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Remonstrance Against Decisions Made by Central Administrative Bodies in the Czech Republic

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Soňa Skulová
sona.skulova@law.muni.cz

Lukáš Potěšil
lukas.potesil@law.muni.cz

David Hejč
david.hejc@law.muni.cz

The Department of Administrative Science and Administrative Law
Faculty of Law, Masaryk University, Brno, the Czech Republic

ABSTRACT

The remonstrance is traditional standard (ordinary) remedial measure which can be (only) applied after the first instance decision has been issued by central administrative body. The article is heading to verify the hypothesis whether the remonstrance does reflect the principle of two instances in entirety. As the finding of the research it can be pointed out that the remonstrance represents relative exclusion of the principle of two instances, which is applied only in a modified form, as the remonstrance is not decided by any higher, independent administrative authority, but by the identical central administrative body, namely by its head, not by its remonstrance committee, which issues "only" recommendations/advices. We concluded that possible solutions are either transformation remonstrance committees into administrative bodies/tribunals, or rules providing the central administrative bodies do not make first instance decisions.

Key words: *remonstrance, appeal, administrative procedure, central administrative authority, legality, effectiveness*

JEL: K41

1 The General Introduction

1.1 The principle of two instances and administrative proceedings

Administrative proceedings[1] are based on the common principle of two instances. However, this principle is not expressly stipulated. Nevertheless, it is possible to fairly reliably infer (Skulová, 2012, pp. 38, 68) the existence of mentioned principle from the contents of the legislation and as such it has been traditionally recognized. And therefore we can find the institution of remonstrance.

The conclusions of the Constitutional and Supreme Administrative Court's jurisprudence are hardly surprising with regard to the specific absence of the stipulation of the two-instance principle for administrative proceedings in legislation. Even though it admits the existence of this principle or directly refers to it, especially in cases where this principle has been violated, it does not accept its nature as a fundamental principle. As the Constitutional Court[2] has expressly stated, "The Charter of Rights and Freedoms or the Convention for the Protection of Human Rights and Fundamental Freedoms does not guarantee the fundamental right to two or multi-stage decision-making in administrative proceedings." In accordance with this, the Supreme Administrative Court[3] has concluded that "the fundamental principles of decision-making pertaining to the rights and obligations of physical or legal entities by administrative bodies do not include two-stage decision-making."

We can conclude that cases of administrative proceedings are admissible without the application of the principle of two instances at all (absolute exclusion) or with its application, but only in a modified form (relative exclusion). And in our opinion, remonstrance can be placed exactly under this specific form and the relative exclusion of the principle of two instances. It needs to be pointed out that, no matter whether absolute or relative, the exclusion of the principle of two instances usually occurs in cases when the first-instance decision has been made by central administrative bodies. Remonstrance is an ordinary remedial measure that is applied against first level decision that was made by the central administrative bodies (see below).

1 The legal definition of administrative proceedings is provided in Section 9 of the Act no. 500/2004 Coll., the Rules of Administrative Procedure, as amended (hereinafter referred to as the "Rules of Administrative Procedure"). According to this provision, "Administrative proceedings are any procedure of administrative body, the purpose of which is to issue a decision which in particular cases establishes, changes or revokes the rights and obligations of specifically designated entities or which in particular cases states that the entity has or does not have given rights or duties."

2 In accordance with the Constitutional Court judgment dated 19 October 2004, file no. II ÚS 623/02.

3 Cf. the judgment dated 27 October 2005, ref. no. 2 As 47/2004 – 61, published under no. 1409/2007 Coll. of the Supreme Administrative Court.

1.2 Central administrative bodies

The organization of the Czech public administration is rather complicated. However, the apex of the system of administrative bodies (leaving aside the specific position of the government and president) is represented by the central administrative bodies. The central administrative bodies are not only those which are explicitly identified by law, but also those which have the conceptual features of such a body.[4]

The conceptual question is whether these administrative bodies should be directly part of the decision-making processes and make specific decisions in specific individual cases relating to individual entities. After all, according to Act no. 2/1969 Coll. governing the establishment of ministries and other central state administration bodies of the Czech Republic, as amended,[5] the role of these bodies lies elsewhere.[6] In our opinion, however, mentioned duties do not necessarily ensure a direct review of specific decisions made by other administrative bodies.

If the central administrative bodies are entrusted with direct decision-making activities, this constitutes, in our opinion, a shift in the role of the central administrative bodies which has not been anticipated by the law, as they are forced to deal with individual cases instead of maintaining a comprehensive and holistic point of view. Nevertheless, practice has shown that these decisions are often not major or extremely difficult or requiring the extensive expertise and experience which can be expected at the central level, but they could be assigned to any other administrative authority at a lower organizational level and, as evidenced by the statistics, most cases require quite extensive decision-making activity.[7] The practice described thus occupies the capacity of the central administrative bodies which is necessary for their primary mission, i.e. their analytical and conceptual activities.

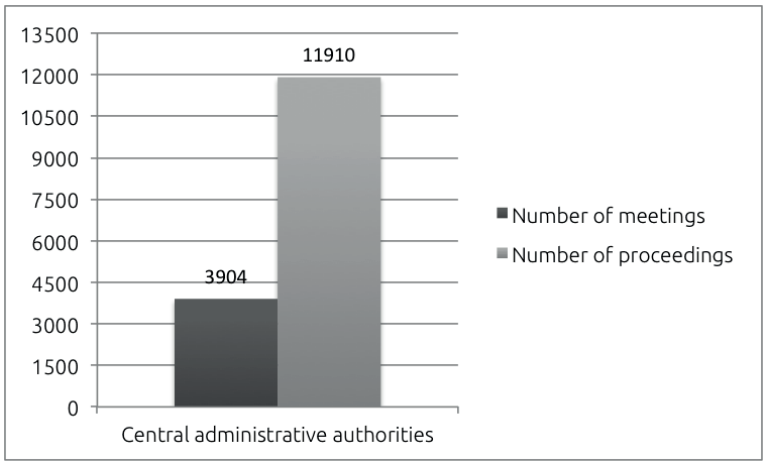
4 Cf. the Constitutional Court's resolution dated 30 November 2010, file no. Pl. ÚS 52/04, according to its material concept "it is necessary to define the body which meets the following criteria as a central state administration body: the performance of state administration represents an essential (albeit minor) part of the description of the body's activities, the administrative body has a nationwide jurisdiction and it is not directly subject to any other central state administration body. (Other criteria, such as the regulatory power or monocracy of the administrative body are not unequivocally accepted in scientific literature and as far as these are concerned, we can talk about characteristics which are prevailing, but not absolutely necessary)."

5 This Act provides a basic list of the central administrative bodies. There are 14 ministries (cf. Section 1) and 11 other central state administration bodies (cf. Section 2). The list is not exhaustive, as shown in Note no. 4.

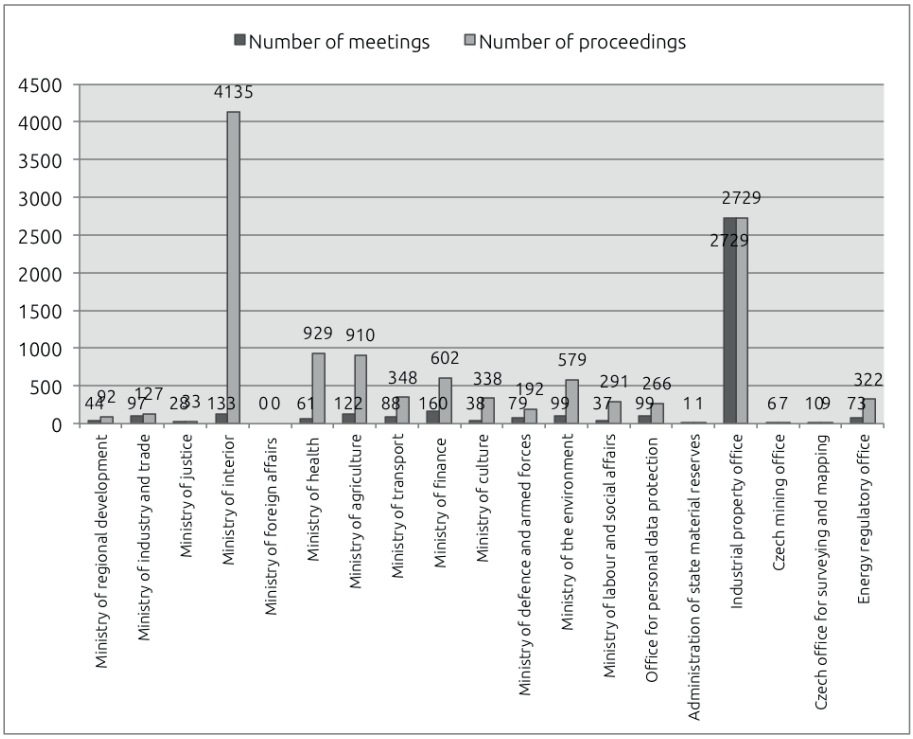
6 They are obliged to undertake the conceptual and analytical activities in the public administration sector which have been entrusted to them (Section 22). For this purpose, they are also involved in the preparation of budgets and legislation in the field of public administration, as well as the supervision of the observance of legality (Section 23 and 24).

7 See the data in Graph 1 and Graph 2. Please note, however, there are also some administrative authorities which have refused to provide information to the authors, and this fact in itself has a certain explanatory value. From these data it is obvious that the agenda of the remonstrance is not a marginal matter. On the contrary it may be very burdensome for central administrative bodies. It fully confirms the suitability of mentioned considerations for the future.

Graph 1: Number of meetings of remonstrance comittee and proceedings 2007–2012 (in total) - summation



Graph 2: Number of meetings of remonstrance comittee and proceedings 2007–2012 (in total) – according to departments



The mentioned role of the central administrative bodies in the administrative proceedings, which we consider to be problematic in itself, can be identified as a twofold activity within the context of the principle of two instances.

Firstly, these bodies represent the second stage which decides on the standard remedial measures. In this sense, central administrative bodies represent the final administrative instance (if we ignore the possibility of extraordinary remedial and supervisory measures). Here, the central administrative bodies fully implement the principle of two instances.

Apart from this, however, there are a large number of cases which cannot be ignored, where central administrative bodies conduct the proceedings and make the direct decisions in the first instance. As such, the proceedings start and end with them in the first instance. We focused on this example.

In relation to or traditionally with respect to the principle of two instances, it is therefore necessary to ensure the possibility of applying the standard remedies in such cases. Such example is the remonstrance, as will be explained. In addition, however, there are also allowable exceptions as stated above, because the principle of two instances is not a fundamental principle, but only a "simple" principle. Therefore, the two-instance model of administrative body decision-making is undergoing certain modifications in those cases where the central administrative bodies decide in the first instance and it is even completely denied in extreme cases.

There are cases where the administrative body makes the decision in the first and at the same time in the last stage with no admissible standard remedy against its decision. The principle of two instances is thus completely excluded.[8] The reason leading to such a legal solution is usually the absence of a superior administrative body and this could be solved by applying the institution of remonstrance, as is the case with the other central administrative bodies. Such a solution often hides the reluctance of the administrative body to have its decision reviewed by another (higher in instance) administrative body, thereby admitting its inferiority. This can be a practical problem in the case of some so-called independent administrative bodies where one of the attributes of independence is the absence of a superior administrative body. [9]

In this case, the review of the administrative decision is then transferred to the court. It is therefore appropriate to ask whether such a solution sufficiently protects the rights of the individuals concerned. Similarly, one can also ponder whether it is not more appropriate to use the institution of remonstrance

8 For example, no standard remedial measure is allowed against the decision of the Ministry of Interior on the merits of international protection (asylum) and one can file an action with the administrative courts against such a first-instance decision (cf. Section 32 of Asylum Act no. 325/1999 Coll., as amended). The same applies to decisions made by the Council for Radio and Television Broadcasting (cf. Section 66 of Radio and Television Broadcasting Act no. 231/2001 Coll., as amended).

9 In addition to the already mentioned Council for Radio and Television Broadcasting, there are also other such independent administrative bodies – the Office for Personal Data Protection and the Office for Protection of Competition. In the case of the Council, there is an absolute exclusion of the principle of two instances, with the stress on its independence. In the case of the aforementioned Offices, however, the principle of two instances is reflected in the possibility of applying for remonstrance. Therefore, we can ask whether these bodies are less independent than the Council and whether the legislation is truly conceptual.

or administrative tribunals[10] in these specific cases before the case comes to court. In any case, it is questionable whether entrusting the court with the possible remedy is an appropriate and conceptual solution.

2 Remonstrance as a Standard Remedy

2.1 The origin, nature and context of the institution of remonstrance

In the Czech legal context, despite its relatively brief existence in comparison with appeal, remonstrance is largely perceived and treated as a "traditional" standard claimable measure for protecting rights in administrative proceedings. In this respect, it is fully equivalent to an appeal.[11]

Under previous legislation (1967) the authority deciding on the remonstrance reasonably applied the provisions concerning any appeal. The amendment or reversal of the contested decision were possible outcomes, as were the dismissal of the remonstrance and confirmation of the contested decision. It should be noted that the principle of uniformity in administrative procedures was fully respected and this formed a procedural unit at the level of the first and second instance proceedings, including the merits of the case, until the final decision on the case came into legal force. For remonstrance proceedings, similarly as for appellate proceedings, it was permitted to use *error coram nobis* under the normal conditions of full compliance with the remonstrance and the integrity of rights or the consent of other parties. An appropriate and necessary companion to the classic two-instance model was also the principle of appeal, especially due to the absence of a judicial review (generally prevailing until 1991). The institution of remonstrance, established in this way, was widely used and deeply internalized in the following decades, when the main reason distinguishing remonstrance from an appeal as a standard remedial measure consisted of relativization, but rather in the factual absence or inability to assume the devolutive effect which was reflected in the delegation of the decision-making to the head of the central administrative body based on the recommendation of a special committee established by the person in question.

10 The case when the legislator has to some extent approximated the establishment of a tribunal is the field of law concerning immigration and aliens. There is a specialized committee attached to the Ministry of the Interior which decides on the merits of the aliens' residence (cf. Section 170a of the Act no. 326/1999 Coll. governing the residence of aliens in the territory of the Czech Republic)

11 Remonstrance was only introduced with the adoption of the Act no. 71/1967 Coll., the Administrative Procedure Act (hereafter also simply referred to as the "old administrative procedure" or "administrative procedure of 1967"), within the application of the new concept, given, inter alia, by the consistent implementation of the principle of a second level of review (Vopálka, Šimunková, & Šolín, 2003, p. 192).

2.2 Current legislation on remonstrance and its (partial non/mis-) interpretation

The legal context of remonstrance after the revolutionary changes of 1989 significantly changed. The key factor in this regard can be seen in the restoration and gradual completion of the judicial review of administrative decisions.[12]

Similarly, the legal regulation of administrative proceedings proper underwent significant changes with the adoption of the new Rules of Administrative Procedure (Act no. 500/2004 Coll.), including the explicit incorporation of the fundamental principles of good governance[13] and the inclusion of the requirements of due process in its individual provisions governing administrative proceedings. The changes also affected the specific regulation of remonstrance (Section 152).

These conceptual changes, as well as the specific new legal regulation, were not in our opinion adequately accepted because there is currently a certain traditional view of the institution of remonstrance which has persisted and survived to some extent. At the same time, there is also a certain ambiguity[14] or incompleteness in the accepted solutions or ideas in some issues and cases (see e.g. example mentioned sub 1.1).

Only a change in the constitutional and international foundations[15] manifested primarily by the establishment of judicial review,[16] could trigger the question as to whether the previous regulation could be seamlessly applied under these new conditions in the same manner as before, in particular with regard to the procedural rights of the parties to the proceedings, as well as in relation to the effectiveness of the procedure. An express change in legislation was not a matter of chance or even misunderstanding.

12 Restored in 1992 (by Act no. 519/1991 Coll.) and fully developed effective as of 1 January 2003 by the implementation of administrative justice headed by the Supreme Administrative Court (Act no. 150/2002 Coll., Code of Administrative Justice, hereafter also referred to as the "Code of Administrative Justice").

13 See Sections 2 to 8 of the applicable Rules of Administrative Procedure, including the fundamental principles of the administrative body's activities.

14 Some authors (cf. e.g. Mikule, 2005, pp. 171–172; Žáčková, 2005, pp. 173–176, in the collection of papers from the colloquium held soon after the adoption of the new Rules of Administrative Procedure), applied practice and partly the jurisprudence have shown a specific approach to the interpretation of the applicable regulation in question.

15 The explanatory report states that the bill complies with the requirements of the announced international treaties, by which the Czech Republic is bound, especially the Convention for the Protection of Human Rights and Fundamental Freedoms and confirms the compliance with the European standard of administrative procedure, mainly included in the documents of the Council of Europe (listed and headed by the Resolution of the Committee of Ministers of the Council of Europe (77) 31 on the protection of individuals with regard to the decisions of administrative bodies).

16 With its specific division into two branches: to review matters of a so-called "public nature" in administrative law and matters of a private nature which are decided on by the administrative authorities under the civil justice system (see more e.g. Skulová, 2011, pp. 331–347).

The legislators significantly narrowed the power of the central administrative body's head. The decision-making power of the body is set out similarly as it is in general for *coram nobis* in appeal proceedings, although, unlike for *coram nobis*, (only) another operationally relevant unit of the central administrative body makes the decision. However, it needs to be taken into consideration that this involves the same administrative authority when viewed by the party to the proceedings, and also in general (in terms of the substantive and territorial jurisdiction). From this perspective, the analogy with *coram nobis* does not seem inappropriate.

If the party to the proceedings which filed the remonstrance is not fully satisfied,[17] the proceedings governing the remonstrance cannot reach any other decision than to dismiss the remonstrance. The unsatisfied party then has no other choice but to go to court.[18] [19] The path to judicial review has thus been simplified in comparison with the previous regulation. This is particularly so in comparison with the previous, aforementioned practice, where it was generally accepted that the remonstrance was decided in such a way that the decision was reversed and the case went back to the first instance body for further proceedings, thus pushing the possibility of judicial review considerably further away. Under the current legislation, such an option is completely impossible according to our opinion. In this conclusion we differ from the views presented in the respected comments on the Rules of Administration Procedure.[20] This option is still (traditionally or rather stereotypically?) used quite frequently in practice and jurisprudence generally accepts it. [21]

The regulation of remonstrance decision options is included as a special provision at the very end of the relevant provisions (Section 152, subsection 5 of the Rules of Administrative Procedure). At the same time, it also defines

17 I.e. not partially satisfied, similarly as for *coram nobis* in the appellate procedure (Section 87), as this would violate the essence and purpose of the institution.

18 The explanatory report to the remonstrance regulation states: "The peculiarities of remonstrance consist of the fact that the devolutive effect of the standard remedial measure is basically relativized […] Materially, this decision-making is limited to the aspects of […] *coram nobis* . In other cases, it will be possible to seek protection from the court".

19 Similar solutions can be found even in the German legislation, specifically at first instance decision making by the Federal Central body at the federal level (Bundesbehörde), eg. by Ministry, when it is not necessary to lodge objection against the decision of the central administrative body, but it is possible to bring an action before appropriate administrative court immediately (Cf. KOPP, 2012, p. 825; Maurer, 2011, p. 268).
The solution - waiving of an standard remedial measure (Widerschpruch), has been applied to certain types of proceedings in some provinces (Rhine-Westphalia, Lower Saxony and Bavaria), and views on this solution are not uniform (Cf. Schmitz, retrieved 5 April 2014; Maurer, 2011, p. 266). In Austria, where the situation has changed significantly from 1 January 2014, by establishing one instance administrative proceedings (with the exception of certain administrative proceedings by municipalities), the judicial review is only remedial measure also for decision issued by central administrative body in first instance (Cf. Explanatory report, retrieved 5 April 2014).

20 Cf. Vedral, 2012, p. 867–869; Jemelka, Pondělíčková, & Bohadlo, 2011, pp. 559–560.

21 For more see the Supreme Administrative Court judgment dated 27 June 2012, ref. no. 3 As 28/2012 – 21, stating that a decision on remonstrance reversing a decision issued in the first instance and returning the case for reconsideration or merely reversing the contested decision is not a decision which would be subject to judicial review (i.e. meritorious), but a decision procedural in nature, for which judicial review is excluded.

the powers of the head of the central administrative body who decides on the remonstrance.[22] These provisions are preceded by subsection 4, which for the purposes of the remonstrance proceedings refers to the application of the provisions on appeals, unless excluded by the merits of the case.

Given the uniqueness of the express provisions as well as the scheme for the inclusion of both the rules, it is hard to accept the view that those provisions confer the option of broadening the powers of the head of the central administrative body by means of the other options included only in the scope of the decision options for the appeal (which reflects the nature of the appeal as a standard remedial measure based on a full review in relation to the principle of two instances). However, it does not reflect the nature of remonstrance, if we ignore the fact that it contradicts the text of the statutory provision. In this regard the authors therefore disagree with the aforementioned authors' views on this issue, as well as with the currently prevailing jurisprudence of the administrative courts.

No decision options other than those mentioned in the Rules of Administrative Procedure can apply to remonstrance under and in compliance with the aforementioned facts. In addition to the arguments above, the authors also argue (using systematic interpretation) that, if the legislators did not consider remonstrance to be a specific institution different from that of appeal, they would have had no reason to include it in Part III of the Rules of Administrative Procedure entitled "Special Provisions on Administrative Proceedings" as well as in Chapter VII entitled "Special Provisions on the Review of Decisions". [23]

To sum up the above, the authors believe that remonstrance in the existing legislation clearly does not "only" represent the institution of appeal adapted to the conditions of the central administrative bodies' decision-making, as was the case under the previous regulation and in the previous legal context. We base our view on the undisputed interpretation of the relevant provisions of the Rules of Administrative Procedure (Section 152), in linguistic, logical, systematic, and also teleological interpretation.

If a decision on remonstrance were to be made which was different from the current practice (as well as the jurisprudence and partly also the expert sources) in its fundamental aspects, the authors are of the opinion that it would be necessary to adopt an adequate legal framework which would be based on a different concept or on the concept of this institution and proceedings pertaining to it, rather than on the current concepts. The authors do not consider the other ways to be sufficient, even though they fully comprehend

22 Which must be provided for by law with due regard for the principle of legality and must also be sufficiently clear with regard to the principles of good governance (cf. the preamble to the Recommendation of the Committee of Ministers of the Council of Europe No. (2007) 7 on good governance).

23 Different setting of power for review under the ordinary remedial measure in general and also for decision making by central (supreme) administrative body is reflected also by german sources (cf. note no. 20).

the motivation to find a sufficiently broad remedy for administrative decisions issued at the central level in the first instance. However, legitimate motivation or earlier regulation and long-term practice do not represent a sufficient basis for the lawful and proper exercise of public authority.[24]

2.3 Decisions pertaining to remonstrance

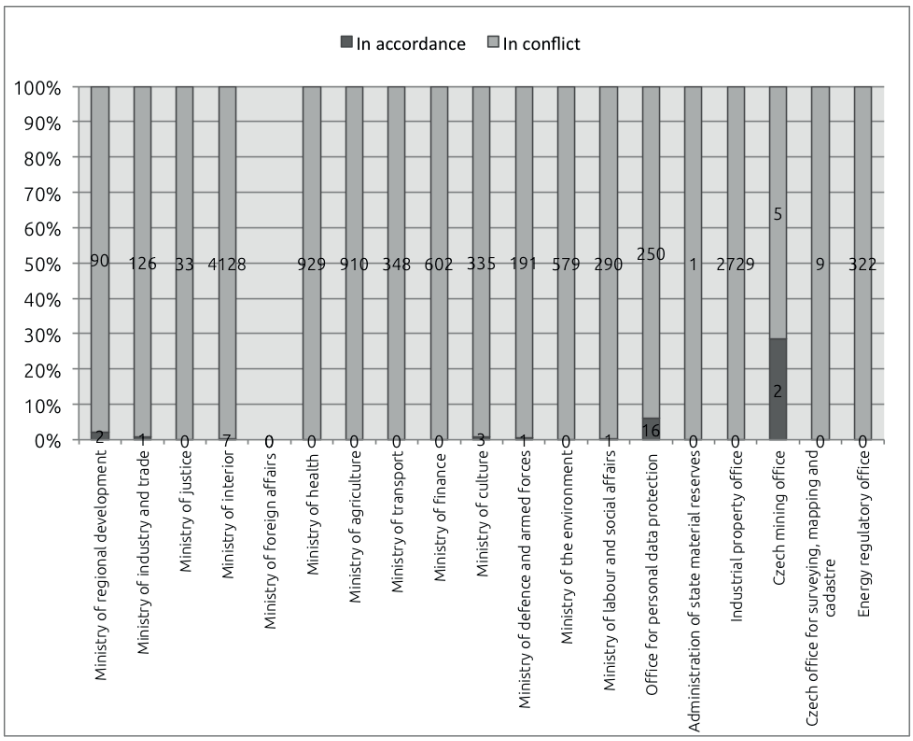
The crucial question is who and in what position actually decides. This is closely related to the internal organization of the central administrative body. The head (minister) decides on the remonstrance in accordance with Section 152, subsection 2 of the Rules of Administrative Procedure.

Even this can be quite problematic in itself, as the person at the head of the central administrative body which decided in the first instance is now required to review the decision of his/her" body and "his/her" colleagues, i.e. to a great extent "his/her" own decision. The factor which is supposed to trigger a greater degree of objectivity involves the requirement of the establishment and proper performance of a Remonstrance Committee. The committee submits proposals or recommendations on how to decide. However, the head of the central administrative body is not bound by these proposals in any way, despite the fact that the minister or the head establishes the Remonstrance Committee and appoints its members. Despite this, or perhaps because of this, the available statistics show[25] that in the majority of cases the head of the central administrative body has accepted the recommendations of the Remonstrance Committee. Out of more than 11,800 decisions issued by some central administrative authorities between 2007 and 2012, the head only reached a decision different from the recommendation of the Remonstrance Committee in 33 cases. Most often these involved cases from the Office for Personal Data Protection, which had 16 such different decisions, i.e. almost half the total amount!

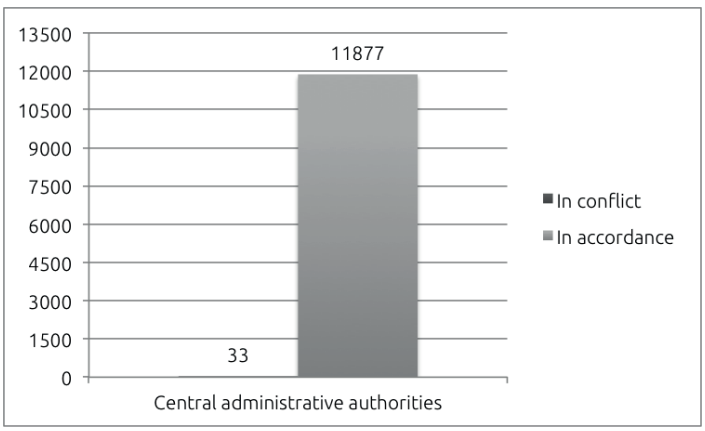
24 After all, "the problem of the Czech Republic is not the lack of remedial measures, but rather their unclear meaning and confusing nature which significantly extends proceedings and lengthens the individual's path to a decision in his case and rather provides an opportunity for the intellectual exhibitionism of judges in procedural matters."(Molek, 2012, p. 112). The stated situation is illustrated by the resolution of the Constitutional Court dated 2.4.2013, file no. Pl. ÚS 30/09, which dealt with the application of Section 14, subsection 6 of the Rules of Administrative Procedure which excludes the application of the institution of exclusion due to bias in the case of heads of central administrative bodies for the requirements of remonstrance proceedings. According to the Constitutional Court, this provision is "applied in the sense that it is not applied" by the administrative court and, when finding reasons for exclusion, the court must examine whether this fact has been reflected in the unlawfulness of the decision or in any other defects of the proceedings based on the need to take into consideration the cautels which directly result from the constitutional order (Article 36, paragraph 1 of the Charter of Fundamental Rights and Freedoms),...

25 Compare Graphs 3 and 4.

Graph 3: Decision of head of central administrative authority (its compliance with recommendations of remonstrance committee) 2007–2012 (in total) – according to departments



Graph 4: Decision of head of central administrative authority (its compliance with recommendations of remonstrance committee) 2007–2012 (in total) – according to departments



Nevertheless, the practice shows that there may be more striking cases which reveal the non-conceptual nature of remonstrance in full. As Section 152, subsection 1 of the Rules of Administrative Procedure adds, remonstrance

can also be applied in cases where the administrative decision in the first case was issued directly by the head (minister) of the central administrative body. However, Section 152 subsection 2 applies here too, under which the minister or head of the central administrative authority decides on remonstrance.

Even though it might seem absurd, the legislation entrusts the decision-making in first-instance administrative proceedings directly to the minister or the head of the central administrative authority in a number of cases.[26] Based on the aforementioned provisions of the Rules of Administrative Procedure, the minister or the head then decides again on remonstrance applied against such a decision. Proceedings and decisions in two stages have therefore been practically concentrated in one and the same person, which is definitely not in compliance with the principle of good governance. Is such a remedy unnecessary? Basically, it contradicts the meaning and importance of remonstrance, as well as the whole principle of a second level of review. The fact that the minister or the head of the central administrative body should take individual procedural steps which are impossible and unthinkable in practice is also quite questionable. As the literature states, "the role of the minister or the head ... is practically reduced to only that of a signature ... of a decision which he or she is presented" (Vedral, 2012, p. 1187). The managerial, controlling and conceptual role of the head of the central administrative body then changes into the role of a "normal" officer.

It is traditionally stated that decisions on remonstrance fall within the exclusive competence of the official who is at the head of the central administrative body. Therefore, this individual cannot delegate it to any other entities, although it may be more appropriate to do so in practice.[27] The fact that the head decides on the remonstrance is indicated by the jurisprudence as being not an objective, but a functional[28] jurisdiction pertaining to the proceedings and decision. It is therefore an expression of a functional position within an internal organization. The head who decides on the remonstrance, however, does not constitute an administrative authority. In this way, the administrative proceedings are carried out in both instances at the same central administrative body. Only the people, who decide on the matter, may change. This is also significant with regard to the follow-up judicial review, because the minister or the head is not the defendant.[29] This therefore merges the defendant who decided on the matter at the final level and the one who decided in the first instance. As such, the fulfillment of the principle of two instances dissolves.

26 With regard to the same foundations of legislation, similar problems can also be found in the case of the regulation of remonstrance in the Slovak Republic (cf. more in Vačok, 2009).

27 Cf. the judgment of the High Court in Prague dated 30 September 1998, file no. 6 A 202/95.

28 For this, cf. the judgment of the Supreme Administrative Court dated 15.1.2004, ref. no. 6 A 11/2002 – 26.

29 For this, cf. judgment of the Supreme Administrative Court dated 31 October 2008, ref. no. 7 Afs 86/2007 – 107, published under No. 1775/2009 Coll. NSS.

The mentioned legislation and judicature solution has deeper, even fundamental connections and consequences; let us add that it is minimally problematic in itself from the perspective of a party to the proceedings, to whom the situation might seem somewhat confusing, when in fact there is an externalization of the internal relationship which exists within a single administrative body and the superiority of the review body is only fictional.

2.4 The Remonstrance Committee – an advisory or decision-making body?

As follows from Section 152, subsection 2 of the Administrative Code, the head of the central administrative body decides on the remonstrance. This solution has been subjected to critical analysis which suggests that it essentially and implicitly contains a violation of the principle of two instances. The provisions of Section 152, subsection 3 of the Rules of Administrative Procedures stipulate several conditions for the decision on remonstrance in order to achieve the illusion of the objectivity of the remonstrance and the fulfillment of the principle of two instances.

There is an obligation to establish a Remonstrance Committee which assesses the case and submits proposals for the decision on the remonstrance. The head of the central administrative body must not make decision without having submitted the case to the Remonstrance Committee for consideration. Otherwise, any such decision would be illegal. However, the committee's assessment is not binding, which is in contrast with the obligation to bring a case to an appellate committee in terms of content and function.

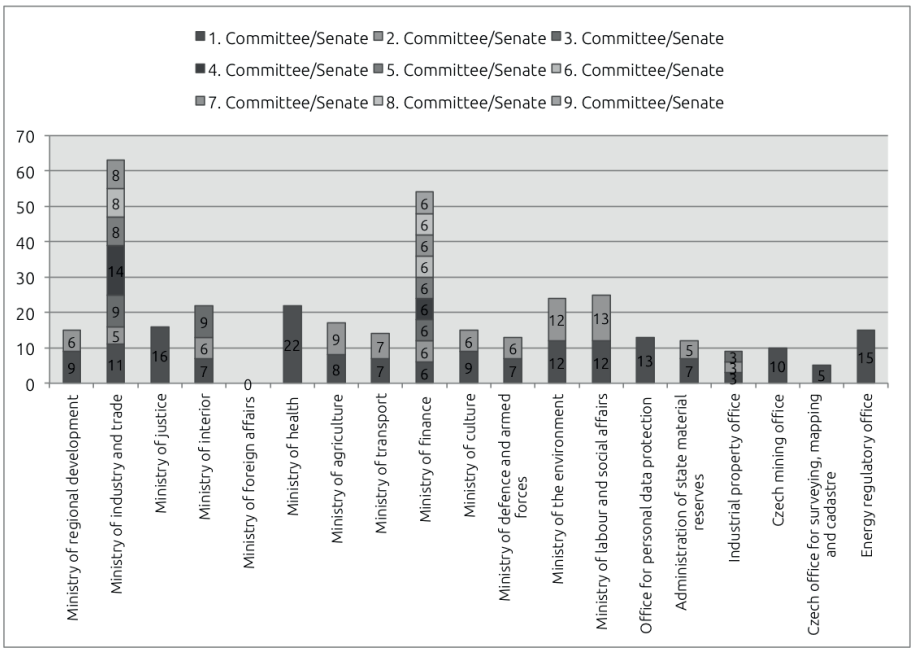
The Remonstrance Committee is a collegial body. It should have at least 5 members. Most of its members should be experts who are not employees of the central administrative body. So far, it might seem that the objectivity and expertise of the decision, as well as the principle of the second level of review, might still be guaranteed within the proceedings and the decision on the remonstrance. However, the legislation does not specify the term "expert" and does not impose any requirements on the expertise of the members of the Remonstrance Committee, either in factual or legal terms. The legislation's weakness lies in the fact that these members are appointed directly by the head of the central administrative body. He or she therefore selects the particular people who then assess (often also his own) decisions and give him or her recommendations. Therefore, the selection is not limited in any way with regard to the vague concept of expertise. Anyone, whom the head of the central administrative head considers to be an expert or appoints as an expert, can become a member of the Remonstrance Committee.

The Remonstrance Committee is not a decision-making administrative body, but merely an advisory body. Proposals concerning decisions are not binding upon the head of the central administrative body and so he or she may decide differently than has been suggested and recommended by the Remonstrance

Committee. It is apparent from available statistics, as presented above, that the assessment of the Remonstrance Committee anticipates the final decision in the majority of cases. The question is whether the head of the central administrative body respects the findings and recommendations of independent experts or whether the "experts" provide such recommendations which are easy for the head to accept because they are in the head's favor and in line with the head's previous views.

The legislation accepts that the Remonstrance Committee may be divided into individual panels, probably with regard to specialization. The majority of these panels should also consist of the category of "experts". The vast majority of the Remonstrance Committees at the central administrative bodies have been divided into several panels.[30] The members of the Remonstrance Committees or their panels usually number about 10 people,[31] which seems to be reasonable, both with regard to the pluralism of opinions and the quorum.

Graph 5: Number of members of remonstrance committees or senates of remonstrance committees (June 2013)



The intensity of the use of remonstrance as a remedy, due to which the function of Remonstrance Committees or their panels is activated, is suggested by the detected data, according to which there were almost 12,000 proceedings at selected central administrative authorities from 2007

30 The Remonstrance Committee at the Ministry of Finance has the most panels; it has 9. See Graph 5..

31 Ibid.

to 2012 and the Remonstrance Committees held almost 4,000 sessions at which remonstrance was assessed.[32]

The Remonstrance Committees are permanent by nature; the *ad hoc* establishment of Remonstrance Committees is very rare. This implies the possible stability of its members, which we can only agree with. However, the question of their expertise and integrity remains. That is to say, whether they are able to objectively assess the decisions of the head of the central administrative body (who has appointed them) and point out any possible flaws? The fact that these experts need not be employed by the central administrative body is a certainly not insignificant factor. Indeed, it is a desirable requirement from the point of view of objectivity and impartiality. However, this is closely related to the question of the remuneration of the Remonstrance Committees, including whether the amount of remuneration provided is proportionate to the fact that these are leading experts. From our own experience, we would add that the participation in advisory bodies for the government or central administrative bodies or Remonstrance Committees is usually seen as an honorary, rather than profitable position. On the other hand, the question of the prestige connected with the membership in the committee might also play important role, as it may motivate them to maintain their membership in the committee at the expense of an increased level of loyalty to the competent central body or directly to the minister or head.

3 The effectiveness, limits of remonstrance and prospects for remonstrance

As is evident from the available data which has been described above, remonstrance is a remedial measure which is used relatively frequently. The number of 12,000 cases, which constitutes incomplete data, represents a significant burden for the central administrative authorities. Whether remonstrance is a truly effective measure for the protection of the rights of the parties to the proceedings cannot be clearly stated; nevertheless, we can see its limits as lying in who decides on it and what the role of expert and independent Remonstrance Committees is.

Proceedings before the court do not constitute a continuation of administrative proceedings and as such they are not so strictly limited by deadlines for issuing decisions. The matter is therefore dealt with faster in public administration than in the court. However, the application for remonstrance is a prerequisite for the consequent filing of an action,[33] even when the party to the proceedings subjectively believes that the remonstrance will not help. However, we cannot ignore the fact that a review of the decision by the court provides a much greater guarantee of a truly impartial and

32 See Graph 1 and Graph 2.I

33 Cf. Section 5 and Section 68 a) of the Code of Administrative Justice.

independent assessment in comparison with the institution of remonstrance, whose objectivity we can reasonably doubt.

Indeed, remonstrance is a remedy, to which one is legally entitled, like an appeal, but it is not decided upon by any higher, independent administrative authority, but by the identical (central) administrative body, even though it is now represented by its head (minister). However, the head, as already stressed in section 2.3, decides under specific conditions.

Another source of doubt is the question of the fulfillment of the procedural rights of the party to the proceedings, who amongst other things does not even have the right to attend the Remonstrance Committee's hearing and is therefore limited in the extent of the openness of the proceedings in comparison with appellate procedure; the element of transparency and immediacy with regard to the party is weakened. These are just some of the differences that pertain to remonstrance proceedings and which display the lack of equivalence with regard to possible applications and the protection of the party's procedural rights.

Another important aspect is the question of the method of gathering evidence which is not immediately carried out by the head of the central administrative body. The position of the Remonstrance Committee in terms of the implementation and evaluation of the evidence needed to prepare a proposal on the basis thereof is therefore another problematic issue from the point of view of fulfilling the principle of material truth and the free evaluation of evidence. How should the right of the party to the proceedings to be present during the gathering of evidence be realized in practice?[34]

If the method of decision-making and the options of decision-making pertaining to remonstrance were to approximate or equal the options of decision-making pertaining to appeal, it would be necessary, in our opinion, to ensure that the parties to the remonstrance proceedings had the same index of application and protection of their procedural rights which is reflected in the possibility and level of protection of material rights in the appellate proceedings.

From the more general view of the protection of the rights of the parties, it is then logical and practical to ask whether the current prevailing practice is really a better, i.e. more effective, more accessible or faster solution for the parties. From the perspective of the state or the public authority, the aforementioned approach can be seen to be more effective and this is apparently the case. The aforementioned fact, however, cannot by itself remove the doubts concerning the legality of such a solution, as well as the fulfillment of the constitutional principles, including the equality of the procedural rights of the parties, as outlined immediately above.

34 Cf. Section 51, subsection 2 of the Rules of Administrative Procedure.

Anyway, skepticism against the current concept of remonstrance seems appropriate. This does not inevitably suggest that it would be appropriate or necessary to completely abandon this type of remedy. If the decisions will be issued in the first instance by central administrative bodies with no superior administrative body above them, then it is appropriate to ensure judicial review in compliance with the existence of the principle of two instances. We believe that to subject the first-instance decision directly to subsequent judicial review would not be adequate or right.

4 Conclusion

In the contribution the authors focused on the specific nature of an ordinary remedial measure in such administrative proceedings when central administrative bodies make first instance decisions. This ordinary remedial measure is the remonstrance. At first sight the remonstrance could create the impression that fully satisfies the requirement of principle of two instances and thus it could be an effective instrument of protection of rights of parties to the proceedings. However, after closer approximation of relevant legislation and practice there are reasonable and substantial doubts about the possibility of positive answers to the two questions. Thus, the remonstrance can be considered as an example of relative exclusion of the principle of two instances.

As mentioned in the text the application of this institute is not only specific to the Czech legislation. Despite, or perhaps because of this fact, range of problems caused by the remonstrance is similar.

The authors find the following question to be pressing in the current legal context and legislation: whether the aforementioned and prevailing traditional or rather traditionalist or even stereotypical perception of remonstrance with its specific effects on the decision-making practice can be considered to be legitimate (or even legal), especially from the point of view of the requirements of due process or the protection of the rights of the parties to the proceedings and its effectiveness.

It is quite possible to consider the addition of bodies to the system – bodies outside the administrative authorities (but not the public administration) with the appropriate degree of independence, objectivity and expertise – i.e. specialized tribunals.[35]

However, there is also a broader, logically related question which needs to be examined, i.e. that of the effectiveness of the set-up of the entire system for reviewing administrative decisions (acts). Current jurisprudence, application practice and some conclusions of judicature serve to underscore the urgency of these questions. The preparation of adequate answers will, however,

35 As to the possibilities, advantages and disadvantages of different kinds of recourse see more, e.g., in Galligan, 1996, pp. 402–406.

require thorough research supported by a rather large expert and information base, including the available data and qualified analyses thereof.[36] Such steps require adequate social support and a will which should ideally be directed towards the necessary revision of the current legislation.

***Soňa Skulová**, PhD., is Associated Professor at Department of Administrative Studies and Administrative Law - Faculty of Law, Masaryk University in Brno (from 2004), Head of Department (2004–2010), member of the Scientific Board of the Faculty of Law, Masaryk University, coauthor of several textbooks and commentary book of administrative law process (latest 2012) and of administrative science (1998), author of 2 monographs on public administration decisions and discretionary power, and a number of articles and contributions at the Czech and international conferences (EGPA). Researcher and coresearcher of several projects on Czech Administrative law and its European context.*

***Lukáš Potešil,** PhD., is currently »postdoc« at Department of Administrative Studies and Administrative Law - Faculty of Law, Masaryk University in Brno. From 2007 to 2012 he was assistant (law clerk) to judge of the Supreme Administrative Court. From 2009 he is member of the working committee for Administrative Law of Legislative Council of Government. He participated as a co-author on writing textbooks and Commentary books in Czech language. In the area of administrative law he published at national level and also at international level (EGPA).*

***David Hejč**, Mgr., is a doctoral student (since 2011) and researcher (since 2013) at the Department of Administrative Studies and Administrative Law at the Faculty of Law, Masaryk University. He is also assistant to judge at the Constitutional Court of the Czech Republic (since 2013). He is a researcher and co-researcher in several projects focusing on Czech administrative law and its European context. In the area of administrative law he publishes at national level: several journal articles and papers on conference proceedings. He also publishes in international conferences (EGPA, IIAS/IASIA, Caribbean Urban Forum).*

36 Chapter VIII ("Options for Actions") from monograph Langbroek, Buijze & Remac, 2012, pp. 153–155, may be useful as inspiration for the methodology of formulating the objectives, analyses, working with data, checking any pilot projects and formulating recommendations for legislation.

POVZETEK

1.02 Pregledni znanstveni članek

Ugovor zoper odločitve centralnih upravnih organov na Češkem

Ključne besede: ugovor, pritožba, upravni postopek, centralni upravni organ, zakonitost, učinkovitost

Ugovor je tradicionalno redno pravno sredstvo, ki se lahko (izključno) uporablja po izdani odločitvi centralnega upravnega organa. Namen članka je preveriti hipotezo, ali ugovor v celoti odraža načelo dvostopenjskega odločanja. Glede na ugotovitve raziskave lahko ugotovimo, da pomeni ugovor relativno izključitev tega načela, ki se uporablja samo v omejeni obliki, saj o ugovoru ne odloča neki višji, neodvisni upravni organ, temveč isti upravni organ, ki je izpodbijani akt izdal, čeprav je njegov predstojnik; ne pa pritožbena komisija, ki izdaja ''samo'' priporočila/nasvete. Ugotovili smo, da sta mogoči rešitvi preoblikovanje pritožbenih komisij v upravne organe/tribunale ali sprejetje pravil, po katerih centralni upravni organi ne bi bili pristojni za odločanje na prvi stopnji.

Bibliography and references

Explanatory report: 1618 der Beilagen XXIV. GP – Regierungsvorlage - Vorblatt und Erläuterungen. Bundeskanzleramt Rechtsinformationssystem. Retrieved 5. 4. 2014, from: www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01618/fname_238643.pdf

Galligan, D. J. (1996). *Due Process and Fair Procedures*. Oxford: Clarendon Press.

Jemelka, L., Pondělíčková, K., & Bohadlo, D. (2011). *Správní řád. Komentář* [Administrative Procedure Code. A Commentary]. 3rd. ed. Praha: C. H. Beck.

Kopp, F. (2012). Verwaltungsgerichtsordnung: Kommentar. München: C.H. Beck.

Langbroek, P., M. & Buijze, A., & Remac, M. (Eds.). (2012). *Designing Administrative Pre-Trial Proceedings*. Utrecht: Eleven, International Publishing.

Mikule, V. (2005). *Nový správní řád, zákon č. 500/2004 Sb., správní řád* [New Administrative Procedure Code, Act No. 500/2004 Coll., Administrative Procedure Code]. Praha: ASPI.

Molek, P. (2012). *Právo na spravedlivý proces* [The Right To Fair Trial]. Praha: Wolters Kluwer.

Maurer, V. (2011). *Allgemeines Verwaltungsrecht* [Administrative law]. München: Verlag C.H. Beck.

Průcha, P. (2012). *Správní řád s poznámkami a judikaturou, podle stavu k 1. 1. 2013* [The Administrative Procedure Code with Commentary and Judicial Decisions]. Praha: Leges.

Schmitz, H. (2008). *Abschaffung des Widerspruchverfahrens.* (»Der kleine Verwaltungsrichtertag« des Bundes Deutscher Verwaltungsrichter [BDVR], Bayerischer Verwaltungsgerichtshof: »Die Abschaffung des Widerspruchverfahrens - pro und kontra«, München, 13 June 2008). Retrieved 5 April 2014, from: www.schmitz-www.de/SiteH1.data/Komponenten/bdvr08.pdf

Skulová, S., et al. (2012). *Správní právo procesní* [Administrative Procedural Law]. 2nd ed. Plzeň: Aleš Čeněk.

Skulová, S. (2011). *Discretionary power of public administration in the Czech Republic in the European context with accent on the dynamics of the action of European principles of administrative law. Principles, Rules and Limits of Europeanisation of National Legal System*. Maribor-Brno: University of Maribor, Faculty of Law.

Vačok, J. (2009). Možno vždy považovať rozklad za prostriedok nápravy? [Remonstrance can always be considered as a remedy?]. II. Days of Law. Masaryk University, Faculty of Law. Retrieved 11. 9. 2013, from: www.law.muni.cz/sborniky/dp08/files/pdf/sprava/vacok.pdf

Vedral, J. (2012). *Správní řád. Komentář* [Administrative Procedure Code: A Commentary]. 2nd ed. Praha : BOVA Polygon.

Vopálka, V., Šimunková, V., & Šolín, M. (2003). *Správní řád. Komentář* [Administrative Procedure Code. A Commentary]. 2nd ed. Praha: C. H. Beck.

The government Draft of the Rules of Administrative Procedure (2003), Parliamentary Document no. 201/2003. Retrieved 10 August 2013, from: www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=201&CT1=0

Žáčková, M. (2005). *Nový správní řád, zákon č. 500/2004 Sb., správní řád* [New Administrative Procedure Code, Act No. 500/2004 Coll., Administrative Procedure Code]. Praha: ASPI.