prague reacted that it was not possible to recognize the National Committee for the whole Silesia but only individual district national committees. The members of the Provincial National Committee for Silesia then decided to ask the National Committee in Prague to recognize it as the representative of the Czech Silesia. In Opava, however, the Austrian administration still worked as

13) In the Czech language see: Gawrecká M. *Československé Slezsko mezi světovými válkami 1918–1938*. Opava, 2004. p. 19.

14) Ibid, p. 20.

15) In the Czech language see: Schelle, K. *Organizace veřejné správy v letech 1848–1948*. Brno : MU, 1993. p. 108.

well as the whole machinery of the provincial government headed by the provincial president A. Widmann.[16)]

On November 2 and November 5, 1918 the temporary agreements were concluded in Orlova and Polish Ostrava between representatives of the Polish National Council and the Provincial National Council to face tense social and ethnic problems. A temporary demarcation line according to ethnic composition of local councils was set. Both sides were, however, violating the adopted agreement "in the interest" of their states. From the half of November 1918 there were demands from the Czech side to occupy the problematic territory by the army of the Entente.[17)]

Concurrently with these events the situation in Silesia was even more complicated by the formation of the Sudetenland province which demanded the whole northwestern Silesia, northern Moravia and a part of eastern Bohemia.[18)]

The problems with the Sudetenland province were resolved by the end of December 1918 when the province was occupied by the Czechoslovak army. The worse situation was with Polish claims. The Minister of Foreign Affairs E. Benes tried to get consent of the states of the Entente to the military occupation of the Tesin region by the Czechoslovak army but he was not successful. So the Czech representatives tried to solve the situation in a different way. From January 23 till January 30, 1919 the so called *Seven-day-war* took place between the two states during which the Czechoslovak army dislodged the Polish forces as far as the Visla River. The states of the Entente, however, strongly disapproved such a solution. An agreement was signed between the states of the Entente and Czechoslovakia prohibiting annexation of problematic territories and determining the limits of the Czechoslovak and Polish powers. Both states were promised a commission would be sent on the problematic territory to prepare materials for the final delimitation.

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16) In the Czech language see: Schelle, K. *Organizace veřejné správy v letech 1848–1948.* Brno : MU, 1993. p. 109.

17) In the Czech language see: Gawrecká M. *Československé Slezsko mezi světovými válkami 1918–1938*. Opava, 2004. p. 21.

18) Olivová V. *Dějiny první republiky*. Praha : Karolinum, 2000. p. 72.

The allied commission started its activities in the Tesin region at the beginning of February.[19)]

During negotiations at the peace conference a turnover in favour of Poland came, therefore Benes asked for decision by plebiscite not only in the question of the Tesin region but also in the problematic territories of Spis and Orava. The situation was then finally resolved in July 1920. Czechoslovakia acquired the territory of 1 270 km^2 and Poland 1 012 km^2. Before the final solution of the whole situation, the Hlucin region was annexed to Czechoslovakia by the Act No. 76/1920 Coll. from January 30, 1920.[20)]

2. Public administration in Slovakia and Sub-Carpathian Ukraine

The situation in Slovakia was difficult. Active political life evolved here more slowly than in Bohemia and Moravia. During the World War One only the National Party, associating other currents, besides the social democracy, really existed there.[21)] More significant manifestation took place on May 1, 1918, when there was a huge antihungarian rally in Liptovsky Mikulas headed by V.Srobar. The resolution of the right to self-determination of the Czechoslovaks in Hungary was adopted. It has meant clear proclamation of the will of the Slovaks to unite with Bohemia in one common state.

Milan Hodza firstly and openly formulated the idea to create the Slovak national race by the end of May in 1918.[22)]

When the end of war was coming on September 7, 1918, the Hungarian House adopted election law which hasn't met Slovak requirements for general, direct and equal elections and moreover preferred the Hungarians over the oppressed nations. On October 19, 1918 after the declaration of the self-determination of the Romanians, the Slovak Deputy F.Juriga presented similar declaration in the

19) In the Czech language see: Schelle, K. *Organizace veřejné správy v letech 1848–1948*. Brno : MU, 1993, p. 110–112.

20) Ibid, p. 219.

21) In the Czech language see: Klimek, A.*Velké dějiny zemí Koruny české*, svazek XIII (1918–1929).Praha : Nakladatelství Paseka, 2000. p.73.

22) Schelle, K. *Organizace veřejné správy v letech 1848–1948*. Brno : MU, 1993. p. 110

Hungarian House. He declared that only the Slovak National Council has the right to represent the Slovaks in future peace conference. He also emphasized that the Slovaks did not recognize the Hungarian House and that they themselves would decide their future state location and their relation to the other nations. But in fact at that time the Slovak National Council has not existed yet.[23)]

The National Newspaper published in October 22, 1918 the report on the answer of the President of the United States on the Austrian note of October 7, 1918 and in two days later it published announcement about the summoning of the established Slovak National Council in Martin. Here on October 30, 1918 the Slovak National Council was created and the declaration on the future common life of the nations of Slovaks and the Czechs was passed and it was emphasized that only the Slovak National Council was entitled to speak on behalf of the Slovaks. To a certain extent a similar situation like in Moravia and Silesia occurred here.

In fact Slovakia has been henceforth commanded by former administration, gendarmerie and army.[24)]

The discussions on the problem of the organization in the Slovak territory had already started in political circles before the formation of the independent Czechoslovakia. Unitarian conceptions of A.Rasin interfered here with rather diffident opinions about Slovak administration of Hodza. Under Panticek proposal uniform political administration should have been introduced instead of Hungarian autonomous public territorial unit administration and Hungarian territorial units should have been transformed into district offices in cities with expository. Similar administration should have been established in both municipal towns (in Bratislava and in Kosice). It should be the first political instance. The office of head district administrator should present the second one, entrusted with the administration of the whole country (similarly to proconsulate in Prague, Brno and provincial government in Opava). The Ministry of the Interior should finish

23) The same book, p.113–114.

24) In the Czech language see: Kováč, D. *Dějiny Slovenska*. Praha : Nakladatelství Lidové noviny, 1998. p. 181.

the third instance. The formal negotiations on the proposal have never been realised.[25)]

In November 3, 1918 the Slovak National Council "identified itself" in "Ohlas" with reception rule of the National committee in Prague. All valid Hungarian laws remained in force, state authorities, local councils and other parts of Hungarian administrative apparatus operated the same way but instead of Hungarian byrocracy apparatus the Slovak National Council was the head.[26)]

The administration in Prague decided to establish the Slovak military administration to strenghten its state powers. A special bureau for administration of Slovakia headed by Srobar was established and as the minister with full power for Slovakia he was entitled to adopt any measures for keeping the order.

Under the influence of the Hungarian Republic, local Hungarian National Council was formed in Martin. But it was not recognized by the Slovak National Council. A lot of disputes lasted until the Czechoslovak army has entered Slovakia and former Hungarian administration has been abolished.

Not even the next development of public administration evolved in comparison with Bohemia, Moravia and Silesia, without difficulties. Local self-government did not exist here, officials were incompetent and municipal officials became marionettes of political parties. Nor quick reaction of the minister with full power for the administration of Slovakia which was the dissolution of municipal committees and local councils and their replacement by special commissions could prevent it.

The implementation of the Region Act was presumed later as well.[27)] In 1920 three acts were passed: the Act No. 210/1920, the Act No. 211/1920 and the Act No. 233/1920 Coll., which meant nationalization of almost whole internal administration and preparation for the transition from present organization to organization supposed by the Region Act. The districts of political administration were regulated by the governmental provision to comply with new requirements. Also the administration of the towns with regulated municipal council was modified.

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25) Schelle, K. *Organizace veřejné správy v letech 1848–1948*. Brno : MU, 1993. p. 115.

26) The same book, p. 116

27) Schelle, K. *Organizace veřejné správy v letech 1848–1948.* Brno : MU, 1993. p. 119.

Those are mentioned in sub-chapter on self-administration which follows below. The Act No. 211 enabled the nationalization of local authority and district notaries who should have been appointed by the Minister of the Interior. Due to the implementation Slovakia was expected to be ready for introducing the Regional Procedure Act. The Region Act is mentioned in sub chapter on Political administration and its representation.

The idea of "Czechoslovakism" is connected with the formation of the republic. Under the constitution the Czechoslovak language was proclaimed the official language, and it consisted of two equal parts of the Czech language and the Slovak language. The idea should have represented significant word "Czechoslovaks" in the world which otherwise included considerable amount of the Germans, the Hungarians and minority of Ruthenia, Polish, Jewish, Romany nations.

The Czechoslovak Republic became one of the succession states of the Austria-Hungary by the Peace Treaty in Paris. The Sub-Carpathian Ukraine became the constituent of the Czechoslovakia. The Paris Treaty confirmed the agreement made by the National committee of Hungarian Ruthenians with T.G.Masaryk in Pittsburgh and the decision of the American national committee of Hunagarian-Ruthenian of November 12, 1918 and it annexed the territory of the Sub-Carpathian Ukraine to the Czechoslovakia with the note that the Sub-Carpathian Ukraine should get its autonomy. The constitutional document of the Czech Republic characterized it as "the broadest autonomy compatible with the unity of the republic".[28)]

For numerous troubles and irreconcilable attitudes to the Czech predominance, in June 6, 1919 the military dictatorship was declared and lasted till January 9, 1922. In August, 1919 the so called civil administration of the territory of Sub-Carpathian Ukraine was established. In November 1919, "General statute" for the administration of the Sub-Carpathian Ukraine was declared. The government provision No. 356/1920 Coll., replaced the "General statute". According to the provision, the Governor was the head of the Sub-Carpathian Ukraine.[29)]

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28) Kováč, D. Dějiny Slovenska. Praha : Nakladatelství Lidové noviny, 1998. p. 185.

29) The same book, p. 187.

The Governor and the vice-governor were appointed by the President of the Republic on the proposal of the government. To represent Sub-Carpathian Ukraine in negotiations with government, to conduct the negotiations of the governor's council, to sign the provisions and yields of normative character for the whole territory of Sub-Carpathian Ukraine, to appoint officials etc. were the main duties of the Governor. The duty of the vice-governor was not mere representation of the Governor but he was also independent official directly responsible to the government as well as the Governor. The Civil administration of the Sub-Carpathian Ukraine – the board of officials, served as the assisting office.[30)]

The territory of the Sub-Carpathian Ukraine was divided into four historical regions with the seat in Uzhorod, Mukacev, Nerejov and Velky Bockov. Last named was soon resettled to Karkas Solotvina. In 1921 there was a new division into 3 regions – Uzhorod. Mukacevo and Velka Sevljusa. The administrators were the heads. Uzhorod, Mukacevo and Berehovo were regarded as the towns with regulated municipal councils headed by the government commisioners and with the police captain. The town of Berehovo was subsequently transferred into the group of big towns. In January 1922, the military dictatorship had finished. In autumn 1923 elections to municipal agencies were held and the government provision No. 113 delegated all powers and duties of municipal committees, high regions and vice-regions to the Administrator of the regional office. The Hungarian structure was preserved in lower administrative instances. Three independent regions were merged in one with the seat of the regional office in Mukacevo.[31)] The Act No.125/1927 Coll. introduced new organization of the administration in the Sub-Carpathian Ukraine. The Sub-Carpathian Ukraine became one of the countries of the Czechoslovak Republic and the municipal president and municipal board headed it.[32)]

The main feature of the beginning of the public administration in the CSR is that it was adopted from Austria legal order and administration system for the Czech countries and the Hungarian legal order and administration for Slovakia

30) Schelle, K. *Organizace veřejné správy v letech 1848–1948*. Brno : MU, 1993. p. 228.

31) Schelle, K. *Organizace veřejné správy v letech 1848–1948*. Brno : MU, 1993. p. 229.

32) Malý, K. *Dějiny českého a československého práva do roku 1945*. Praha : Linde, 1999. p. 272.

and Sub-Carpathian Ukraine. Adoption of the Reception Act prevented the existence of lawlessness because the independent Czechoslovak Republic has not created its own legal order or legal system yet. Adopted regulation of administration system of the individual countries was diverse and that is why only temporary functioning was expected. Subordination to Prague power has not always been accepted without problems.

The public administration as well as the self-administration was taken over in 1918 by the Reception Act. In the lowest (municipal) level there was democratization in the Election Procedure Act 1919, nevertheless the powers in all levels of the self-administration have been gradually restricted, the result of which was the concentration of the power into state agencies.

Instruments of Spatial Planning[1)] in the Czech Republic and in Austria

JUDr. Veronika Vlčková

1. Introduction

Territory is one of the most important non-renewable resources, which presents the basis for many human activities. From the perspective of human activities placed in the territory the territory is a potential and instrument of production.

There is no doubt that according to dynamic development of the recent human society it is far more than necessary to plan all human activities especially those based in the territory. The process of planning the territory development is so significant that it is regulated by law. The law steps into the planning process in order to set the basic protection guarantees for both private and public interests, and unavoidable limits of the human activities so that there is a sufficient protection of the territory values, which would be endangered by unregulated human activity.

Of the field of spatial planning this article focuses only on so-called instruments of spatial planning, which are particular documents, concepts and plans by means of which the objectives, tasks and principles of the spatial planning are to be realized. This article describes and compares two different national systems of spatial planning instruments, i.e. the Czech and the Austrian one.

2. Legal Regulation of Spatial Planning in the Czech Republic

The first Czech or more precisely Czechoslovak legal regulation of the spatial planning was the Act No. 280/1949 Coll. from December 19th, 1949 on Spatial Planning and Town Building. Till this first Czechoslovakian law came into the force the former Austrian-Hungarian Building Acts[2)], which regulated only so-called positional plans were in force.

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1) The scope of the term "územní plánování" differs in all European countries so the translation uses the neutral term "spatial planning" in order not to get confused by the terminology used in this article.

2) The Act from April 10th, 1886 No. 40 Coll. on Building Code for the Capital Prague; the Act from January 8th, 1889 No. 5 Coll. on Building Code for Bohemia; the Act from

After nine years being in force the first Czechoslovakian legal regulation of spatial planning was replaced by the law which was limited only to the spatial planning and did not regulate the town building.[3)]

In 1976 the complex Act No. 50/1976 Coll., on Spatial Planning and Building Code came into the force. It was again complex legal regulation which contained the legal regulation of spatial planning as well as that of town building. The Building Act of 1976 which was number of times amended had been in force over 30 years. One of the last major amendments was the Act No. 83/1998 Coll.

As of the January 1st, 2007 the new Building Act No. 183/2006 Coll., on Spatial Planning and Building Code (Building Act) has come into force. Together with the new Building Act also the Act No. 184/2006 Coll., on Expropriation and Curtailment of Property Rights to a Piece of Land or to a Construction (so-called Expropriation Act) and the Act No. 186/2006 Coll., amending some acts in connection with the new Building Act and Expropriation Act.

The new Building Act was adopted in connection to the new Act on Administrative Procedure[4)], which has come into force on January 1st, 2006. The new Building Act in compliance with the Act on Administrative Procedure introduces some new legal institutes, which were not known by the Building Act of 1976, e.g. general measure, public administrative contracts etc.

The new legal regulation of the spatial planning may be characterized as more extensive and detailed. It is criticized by the professional public because it is too detailed and sophisticated, which might complicate the application of the law in practice. One of the most criticized aspects of the new legal regulation is a tendency to centralize the state administration in the field of spatial planning as a result of putting an emphasis on qualification of the officers responsible for spatial planning.

June 16th, 1894 No. 63 Coll. on Building Code for the Provincial Capital Brno, the capital Olomouc and the cities of Jihlava and Znojmo and for their suburban areas; the Act from June 16th, 1894 No. 64 Coll. on Building Code for Moravia.

3) The Act No. 84/1958 Coll. from December 12th, 1958 on spatial planning 12. 12. 1958.

4) The Act No. 500/2004 Coll. Administrative Code, as amended by later regulations.

3. Legal Regulation of Spatial Planning in Austria

In comparison to the Czech system the Austrian spatial planning has its specific features, which have broader, constitutional link. According to the Austrian Federal Constitution of 1920 the legislative power is vested in Federation (*Bund*) as well as in all nine Federal lands (*Bundesländer*). Contrary to the Federal Republic of Germany the Austrian Federal Constitution does not know so-called concurring powers, which means that either Federation or Federal lands have a power in certain field.

In this respect the Austrian spatial planning is cross-sectional field because it is not regulated in one complex, federal law however the competencies are split between Federation and Federal lands. The Austrian Constitution states explicitly which competencies belong to the Federation and which are executed by the Federal lands.

However the Austrian Federal Constitution does not explicitly assign the competence in the field of spatial planning to any of the legislators. In such a case Art. 15 of the Austrian Federal Constitution applies according to which all unlisted matters fall into the both legislative and executive competency of Federal lands unless they are explicitly reserved to the Federation[5]. So the spatial planning in Austria is regulated in nine land laws.

However there are more specific features of the Austrian spatial planning besides the one mentioned above. Along the general spatial plan there are also highly specific sectional plans, e.g. in the field of railways, mining etc. These sectional matters handled in the specific plans are not part of the general spatial plans and are mostly issued by the Federation on the basis that the Federation according to the constitution has the explicit competence in that particular field.

So in addition to the Federal lands also the Federation itself has some planning competencies, however these are only sectional. The Federal lands issue both sectional[6] and general plans either on the basis of the explicit constitutional com-

5) For example the railways, mining, forestry or water management. See Bachmann, S. – Baumgartner, G. – Feik, R. – Giese, K.J. – Jahnel, D. – Lienbacher, G.: Besonderes Verwaltungsrecht. 5. vollständig überarbeitete und erweiterete Auflage. Springer Verlag. Wien 2004, pg. 327

6) For example the nature protection, roads. See Bachmann, S. – Baumgartner, G. – Feik, R. – Giese, K.J. – Jahnel, D. – Lienbacher, G.: Besonderes Verwaltungsrecht.

petence or the residual competence stated in the Art. 15 of the Austrian Federal Constitution.

Based on the Art. 118 par. 3 No. 9 also the municipalities have under certain conditions the competence to issue municipal plans. In doing so they are not bound by instructions of the superior authority because the plans are issued within their self-governing power.[7)] However they still have to adhere to the federal and land laws and ordinances. The Federal lands have the power to review the local plans in terms of their legality and their compliance with the sectional plans issued by the Federation and the Federal lands.

In result there is number of various planning instruments issued on various levels to regulate the territorial development in Austria. These various planning instruments come often into a conflict, which is unfortunately not always resolved by the law.

4. Czech Instruments of Spatial Planning

The system of the Czech spatial planning instruments based in the new Building Act differs conceptually from the old system based in the Building Act of 1976.

From the former non-statutory planning documents only two, i.e. territorial analytic documents[8)] and territorial study are left over in the new Building Act. According to the new Building Act they are no longer non-statutory.

Contrary to the Building Act of 1976 the new Building Act provides for a national planning instrument and that is the Spatial Development Policy. The system of the planning documentation form so-called Principles of Spatial Development replacing the regional plans and the municipal planning instruments, i.e. the municipal plan and regulatory plan.

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5. vollständig überarbeitete und erweiterete Auflage. Springer Verlag. Wien 2004, pg. 328.

7) See Raschauer, N. – Wessely, W. (eds.): Handbuch Umweltrecht. WUV Universitätsverlag. Wien 2006, pg. 358

8) § 26–29 of the Act No. 183/2006 Coll. on Spatial Planning and Building Code.

4.1 Spatial Development Policy

The former legal regulation lacked the planning instrument on the national level, which would reflect the national, cross-border and international territorial connections. According to the old Building Act of 1976 these territorial connections were reflected and coordinated in so-called regional plan. In case the regional plan exceeded the territory of more districts it was issued by the Ministry for Local Development, i.e. by the central state administration authority in the field of spatial planning.

After the creation of the regions as self-governing territorial units in 2000 the competencies for issuing and approving the regional plans were shifted to the regions. Nevertheless the Ministry for Local development still kept the authority to issue the regional plan in case it exceeded the territory of more regions. The regions forced the change of this situation so the Building Act of 1976 was amended and the Ministry for Local Development lost the competence to issue the planning documentation. In case the regional plan exceeded the territory of more regions the consent of all respective regions was necessary to approve such a plan.

The new Building Act of 2006 includes a brand new national instrument, which according to the Art. 31 par. 1 of the Building Act determines for the set period of time requirements for concretization of the spatial planning tasks in national, cross-border and international links and especially with respect to the sustainable territorial development.

Furthermore the Spatial Planning Policy sets the strategy and basic conditions for fulfilling the set tasks. The fact that the Czech legal regulation of the spatial planning includes the national instrument corresponds with the requirements set in the EU document called European Spatial Development Perspective and in the Council of Europe document called Guiding Principles for Sustainable Development of the European Continent.

The Spatial Development Policy shall according to the Art. 31 par. 2 of the Building Act serve the coordination of elaborating and updating the planning documentation on the regional level. The Spatial Development Policy presents the conception, which in compliance with complexity of the spatial planning

coordinates the elaboration of the other specialized policies approved by other ministries and central administrative offices.

The Ministry for Local Development will be elaborating the Spatial Development Policy for the whole territory of the Czech Republic and it will be approved by the Government of the Czech Republic.

The first Spatial Development Policy of the Czech Republic was approved by the Government on May 17th, 2006 by the Resolution No. 561 and the Spatial Development Policy will be then in accordance with the Art. 31 par. 3 of the Building Act of 2006 published in form of Announcement of the Ministry for Local Development in the official Collection of Laws.

4.2 Planning Documentation

The regional plans which were elaborated on the regional level on the basis of the old Building Act of 1976 will gradually and with the end effect from the year 2010[9)] be substituted by the planning documentation called the Principles of Spatial Development. Contrary to the regional plans the principles of spatial development will be elaborated for the whole territory of the region.

The fact that the planning documentation on regional level will be elaborated for the whole territory of the region is often criticized because this will factually exclude the possibility to elaborate a supraregional plan for homogenous territories which exceed the territory of one region. One example of such homogenous territory for which the special planning documentation shall be elaborated is national parks or specially protected areas established on the basis of the Act No. 114/1992 Coll., on nature and landscape protection.[10)]

The principles of spatial development will be elaborated by the regional offices as delegated authority. The approval of the principles of spatial development is the autonomous competence of the regional council as self-governing body.

As it is stated in the Art. 36 par. 6 of the Building Act the principles of spatial development in regional context and in compliance with the Spatial Development

9) § 187par. 4 of the Act No. 183/2006 Coll. on Spatial Planning and Building Code.

10) See Říha, M. Komentář k textu návrhu zákona v podobě odeslané z PS do Senátu PČR. Retrieved on November 15th, 2006 from Společnost pro trvale udržitelný život database on the World Wide Web: www.stuz.cz/view.php?cisloclanku=2006031001

Policy specify and amplify the tasks and objectives of the spatial planning. Furthermore they set the enforcement strategy for the specified tasks and objectives and they coordinate the spatial planning activities on the municipal level. The Art. 36 par. 5 of the Building Act states that the principles of spatial development are binding for elaborating, approving the planning documentation and decision-making on municipal level.

The Building Act specifies the content of the principles of spatial development in such a way that they include demarcation of the areas and corridors intended for public utility constructions and measures important from the regional perspective.[11)] The principles of spatial development may for selected areas and corridors assign the elaboration of the territorial study, which will examine the changes in their usage.

The principles of spatial development may as a condition for decision-making on the territorial changes within the regionally important areas and corridors set the elaboration and approval of regulatory plan instead of issuing a decision. [12)] In case the principles of spatial development set this condition then they have to explicitly state the conditions for the elaboration and approval of the regulatory plan, which will serve as a plan assignment.

The principles of spatial development may also state that the region will exceptionally and on the basis of an agreement with the respective municipalities issue the regulatory plan, which is under normal conditions in the municipal com-

11) Both terms are defined in the § 2 of the Building Act. According to the § 2 the public utility construction is the construction intended for public infrastructure which is aimed at development or protection of the municipal, regional or national territory and delimited in the passed planning documentation. The public utility measure presents the measure of non-building character aimed at reducing the territory threat and at development or protection of the natural, cultural and archaeological heritage and delimited in the passed planning documentation. See Doležal, J. – Mareček, J. – Sedláčková, V. – Sklenář, T. – Tunka, M. – Vobrátilová, Z. *Nový stavební zákon v teorii a praxi a předpisy související s poznámkami*. Praha : Linde,2006. pg. 42

12) Machačková, J. Regulační plán. Základní koncepční nástroj územního plánování obce. In *Nový stavební zákon o územním plánování a stavebním řádu*. Vybrané referáty z 15. celostátní konference o územním plánování a stavebním řádu, Praha, 10.–15. listopadu 2005. Zvláštní příloha časopisu Urbanismus a územní rozvoj No. 1/2006, pg. 43.

petence. The conditions under which the regulatory plan will be elaborated by the region must be agreed upon by the respective municipalities. Also in this case the regional authorities may intervene in the self-governing activities of the municipalities only in cases foreseen by law and these cases of interference must involve a matter of regional significance.[13)] Otherwise such an action would be illegal.

Newly the principles of spatial development may determine so-called territorial reserve consisting of areas and corridors for which the possibilities of future usage are to be verified. Determination of the territorial reserve presents a measure on the basis of which the present usage of certain areas and corridors may not be changed in order to avoid restraint or substantial aggravation of their future usage.

The commentary on the Building Act of 2006[14)] compares the institute of territorial reserve to so-called territorial measure on building ban[15)]. Both institutes limit the activity which could aggravate or restraint the future usage of particular piece of land. The difference between these two institutes is in the authority who issues the measure. According to the Art. 36 par. 1 of the Building Act the territorial reserve is approved by the regional council within its self-governing power. On the contrary the territorial measure on building ban for the territory of more municipalities is issued in form of so-called general measure[16)] by the regional board within the delegated power of the region.

The territorial reserve as well as the building ban limits differently the activities. In territorial reserve the limitation of the activities is broader than the limitation set in the building ban. The territorial reserve limits any other usage of certain

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13) § 5 par. 4 of the Act No. 183/2006 Coll. on Spatial Planning and Building Code.

14) Doležal, J. – Mareček, J. – Sedláčková, V. – Sklenář, T. – Tunka, M. – Vobrátilová, Z. *Nový stavební zákon v teorii a praxi a předpisy související s poznámkami*. Praha : Linde, 2006, pg. 97 an.

15) The Building Act of 2006 introduces so-called territorial measure, i.e. territorial measure on building ban and territorial measure on territory sanitation. See § 97–100 of the Act No. 183/2006 Coll. on Spatial Planning and Building Code. The territorial measure on building ban substitutes the former decision on building ban, which was issued on the basis on the old Building Act of 1976.

16) § 97 par. 1 of the Act No. 183/2006 Coll. on Spatial Planning and Building Code.

areas and corridors than the recent one while the building ban limits within the respective territory only the building activities.

The Building Act regulates also spatial planning on the municipal level. There are two planning instruments on the municipal level, i.e. municipal plan and regulatory plan. As the basic municipal planning documentation the municipal plan sets the primary concept of the municipal territory development, the protection of the territorial values, the spatial organization, the landscape organization and the concept of the public infrastructure.

Moreover the municipal plan determines the built-up areas and corridors, areas that might be built up and so-called areas of reconstruction (areas set for the change of the existing development, for the renewal and reuse of devaluated territory). Besides that the municipal plan determines the areas for public utility constructions and measures and areas of the territorial reserve. The municipal plan sets also the usage conditions for such delimited areas.

The municipal plan may as well as the principles of territorial development order for the change verification of certain areas and corridors by means of the territorial study or it may order the issuance of the regulatory plan as a condition for decision-making on the territorial changes. In case the municipal plan prescribes the issuance of regulatory plan it sets at the same time the issuing and approving conditions, which basically form the plan assignment.

The Building Act of 2006 states that the municipal plan is issued for the whole municipal territory. The municipal plan is also passed in the form of the general measure.

In respect to the planning documentation hierarchy the municipal plan is binding for elaboration and passage of the regulatory plan and for the territorial decision-making.

The regulatory plan is the most detailed instrument of the Czech planning documentation. Under the new Building Act of 2006 the institute of regulatory plan has undergone the biggest conceptual changes. According to the Art. 61 of the Building Act the regulatory plan sets for a specific area detailed conditions for the usage of particular pieces of land, for the location and organization of the constructions, for the protection of values and the character of the territory and for the creation of friendly environment. Moreover the regulatory plan sets always

the conditions for location and spatial organization of the public infrastructure and delimits the public utility constructions and measures.

Newly the regulatory plan substitutes the territorial decision, however only in a built-up area. For the use changes of an un-built area the separate territorial decision must be issued[17]. The passed regulatory plan is binding for the territorial decision-making. In case the regulatory plan is issued by the regional authorities it is binding for the municipal and regulatory plans issued by the municipalities within the respective region.

5. Austrian Instruments of Spatial Planning

The fact that the Austrian system of spatial planning instruments is so complicated raises the necessity to coordinate the planning instruments in order to guarantee the effective planning system.

Contrary to the Czech Republic the Austrian Federation does not have any general competence in the field of spatial planning. This results in absence of some binding coordination instrument for the planning on the lower levels, i.e. federal lands and municipalities.

5.1 Austrian Spatial Development Concept

Since 1971 the most significant instrument of spatial planning coordination on national level is the Austrian Spatial Planning Conference (*ÖROK - Österreichische Raumordnungskonferenz*).[18] The ÖROK presents the advisory and coordinative panel of all Austrian authorities responsible for the spatial planning.[19]

In 2001 the ÖROK has issued the third Austrian Spatial Development Concept (*Österreichisches Raumentwicklungskonzept*). The first one was issued in 1981. The Spatial Development Concept presents non-binding instrument which is supposed to serve as a directive of only recommending nature for all Austrian authorities responsible for the spatial planning.

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17) § 61 par. 2 of the Act No. 183/2006 Coll. on Spatial Planning and Building Code.

18) Official ÖROK webpages at www.oerok.gv.at

19) See Raschauer, N. – Wessely, W. (eds.): Handbuch Umweltrecht. WUV Universitäts verlag. Wien 2006, pg. 362.

5.2 Instruments of Regional Planning

As it was already said above, the laws regulating the spatial planning in general are issued by the federal land which means that there are nine land laws regulating spatial planning. The spatial planning instruments are drawn up very similarly in all the land laws on spatial planning, however there are some differences.

In case of some Austrian federal lands there is not only one law which is regulating the spatial planning. However all land laws include regulation of regional and local spatial planning instruments.

All the Land laws on spatial planning regulate so-called Principles and Objectives of Spatial Planning (*Raumordnungsgrundsätze und –ziele*)[20]. These principles and objectives must be strictly adhered by issuing all the spatial measures on both regional and local levels. However not all the land laws on spatial planning state that the principles and objectives of spatial planning are binding for issuing the spatial measures even on local level.[21]

On regional level the principles and objectives of spatial planning are implemented in so-called Programmes of Spatial Development (*Landesentwicklungs- / Raumordnungsprogramme*)[22]. These Regional Spatial Development Programmes

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20) Compare e.g. § 2 of the Upper-Austrian Act on Territorial Organization (*Oö. ROG 1994*): "Raumordnungsziele und –grundsätze"; § 2 of the Salzburger Act on Territorial Organization (*Salzburger Raumordnungsgesetz 1998 – ROG 1998*) LGBl 1998/44 (Wv) as amended by the Act No. 2004/96 (Dfb): "Raumordnungsziele und -grundsätze"; § 2 of the Lower-Austrian Act on Territorial Organization of 1976 (*NÖ Raumordnungsgesetz 1976 – NÖ ROG 1976*) LGBl 8000-0, as amended by the Act No. LGBl 8000-21: "Leitziele"; Kärtner Act on Territorial Organization (*Kärntner Raumordnungsgesetz – K-ROG*) LGBl 1969/76, as amended by the Act No. LGBl 2001/163: "Ziele und Grundsätze der Raumordnung".

21) The exception exists e.g. in Burgendlander Act on Spatial Planning (*Bgld RplG*), which in § 1 par. 2 supposes that the principles and objectives (*Grundsätze und Ziele*) cover only the regional spatial planning.

22) To the legal basis in Upper-Austria see § 11 of the Upper-Austrian Act on Territorial Organization (*Oö. ROG 1994*) -- "Raumordnungsprogramme". § 7 of the Salzburger Act on Territorial Organization (*ROG 1998*): "Landesentwicklungsprogramme"; § 3 of the Lower-Austrian Act on Territorial Organization (NÖ ROG 1 976): "überörtliche Raumordnungsprogramme"; § 3of the Kärtner Act on Territorial Organization (K-ROG): "überörtliches Entwicklungsprogramm".

are issued by land governments in form of ordinance (*Verordnung*)[23], which is binding for issuing the planning documents on municipal level.

5.3 Instruments of Municipal Planning

Three planning instruments are issued on the municipal level, i.e. Concept of Local Development (*örtliches Entwicklungskonzept*)[24], Land Use Plan (*Flächenwidmungsplan*)[25] and Building Plan (*Bebauungsplan*)[26].

The Local Development Concept is passed mostly by the municipalities and it formulates the development objectives of the specific municipal territory. This planning instrument is sometimes called Local Spatial Planning Programme (*örtliches Raumordnungsprogramm*) or Concept of Spatial Development (*räumliches Entwicklungskonzept*).

On the basis of the local development concept the municipal council passes the Land use plan in form of the ordinance. The land use plan regulates land use

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23) Closer to this form of administrative action see Raschauer, B.: Allgemeines Verwaltungsrecht. 2.aktualisierte Auflage. Springer Verlag. Wien 2003, str. 212 an.

24) Compare e.g. § 18 of the Upper-Austrian Act on Territorial Organization (*Oö. ROG 1994)*; § 15 of the Salzburger Act on Territorial Organization of 1998 (*ROG 1998)*; § 14 of the Lower-Austrian Act on Territorial Organization (*NÖ. ROG 1976*); § 1 of the Kärtner Act on Municipal Planning of 1995 (Kärntner Gemeindeplanungsgesetz 1995 – K-GplG 1995).

25) Compare e.g. § 18 of the Upper-Austrian Act on Territorial Organization (*Oö. ROG 1994*): "örtliches Entwicklungskonzept"; § 13 of the Salzburger Act on Territorial Organization (ROG 1998): "räumliches Entwicklungskonzept"; § 13 of the Lower-Austrian Act on Territorial Organization (NÖ ROG 1976): "örtliches Raumordnungsprogramm"; § 2 of the Kärtner Act on Municipal Planning of 1995 (Kärntner Gemeindeplanungsgesetz 1995 – K-GplG 1995) LGBl 1995/23 (Wv) as amended by the Act No. LGBl 2005/88: "örtliches Entwicklungskonzept".

26) Compare e.g. § 31 of the Upper-Austrian Act on Territorial Organization (*Oö. ROG 1994*); § 27 of the Salzburger Act on Territorial Organization (*ROG 1998*); §§ 68 and following of the Lower-Austrian Act on Territorial Organization (*NÖ Bauordnung 1996*) LGBl 8200-0, as amended by the Act No. 8200-12; § 24 of the Kärtner Act on Municipal Planning of 1995 (Kärntner Gemeindeplanungsgesetz 1995 – K-GplG 1995).

of the whole municipal territory. The ordinance is subject to review by the Federal Land Government in technical[27] and legal terms.

The land use plan composes of the textual and graphical part. For every piece of land of the municipal territory the plan prescribes its possible way of use, e.g. building land, traffic plot etc.

Building plan presents inferior and concretized category of planning documentation. The building plan is passed on the basis of the land use plan in the form of ordinance. It regulates the traffic accessibility and build-up area of particular municipality. It specifies in detail the way the particular building land could be build-up and sets feasible building procedures, height of a construction or building lines.

6. Conclusion

The main objective of this article was to describe the systems of spatial planning instruments in two EU member states, which at the same time border upon each other and which once were part of one Austrian-Hungarian Empire so the common roots of the legal regulation are to be considered.

Political development of Austria after the split-up of the Austrian-Hungarian Empire and after the World War II could imply very advanced legal regulation of the spatial planning because contrary to the Czech Republic the Austrian Federal Republic did not go through the totalitarian era. However the Austrian system of the spatial planning has its negatives, which have a very strong constitutional context.

The Austrian Federal Constitution of 1920 does not know any explicit competency in spatial planning, so the legal regulation as well as the public administration in this field is very fragmented and heterogeneous.

The Federation has planning competencies in the fields explicitly named in the Austrian Federal Constitution, e.g. in mining, railways etc. The planning is part of these competencies as such, so the legal science uses the term sectional planning (*Fachplanung*). The Federal lands have a general land use planning competency and in some special areas such as nature protection assigned to the Federal lands especially by the Austrian Federal Constitution also the sectional planning competencies. Moreover also the municipalities have the competency to pass the municipal spatial plans.

27) Just in case of the possible collision with the sectional plans.

The Czech legal regulation of the spatial planning is included in one act, i.e. Act No. 183/2006 Coll. on Spatial Planning and Building Code. The Czech spatial planning regulation is complex and uniform and covers all aspects of land use. Contrary to the Austrian legal regulations the new Czech regulation encompasses also the nationwide legally binding spatial planning instrument, i.e. Spatial Development Policy.

The supraregional instruments of spatial planning in both countries are regulated very similarly. In Austria the programmes of spatial development, which implement the principles and objectives of the spatial planning set in particular laws on spatial planning, are passed. The new Czech Building Act of 2006 introduces instead of the former regional plans so-called principles of spatial development. Contrary to the Austrian programmes of spatial development the Czech principles of spatial development are elaborated for the whole regional territory while the Austrian programmes of spatial development might be elaborated also for some determinate part of the federal land territory or for some material aspect of the spatial development.

Also the instruments of local planning are very similar in both countries. In the Czech Republic the city councils pass for the whole municipal territory the municipal plan, which is then concretized in the regulatory plan. In Austria the city board (*Gemeinderat*) passes the land use plan and so-called building plan. The difference between the local planning instruments in the Czech Republic and in Austria is in the form in which the planning instruments are passed. In the Czech Republic the municipal plan as well as the regulatory plan is passed in the form of general measure, which is defined in the Act on Administrative Procedure[28)] as being neither decision nor legal regulation. The Austrian laws on spatial planning state that the land use plan as well as building plan is passed in the form of an ordinance, which is a form of legal regulation.

Although the laws regulating the spatial planning in both countries show some differences the influence of the European integration process may be anticipated also in the field of spatial planning, which is by the way considered as very important instrument of sustainable development and as such it becomes an object of an attention from the side of the EU and its policies.

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28) § 171 of the Act No. 500/2004 Coll., Administrative Code. See also Vedral, J. *Správní řád. Komentář.* Praha : Polygon, 2006. pg. 966 an.