PROBLEMATICAL ASPECTS OF CURRENT LEGAL REGULATION OF APPELLATE REVIEW AND THEIR SOLUTION IN SUGGESTED AMENDMENT OF CZECH CIVIL PROCEDURE CODE¹

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Abstract: The aim of this article is to point to insufficiencies of the current legal regulation of the appellate review proceeding in civil cases, when the court competent to deal with the appellate reviews is not able to fulfill its function of a unifier of case law and the defender of lawfulness of decision-making any more. The proposed amendment of the Civil procedure code which is being prepared by the Ministry of Justice reacts to many of these insufficiencies. In the article we have only focused on crucial conceptual problems of the proposed legal regulation and we have avoided other deficiencies requiring deeper analysis and the knowledge of Czech legal regulation.

Keywords: regulation, appellate review, amendment, Civil Procedure Code

Appellate review as an extraordinary remedy in civil cases was embodied into the Civil procedure code (Act N. 99/1963 Coll.) through Act N. 519/1991 Coll., coming into effect on 1st January 1992. This institute replaced complaint against a breach of law. Through the complaint against a breach of law it was possible to challenge a final decision of a court or a public notary's office on the grounds that law was breached in the procedure or during the process of decision making. The fact that the filing of a complaint laid at the discretion of the general prosecutor of the Czechoslovak state, general prosecutors of both Republics or Justice Ministers was a major drawback of this extraordinary remedy. Participants of proceedings could only initiate the complaint; however, they did not dispose of such a remedy themselves. The time-limit for filing a complaint, which was 3

1 This article was written within the project of Student grant competition no. PF_2011_006 (New conception of extraordinary appeal in civil proceedings in the context of comparison with foreign legal regulations).

years from the final and conclusive decision, was another controversy. This was causing a major violation of legal certainty of both, participants in the proceedings, as well as the third parties.

Through the appellate review it is possible to challenge the final decisions of the court of appeal if it is admissible under the law. The Civil procedure code includes a full list of decisions against which it is possible to file an appellate review. These are mainly decisions of meritorious nature. At the same time it also regulates so called negative conditions of admissibility, i.e. it provides an exhaustive list of decisions, against which an appellate review is not possible. Appellate review can be filed only on the grounds specifically listed. A participant can challenge the decision of the court of appeal at the court which made the decision as the court of first instance within the time-limit of two months from the delivery. It is a duty of the court of the first instance to remove possible defects of the appellate review, send the appellate review to the other participants and examine whether the requirements of the proceedings have been met. The court itself can only decide on refusal of the appellate review on the grounds of failing to comply within the time-limit and discontinuance of the proceedings on the grounds of failing to pay the court fee. If this is not the case, the court sends the file and a report to the court competent to deal with appellate review.

In case the court competent to deal with appellate review does not reject the appellate review due to delay (unless the court of first instance has already done so), inadmissibility, apparent unlawfulness, or due to the fact that it was filed by unauthorized person, or unless it discontinues the appellate review proceeding, then it decides whether or not to order a hearing. It orders a hearing if it is considered reasonable or if evidence is introduced. This is only possible in order to prove the grounds for appellate review. Thus it is not possible to apply new facts or evidence concerning the case itself. The appellate review is under the current legal regulation based on cassation remedial system. Therefore the court competent to deal with appellate review can only nullify the decision of the court of appeal; it cannot change its decision. It is entitled to re-examine the case only from legal aspects. It is always the Supreme Court which is competent to decide the appellate review.

The Supreme Court as the final judicial authority in matters falling within the powers of courts in the civil court procedure and in criminal procedure secures unity and lawfulness of the decision-making. It is supposed to achieve this goal mainly through the process of decision-making on appellate review. However the Supreme Court currently copes with a large number of appellate reviews filed, many of which are either totally unimportant, or of no significance from the legal aspect. However, the Supreme Court has to deal with all of them and with respect to the scope of admissibility of the appellate review it in fact becomes a court of third instance. In 2010, 4 986 appellate reviews in civil cases were filed at the Supreme Court. In addition to this number of cases 5 595 remaining

cases from the previous period had not been concluded by that time.² However, according to the information obtained from the Supreme Court, only about 200 cases yearly have the power of judicial precedents.

Thus the Supreme Court does not fulfill its function sufficiently neither from the viewpoint of the unification of judicial decisions, nor from the viewpoint of protection of rights of participants. For this reason the Ministry of Justice is currently working on crucial amendment to the whole appellate review proceeding.³ This bill was drafted as a result of close cooperation with the Supreme Court of the Czech Republic and it mainly reacts to the Memorandum of the Government of the Czech Republic, which, apart from other things expresses the Government's readiness to do something about the state of busyness of the Supreme Court through the restriction of reasons for appellate review and preferences of its role through the means of unification of case law.⁴

I. Admissibility of Appellate Review

The crucial point of the amendment is the restriction of the admissibility of the appellate review. Under the current legal regulation it is possible to file appellate review against the meritorious decision of the court of appeal, if one of the following conditions has been satisfied:

1. it is a decision, through which the meritorious decision of the court of first instance was changed,
2. it is a decision, through which the meritorious decision of the court of first instance was upheld, by which the court of first instance decided in a way different from its previous decision as it was bound by the legal opinion of the court of appeal, which reversed the previous decision,
3. it is a decision, through which the decision of the court of first instance was upheld if the appellate review is not admissible under the letter b) and the court of appeal concludes that the challenged decision is of crucial significance from legal aspect.

In the first two cases the current legal regulation only requires satisfying formal pre-requisites for the appellate review to be admissible without taking into

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2 These data result from the statistics included in the explanatory note to the proposed amendment of the Civil procedure code concerning the topic of appellate review published on the web sites of the Ministry of Justice. Cited July 26th, 2011.
Available on <<http://portal.justice.cz/Justice2/MS/ms.aspx?j=33&o=23&k=4978&d=315854>>.

3 This article is based on the proposed amendment of the Civil procedure code concerning the appellate review, published on the web sites of the Ministry of Justice. Cited July 26th, 2011. Available on <<http://portal.justice.cz/Justice2/MS/ms.aspx?j=33&o=23&k=4978&d=315854>>.

4 Ministry of Justice notification. Cited July 26th, 2011. Available on <<http://portal.justice.cz/Justice2/MS/ms.aspx?j=33&o=23&k=4978&d=315854>>.

consideration whether or not from the viewpoint of the fulfilling of the function of the Supreme Court there is any significance in dealing with and deciding about the appellate review from legal aspect. For this reason the proposed legal regulation does not take into account the admissibility of the appellate review in accordance with these criteria and it restricts the admissibility of the appellate review only to the cases of crucial significance from legal aspect. Currently the Civil procedure code contains a demonstrative list of cases in which the decision of the court of appeal is of crucial significance from legal aspect. This is the case when the court of appeal deals with a legal issue, which has not been solved by the court competent to deal with the appellate review, or which is decided in a different way by different courts, or if the legal issue resolved by the court competent to deal with appellate review is to be judged in a different way. In connection with this situation during the preparation of the amendment discussions keep appearing whether the current demonstrative list should be kept or replaced by a full one. We incline to the conclusion that the demonstrative list should be kept, as it not only enables the Supreme Court to achieve its main goal, which is securing unity and lawfulness of courts' decision-making, but it also enables the Supreme Court to intervene in cases of excesses of the courts of appeal concerning cases where there already are constant and clear judicial decisions.

The proposed legal regulation left the idea of demonstrative list, however when defining the case of crucial significance from the legal aspect it includes all situations, which can lead to the fact that the decision of the court of appeal is of crucial significance from legal aspect including cases when the court of appeal departed from the case law of the court competent to deal with the appellate review.

In relation to non-meritorious decisions the valid and effective legal regulation dealing with the admissibility of appellate review is rather complicated. It is based on a full list of decisions for which the appellate review is admissible. In most of them the law sets out conditions, which were mentioned above, which must be satisfied if the appellate review is to be admissible. If the Ministry of Justice is considering omission of the first two conditions of the admissibility of the appellate review, the next time appellate reviews against procedural decisions should also be admissible only in those cases, which are of crucial significance from legal aspect. The next question is, whether the mentioned full list should be broadened including also other procedural decisions, or if some of them should be left out.

The amendment allows to file an appellate review against all final decisions of the court of appeal, i.e. even those of procedural nature. However, even in these cases it holds true that the case must be of crucial significance from legal aspect. Apart from this the amendment also regulates absolute admissibility of the appellate review (i.e. regardless of the fact whether the matter is of crucial

significance from legal aspect) against the enumerative list of resolutions of the court of appeal, which were issued during the appellate review proceeding.

In addition to positive conditions of the admissibility of the appellate review the law also regulates negative conditions of admissibility. Currently, the appellate review is not admitted:

1. in cases, where it was decided in favor of monetary remedy not exceeding 50 000 CZK and in business matters 100 000 CZK, however, accessions of a claim are not taken into account. The regulation dealing with the restriction of admissibility according to the monetary value of the case has undergone certain development. The original amount which was 20 000 CZK and in business cases 50 000 CZK was increased as a result of Act N. 7/2009 Coll. coming into effect on 1st July 2009. Therefore the exact impact of this restriction on the amount of appellate reviews filed has not been found out yet. The proposed legal regulation is considering a unified limit of 50 000 CZK, in some matters this limit should not be set.
2. in cases regulated by Family Act, with the exception of judgment of restriction or removal of parental duties or discontinuing of their performance, determination (denial) of parenthood or irrevocable adoption. Opinions whether or not to keep this restriction vary. The fact that unification of case law in some crucial issues of this area of law is missing speaks in favor of omission of this negative condition. The reason for keeping this condition is the effort to make the proceeding as fast as possible as well as ensure the legal certainty of litigants. In most of these cases it is also possible to use a special institute, which is called "*clausula rebus sic stantibus*". This remedy provides the participants with a much more flexible way of using the correction of a court's decision. This can be seen especially in the issues of alimony. Although the *clausula rebus sic stantibus* does not serve primarily to correct a faulty decision, but to react to a change of circumstances, it can be used even in these cases. The plaintiff can often claim that a change of circumstances occurred in the meantime and thus he can get a favourable decision in much shorter time.

In our opinion the enactment of the admissibility of appellate review in family law cases would not be contra-productive, especially with respect to the fact that the admissibility of appellate review is conditioned by the crucial legal significance of the case.

A temporary restriction of the admissibility of appellate review in these cases would also be worth considering, before a constant case law in the most significant issues of family law is formed. However, if we take into account the specific nature of these relationships and a fast development of cultural, social, economic

and psychological aspects in this area, this solution does not seem to be very beneficial.

The proposed amendment of the Civil procedure code still counts with the inadmissibility of the appellate review in family law cases. However, it allows the court competent to deal with appellate reviews to consider, whether the case deserves a special attention from the viewpoint of securing unity and lawfulness of the court's decision-making. In such cases the appellate review is admissible. However, the amendment does not go on to specify, what can be understood by the term "a case deserving a special attention". Again this can cause unpredictability in the court procedure, and this in turn can diminish legal certainty of participants.

3. in cases of international kidnapping of children. Here, the inadmissibility depends on the necessity to handle these cases as fast as possible. The institute of returning a child in cases of international kidnapping serves only to immediate restoration of the original condition.

In relation to final procedural decisions the proposed bill defines other negative conditions, which is the result of planned broadening of the admissibility of appellate review against these decisions.

II. Who is entitled to examine the Admissibility of the Appellate Review

Under the current legal regulation it is only the Supreme Court that is **entitled to** examine whether the case is of crucial significance from legal aspect and thus the appellate review is admissible. This was established through the amendment of the Civil procedure code Act N. 30/2000 Coll. Up to then the issue of admissibility was judged by the court of appeal in the appellate proceeding, which stated the admissibility or inadmissibility of the appellate review in its final decision. The admissibility of the appellate review could be stated by the court of appeal even without a motion. If the court of appeal did not comply with the litigant's motion to pronounce the admissibility of the appellate review, the litigant was still allowed to turn to the Supreme Court with his appellate review. Such appellate review was admissible if the court competent to deal with appellate reviews reached the conclusion that the challenged decision of the court of appeal was of crucial significance from legal aspect. Apart from the admissibility of appellate review in cases which were of crucial significance from legal aspect the appellate review was still admissible as today against decisions of court of appeal, through which a meritorious decision of court of first instance was changed, or through which a meritorious decision of the court of first instance was upheld, in which the court of first instance decided in the merit of the case in a way different from its previous decision because it was bound by the legal opinion of court of appeal, which reversed the previous decision.

The proposed amendment dealing with the appellate review takes into account only one criterion of the admissibility of appellate review that is the fact that the case is of a crucial significance from legal aspect. For this reason the discussion over who should the next time be entitled to examine whether the case is of crucial importance was resumed. The first possibility would be to draw inspiration from the model before the amendment 30/2000 Coll., i.e. the matter of admissibility of appellate review would be decided by courts of appeal as well as the Supreme Court. The Supreme Court would always be entitled to examine the decision of the court of appeal on admissibility and inadmissibility of the appellate review. This could definitely lead to at least partial unburdening of the Supreme Court. This would be achieved through the fact that part of the participants of the appellate proceeding would not file the appellate review if the court of appeal pronounced the inadmissibility of the appellate review. The fact that the court competent to deal with the appellate reviews could base its decision on the admissibility on the conclusions and reasoning of the court of appeal would definitely be another positive aspect of this system. However, the negative aspect of this option would be the fact that this process could be unpredictable for the participants and it could also increase the costs of the whole procedure in case that the Supreme Court reached a negative conclusion pronouncing the inadmissibility of the review in comparison with a positive decision of the court of appeal.

To leave the duty to examine the admissibility of the appellate review only up to the Supreme Court is another possibility. The proposed amendment of the Civil procedure code eventually inclined to this variant.

III. Reasons for Filing of Appellate Review

The current legal regulation takes into account three reasons for filing appellate review. The appellate review can be filed only for these reasons:

1. there has been a defect in the proceeding. This defect could have resulted in a wrong decision in the case
2. the decision is based on an erroneous legal qualification in the case
3. the decision results from fact-finding, which is not supported in the pleadings by evidence (however, this rule cannot be applied in case of admissibility of appellate review under the criterion of crucial legal importance from legal aspect).

It is expected that in the future there will only be one single reason for filing the appellate review with respect to the proclaimed main purpose of the Supreme Court, which is securing unity and lawfulness of courts' decision-making in civil court proceedings. The reason is the fact that the decision of the court of appeal has been based on an erroneous legal qualification in the case. The explanatory

note says that the above mentioned goal can be achieved through considering decisive issues of the substantive and procedural law. As a matter of fact such interpretation also relates to the definition of what can be regarded as a case of crucial significance from legal aspect. The decision of the court of appeal is of crucial significance if it depends on the settlement of the issue of substantive or procedural law which is important from the viewpoint of securing unity and lawfulness of the courts' decision-making. Up to now procedural issues have been subjected under appellate review reason mentioned above under letter a), i.e. defects in proceedings which could result in a wrong decision in a case. Under the proposed legal regulation a procedural defect is a legitimate reason for filing the appellate review regardless of the fact whether this defect caused a wrong decision in the case. This definitely increases the chances to challenge the decision through appellate review.

IV. Limit for Filing of Appellate Review

The limit for filing appellate review is currently two months from delivery of the decision of the court of appeal. If the decision does not contain an instruction on admissibility of appellate review, limit for filing the appellate review or of the court at which the review is filed, or if it contains a wrong instruction on the fact that the appellate review is not admissible, it is possible to file appellate review within four months from the delivery of the decision of the court of appeal.

Under the proposed amendment it is expected that the time limit will be one month⁵, which is a return to the legal regulation before the amendment of the Civil procedure code Act N. 30/2000 Coll. It was in the explanatory note⁶ to the Act N. 30/2000 Coll. where it was stated that compulsory representation of the appellant, difficulty of drawing up of the appellate review as well as the possibility of the appellant to define the scope and the reason for which he challenges the decision of the court of appeal only within the limit for filing the appellate review were taken into account when extending the time-limit.

The proposed legal regulation is even stricter for the appellants in the fact that it rules out the application of § 43 of the Civil procedure code in the appellate review proceeding, under which the court shall challenge the appellant to remove the faults of filing the appellate review and sets a limit for doing so. The actual length of the time-limit is left at the discretion of the court. In case the appellant was not represented in the previous proceedings, or does not want to

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5 In case the decision does not contain appellate review notification, notification of the time-limit for filing the appellate review or of the court at which it is filed, or if it contains a wrong notification of inadmissibility of the appellate review, it will be possible to file the appellate review within three months from the delivery of the decision of the court of appeal.

6 The explanatory note to the Act N. 30/2000 Coll. Parliamentary Press number 257/0.

be represented any more by the same advocate, he must get an advocate within the limit of one month and this advocate will file the appellate review. The advocate also has to study the whole case and then he must file an appellate review free from any defect. Thus if there is not a appellate review filed without any defect within the limit for filing the review, or if it was not corrected or completed within this limit, the court will reject this appellate review. Thus it is all the more possible to doubt about the adequacy of the proposed length of the limit for filing of the appellate review.

V. Elements of the Appellate Review

Apart from general essential elements, such as which court the appellate review is intended for, who is the one filing the review, what matter it concerns, what is the aim of the review, signature and date, the filing must also include the information about the decision against which the appellate review has been filed, the scope within the decision is to be challenged, definition of the reason of the appellate review and what the appellant is seeking (appellate review proposal). Under the proposed amendment the reason of appellate review shall be defined through the appellant stating the legal qualification of the case which he considers to be wrong and subsequently explaining the incorrectness of such a qualification. The decision of the court of appeal can be examined on the grounds set out in the appellate review only. Therefore it will also be necessary to make it clear, whether the Supreme Court is bound only by the specific qualification in which, according to the appellant, the court of appeal made a wrong decision, or also what is, according to the appellant, the nature of the wrong qualification. We ourselves incline to the first variant, i.e. the court competent to deal with the appellate review should be bound only by the fact, in which particular judgment the court of appeal made a wrong decision. Otherwise the position of a court would be denied. A court cannot be bound by legal opinion of the participant of a proceeding, which results from the principle *iura novit curia*.

Under the proposed amendment if the appellate review has any defects which have not been removed within the limit of one month from the delivery of the decision of the court of appeal and thus it is not possible to continue with the appellate review proceeding on account of this, the court competent to deal with the appellate review shall reject the review. It will proceed in the same manner if it reaches the conclusion that the appellate review is not admissible. The judicial resolution about this must be issued by the court competent to deal with the appellate review within 6 months from the day when the case was submitted to this court. However, in comparison with the original intentions the proposal does not include (in relation to passing this limit) the possibility of a fiction of a positive decision concerning the admissibility of the appellate review and the limit is a procedural time-limit only. Consequences which result from violating the time-limit can be of a certain significance only in cases where the length of

the proceeding has been taken into account, e.g. in disciplinary proceedings. The proposed six months limit can be found too long from the viewpoint of legal certainty, however, even with respect to the busyness of the Supreme Court and the number of cases not finalized, establishing a shorter time-limit would in fact not be of essential significance.

As far as the legal regulation of the process of the appellate review proceeding is concerned, no changes of crucial importance have been made in the proposed regulation. We can just draw attention to the legal regulation of evidence. In the appellate review proceeding it will not be possible to use new facts and evidence. Currently this restriction applies only to facts and evidence in the case itself. As a result of this, any evidence shall be ruled out in the appellate review proceeding.

The current legal regulation of the appellate review is based on cassation remedial system. The new proposal assumes that the court competent to deal with the appellate review can not only reverse the incorrect decision of the court of appeal, but it can also change the decision if the results of the proceeding show that it is possible to decide in the case. Thus the appellate review will be based on revisional remedial system. This system allows the participants to seek the re-examination of the challenged decision from the viewpoint of violation of substantive law as well as procedural rules within the limits of the appellate review and for reasons stated therein. The reviewing court can uphold and reverse the challenged decision; the change of decision is only possible in case the court of second instance correctly found the facts of the case, but they were incorrectly qualified.⁷

Conclusion

Appellate review is an extraordinary remedy. Thus it represents the last chance to defend the subjective rights of the participants of a court proceeding in the general justice system. The issue of considering the admissibility of the appellate review is of crucial importance even in relation to possible filing of constitutional complaint. It is the constitutional complaint which initiates the constitutional court proceeding. A natural person or legal entity is entitled to file a constitutional complaint if they claim that their basic right or freedom guaranteed by the constitutional order was violated through the final decision in the proceeding in which this person or entity participated or through another intervention of a public authority. The constitutional complaint is currently inadmissible unless the complainant has used all the procedural measures which are provided by law in order to protect his rights. However, this does not apply to the appellate review, which can be rejected by the Supreme Court as inadmissible for reasons which are discretionary (i.e. this is an example when it has to be considered whether the case is of crucial importance from legal aspect). Such legal regulation causes excessive busyness of the Constitutional Court, which

7 STAVINHOVÁ, Jaruška, HLAVSA, Petr. *Civilní proces a organizace soudnictví*. Brno: Masarykova univerzita a nakladatelství Doplněk, 2003. p. 411

has to deal with cases which could well be handled on the level of general justice system (it is obvious that Constitutional Court deals with the case itself only in cases when the fundamental right or freedom of the participant guaranteed by the constitutional order has been violated).

In connection with the proposed legal regulation of appellate review which connects the admissibility of the appellate review only with satisfying the condition of crucial significance of the case from legal aspect, it will also be necessary to consider possible changes in legal regulation of constitutional complaint. If the proposed amendment is enacted and at the same time the current legal regulation dealing with the proceeding of constitutional complaint is kept then a situation may occur in which participants will turn to the Constitutional Court without using the opportunity to file appellate review first.

It is obvious that it is not possible to find a solution that would completely suit both courts. However, in this case it is necessary to bear in mind that the Constitutional Court is supposed to handle the cases of violation of rights and freedoms guaranteed by the constitutional order unless the protection has been provided by general justice system.

The Supreme Court is supposed to primarily ensure uniformity of case law. However, it is not possible to forget that "this purpose cannot outweigh the protection of participant's rights so that the protection of these rights loses its sense and this participant will only become "a supplier of material" for unifying of the case law. On the contrary it is necessary to find a reasonably balanced relationship between the restriction of a right to the access to court and this purpose which also represents public interest. In this situation the public interest means securing of harmonious application and interpretation of law by general justice system".⁸

The aim of this article is to point to insufficiencies of the current legal regulation of the appellate review proceeding in civil cases, when the court competent to deal with the appellate reviews is not able to fulfill its function of a unifier of case law and the defender of lawfulness of decision-making any more. The proposed amendment of the Civil procedure code which is being prepared by the Ministry of Justice reacts to many of these insufficiencies. The proposed amendment which has been sent to relevant institutions for comments is currently available to the public. After a deep analysis we have reached a conclusion that although this amendment in many respects tries to solve the current problematic aspects successfully, it can be found insufficient in many respects and thus further discussions and subsequent changes in this proposal can be anticipated. In this contribution we have only focused on crucial conceptual problems of the proposed legal regulation and we have avoided other deficiencies requiring deeper analysis and the knowledge of Czech legal regulation.

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⁸ Ruling of the Constitutional Court of the Czech Republic of May 10th, 2005, evidence number IV. ÚS 128/05.