FRAMEWORK REGULATIONS AND TAILOR-MADE LAWS AS A PROBLEM OF PUBLIC ADMINISTRATION

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Abstract: *Extralegal character of administrative action does not denote an unauthorized power. The extralegal dispute first shifted to the question of the delegability of legislative and judicial power, and then to the riddle of how the independence of executive and administrative bodies can be understood. If legislation without legislature was a complex issue of constitutional and administrative law, the issue of legislative measures is no less, and possibly more so difficult. Two basic forms of measures need to be distinguished as quasi-laws: tailor-made law and framework regulation. True legislative acts are distinguished in the field of public administration by the criterion of abstractness and the criteria of universality. Quasi-legal measures may be both abstract and specific in nature. In terms of merging legislative and executive power, quasi-legal acts can work as heteronomous laws in public administration.*

Keywords: *separation of powers, delegated legislation, extralegal power, extension of legislation, framework regulation, tailor-made law, individual regulation, over-regulation*

I. UNAVAILABILITY AND UBIQUITY OF THE LAW

Franz Kafka, a famous German-language novelist, put this sentence into one of his short fiction in 1920: *Unsere Gesetze sind nicht allgemein bekannt, sie sind Geheimnis der kleinen Adelsgruppe, welche uns beherrscht.* This text was published posthumously[1] and was often quoted, commented, and paraphrased.

Rainer Maria Kiesow concluded that the quoted sentence has not aged in the century and that the laws are essentially esoteric in our time. The requirement for transparency is a new star of understanding, but clarity cannot reveal the legal mystery. The law must be incomprehensible, so that it can always be decided again.[2]

Kafka perceived the legal esotericism as consequence of reconciliation with the fact that the law is closely guarded secret of the small group of the elite who govern us. That is why Kafka writes about faith that laws are scrupulously adhered to, even though it remains a vexing thing to be governed by laws one does not know. He was not thinking of disadvantages that stem from only a few individuals and not the whole population are able to understand the law.

Although we try to govern our behaviour in accordance with carefully sieved and ordered conclusions, all that remains perhaps nothing more contemplation because the laws we try to guess possibly don't exist at all. Kafka's consideration offers some certainty when we acquire beliefs that if any law exists, then the law is what the elite do. Nevertheless, we live on the razor's edge.

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[1] KAFKA, F. Zur Frage der Gesetze. In: M. Brod – H. J. Schopes (eds.). *Beim Bau der Chinesischen Mauer*. Berlin: Gustav Kiepenheuer Verlag, 1931, p. 29.

[2] KIESOW, R. M. Verständnis des Rechts. In: Kent D. Lerch (ed.). *Die Sprache des Rechts: Recht verstehen*. Berlin: Walter de Gruyter, 2004, p. 195.

The only visible law is the will of the elite, and who are we to rob ourselves of the only law we have? Kafka does not consider encouragingly about the possibility of change, though he acknowledges that a group that would reject the traditional confidence in the laws would immediately have the entire population behind it. But such a party cannot come into being, because no one dares to reject the elite.

It offers a comparison with pragmatic models of solving conflicts of this kind, perhaps the best known of which is associated with the thought offered by Machiavelli in the Book I.4 of Discourses on the First Ten Books of Titus Livius: "I say that to me it appears that those who damn the tumults between the nobles and the plebs blame those things that were the first cause of keeping Rome free, and that they consider the noises and the cries that would arise in such tumults more than the good effects that the engendered. They do not consider that in every republic are two diverse humours, that of the people and that of the great, and that all the laws that are made in favour of freedom arise from their disunion".[3]

Jeremy Waldron follows this well when he explains what it means a representative lawmaking: What makes legislation an attractive mode of lawmaking, as compared to the lawmaking by judges and lawmaking by decree or executive agencies? Why exactly do we not reduce the mess and the incoherence by electing small legislative team? The key here are the noises and the cries, or – in other words – the diversity. And what sort of diversity are we talking about here? Not just diversity of opinion and experience, but also diversity of interests. The first two seem appropriate but the third may be a problem for democracy. In lay discussion if not in political and legal theory, it is often though that it would be an improvement if legislators were to concentrate on what are said to be the issues rather than what is in it for them or what is in any proposal to affect the interests of their constituents.[4]

Therefore, we remind ourselves of two seemingly contradictory attributes of the law. One is unavailability, the other is ubiquity.

The unavailability of the law is reflection of bureaucratic alienation. It is balancing on the razor's edge - or the desire for something incomprehensible – as Kafka reflected in his thoughts.

In addition, the ubiquity of the law is a manifestation of democracy in representative lawmaking. It is accompanied – in Machiavelli's reflexions – by noises and cries that arise in omnipresent tumults. Nevertheless, such laws arising from the disunion of diverse humours are made in favour of freedom.

What lessons can be learned from the above for the theory of administrative law in the 21st century?

The unavailability as well as the ubiquity of the law is joined with the concept of extralegal executive and administrative power.

Let's recall the controversy that unleashed on the remarkable book *Is Administrative Law Unlawful*? The author of this book Philip Hamburger relies, among other things, on

[3] MACHIAVELLI, N. *Discourses on Livy*. Translated by H.C. Mansfield and N. Tarcov, Chicago: The University of Chicago Press, 1996, p. 16.

[4] WALDRON, J. *Political Political Theory: Essays on Institutions*. Cambridge, MA: Harvard University Press, 2016, pp. 125–144.

claims that executive power has been multiplied because legislatures and courts have failed to execute their own power in a decisive way.

Some misunderstanding caused the use of the term extralegal for what other authors consider to be normal in administrative law. Thus, in the book, great attention was paid to phenomena called extralegal legislation and extralegal adjudication related to the historical development of public administration in the United States and in the United Kingdom.

Moreover, Hamburger concluded that after absolute power was defeated in England and America, it circled back from the continent through Germany. "There, what once had been the personal prerogative power of kings became the bureaucratic administrative power of the states… Thousands upon thousands of Americans studied administrative power in Germany, and what they learned there about administrative power became standard fare in American universities. At the same time, in the political sphere, American Progressives were becoming increasingly discontent with elected legislatures, and they increasingly embraced German theories of administration and defended the imposition of administrative law in America in terms of pragmatism and necessity."[5]

Extralegal character of administrative action does not denote an unauthorized power. Hamburger's book carefully rejects any such meaning and instead uses extralegal power to mean power exercised not merely through law, but through other mechanisms – that is, not merely through legislative and judicial acts.[6] Exactly what makes power extralegal may not be immediately obvious.[7] After all, the combination of three powers of government – legislative, executive, and judicial – in administrative agencies is dangerous in any case, because administrative activities take legislative and judicial forms, but they must be exercised in the sphere of executive power. The extralegal power, whether legislative or judicial, could be understood merely as a departure from regular institution or processes, and certainly this is the key element of the problem.[8] The more fundamental point, however, is not merely about institutions or procedures, but about the contrast between regular law and irregular commands, between ordinary adjudication and the extraordinary substitutes for it.[9]

These statements remind us of the recognition that public administration prefers *rule through law* (and possibly extra law) to *rule of law*. The danger of an administrative return to an extralegal regime becomes particularly concrete when one recognizes the potential for evasion. When the executive makes regulations, it claims to escape the constitutional requirements for the election of lawmakers or for deliberation. Similarly, when the executive adjudicates disputes, it claims to sidestep most of the requirements about judicial independence or due process.[10]

[5] HAMBURGER, P. The History and Danger of Administrative Law. *Imprimis*. 2014, Vol. 43. No. 9, p. 4.
[6] HAMBURGER, P. Early Prerogative and Administrative Power: A Response to Paul Craig. *Missouri Law Review*. 2016, Vol. 81, p. 945.
[7] HAMBURGER, P. *Is Administrative Law Unlawful?* Chicago: The University of Chicago Press, 2014, p. 22.
[8] Ibid., p. 23.
[9] Ibid., p. 23–24.
[10] Ibid., p. 29.

II. EXTRALEGAL POWER, TAILOR-MADE LAW AND FRAMEWORK REGULATION

Extralegal character of administrative action is seen in many contexts primarily as illegal conduct. In another sense this term indicates de facto standards installation which can be later incorporated in the legal order. Extralegal elements in different branches of legal activity are often understood as solutions motivated politically. For example, legislative acts are influenced by way of lobbyism, or even corruption or opportunism during the legislative procedure. Legislators with limited knowledge of a topic can easily be manipulated and their vote will say nothing about the propriety of a rule. Extralegal elements in the sphere of adjudication may in turn be related to the fact that the judge has a reason for his choice. The true motivation underlying the decision will not be always discovered and it cannot be excluded that the outcome is, to a certain limit, influenced by random factors.[11]

It cannot be overlooked that aforementioned Hamburger's argumentation returns to the issue, which was precisely defined in the comparative administrative law already in connection with the emergence of administrative state in the period of Roosevelt's New Deal. At that time, Fritz Morstein Marx explained precisely the difference between Continental and American access to administrative law: "American terminology identifies administrative law primary with the evolution of quasi-legislative and quasi-judicial powers… The difficulty of isolating in concise terms the quasi-legislative and quasi-judicial elements within the wider range of administrative action would be almost insurmountable, were it not for the fact that a shortcut is offered by a structural peculiarity of our scheme of regulatory controls. For practical purposes, it has been possible to resolve the dilemma by associating both elements with the functions of the independent regulatory commissions or boards. Admittedly, this is an entirely pragmatic classification since delegated legislation and administrative adjudication are by no means a monopoly of independent establishments."[12]

The problem that emerged in the field of comparative administrative law was transformed into general administrative law. Thus, the extralegal dispute first shifted to the question of the delegability of legislative and judicial power, and then to the riddle of how the independence of executive and administrative bodies can be understood. Some of the applicable arguments have also been adopted by judges as is evident, for example, from the Czech case law: "The first of the arguments against laws, legal regulations, concerning individual cases is the principle of the separation of powers, or the separation of the legislative, executive and judicial power in a democratic state based on the rule of law… Thus, an individual regulation contained in a legal regulation which deprives the addressees of the possibility of judicial review of whether the general conditions of a normative framework have been met concerning a particular entity, a regulation which lacks transparent

[11] PELIKÁNOVÁ, I. Legal and extra-legal elements of motivation in legislation and interpretation of law – a judge's thoughts. *Acta Universitatis Szegediensis: acta juridica et politica*. 2016, Vol. 79, pp. 505 and 509.

[12] MORSTEIN MARX, F. Comparative Administrative Law: the Continental Alternative. *University of Pennsylvania Law Review*. 1942, Vol. 90, p. 121–123.

and acceptable justification within the general possibility of regulation, must be considered inconsistent with the principle of a state governed by the rule of law."[13]

Judicial conclusions of this kind require reflection on individual regulation. As to political choice the determination is made by the legislature. It does not imply the executive is authorised to infringe rights where the legislative act is cast in general or ambiguous words. In accordance with non-delegation doctrine, the legislature is also forbidden to endow the executive with extensive powers to do whatsoever it wished. This is a great opportunity for extralegal legislation. What matters in the rule of law is how the judiciary tolerates this opportunity in terms of enhancing democracy. However, from the perspective of rule through law, it is more important whether a legalistic or multi-instrumental approach to public administration prevails.

If legislation without legislature was a complex issue of constitutional and administrative law, the issue of legislative measures is no less, and possibly more so difficult. Two basic forms of legislative measures need to be distinguished as quasi-laws: tailor-made law and framework regulation.

Tailor-made law is a legislative measure adapted to specific subjects and situations. It is a prototype of a specific law that can be directly or indirectly individualized.[14] What is remarkable is the fact that the tailor-made law purposefully replaces what might otherwise be subject to administrative decision-making. A practical example can serve as an illustration. The law was to be adjusted to days and hours when it would be forbidden for trucks to cross each other on specific sections of the highway. Nothing positive can be said about the stability of such adjustment.

Current public administration undoubtedly suffers from over-regulation, so it is not surprising that legislature is increasingly producing individual regulation. Especially in view of the legalistic tradition, such a procedure can facilitate the judicial control of public administration, as it narrows the scope of administrative discretion. The legislature, however, takes hypocritical measures rather than ordinary laws which may be tailored to political circumstances, but not tailor-made for certain individuals or concrete predicaments.

It is somewhat paradoxical that the complaints against delegated legislation have not detracted from individual regulation efforts. Classical administrative law has reserved tailor-made laws for urgent and exceptional situations. Gradually, we began to accept that we are living in turbulent times, when only a permanent state of legislative emergency really exists.

From purely administrative point of view, tailor-made law is a diverse set of quasi-legal instruments whose pragmatic advantage should be that they are ready for immediate use in public administration. It can't be said so completely about framework regulations.

Framework regulation is a legislative measure, which seems to have a great future due to fragmentation of administrative law. The rise of this form of regulation is supported by the conditions of multi-level governance and shared public administration. It is not a con-

[13] Judgement of the Constitutional Court Pl. ÚS 40/02 of 11 June 2003.

[14] HANDRLICA, J. Two faces of "tailor-made laws" in administrative law. *The Lawyer Quarterly*. 2020, Vol. 10, No. 1, pp. 34–47.

crete, but an abstract measure. Framework regulation nominally regulates cases of the same kind and refers to the group of addressees, which is defined by the general characteristics. In fact, however, the abstract nature has only a very vague rule that cannot be generally used. Thus, regulation has a blurred purpose and can only be used selectively. In this way, the public administration receives the blank check that it would not be able to obtain through a legal delegation of power.

For example, there is no universal definition of conflict of interest in public administration. There is a sample modification - Model Code of Conduct for Public Officials – which is usually referred to for the purpose of improving a specific legal regulation. Although the definition of conflict of interest in Model Code has a sufficiently abstract dimension, it is practically unusable because of its unavailability and ubiquity. The definition sounds like this: "Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties. The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations." Through this abstract outbreak there are various variations of adjustments that conceal the possibility of focusing on pre-selected persons or situations.

Framework regulation with particular aim thus performs a similar function as a specific law. In effect, the framework measure does not rely on a comprehensible standard and is therefore not applicable in generic situations but is directed towards selected persons in pre-determined circumstances.

III. CONCLUSIONS

The role of public administration is affected by a change in the structure of governance and separation of power.

The rule of law emphasizes that the preservation of separation of powers requires precise allocation of powers to the institutional components. The exclusive legal remedies belong primarily to legislature and justice. The executive authority and public administration are strictly subordinate to heteronomous sources of law, especially because the authority applies extralegal instruments. Therefore, autonomous lawmaking must be substantially reduced, as expressed by the doctrine of non-delegation in relation to legislation and adjudication.

However, we lack a functioning institutional concept that contains sufficiently specific criteria for resolving conflicts associated with the reality of postmodern states where triparticism fails. It is not sustainable to ignore the fact that executive and legislative power merge in the parliamentary systems opening up to international and global influences.[15]

True legislative acts are distinguished in the field of public administration by the criterion of abstractness and the criteria of universality. Quasi-legal measures may be both ab-

[15] CAROLAN, E. *The New Separation of Powers. A Theory for Modern State.* Oxford: Oxford University Press, 2009, pp. 22–27, 39–45.

stract and specific in nature. In terms of merging legislative and executive power, quasi-legal acts can work as heteronomous laws in public administration. Legislation measures are specifically expressed. They approximate the requirements of individual regulation and become tailor-made acts for particular cases. However, measures can also be expressed with great abstraction. Such an arrangement invigorates discretion.

Fifteen years ago, T. Čebišová stressed that not only the rules but the law as whole is changing in connection with administrative over-regulation. The pursuit of legal concretization was reflected in formulations involving an infinitely large amount of detailed and ephemeral duties, which shifted legislation into a virtual plane. And moreover, general problems of governance have penetrated through lawmaking: formal legalism, alibism, political self-purpose.[16] It was a thoughtful evaluation. The consequences need to be considered with the necessary consistency.

[16] ČEBIŠOVÁ, T. Právo na dobré zákony? [The Right to Good Laws?]. In: L. Vostrá – J. Čermáková (eds.). *Otázky tvorby práva v České republice, Polské republice a Slovenské republice.* Plzeň: Aleš Čeněk, 2005, pp. 86–89.