

CONFERENCES AND REPORTS

Round table on “Tailor-Made Laws” in Public Law: Mirage and Reality, Prague, 7th May 2019

The round table entitled “*Tailor-Made Laws*” in *Public Law: Mirage and Reality* was held in Prague on 7 May 2019. The unique event was organized by the Department of Administrative Law and Administrative Science of the Faculty of Law of Charles University in Prague, in cooperation with the Department of Law of the University of Naples “Federico II”. The round table was a result of a long-standing cooperation between the two organizing institutions in the field of comparative administrative law and addressed the issues of “tailor-made laws”.

Even though the theory of public law traditionally distinguishes between functions of legislative and executive powers, law textbooks usually condemn cases of extension of legislative power into the executive and legal doctrine is overall sceptical towards such measures, tailor-made laws do exist. Probably the most recent example that caught the attention of the public comes from France where a (tailor-made) law on an accelerated restoration of Notre Dame Cathedral is being debated. The participants of the round table however did not have to look abroad to find examples of existing tailor-made laws – there are several tailor-made laws in Czech and Italian legislations, typically concerning banks, airports or highways. Therefore, the participants of the round table were faced not only with theoretical issues of tailor-made laws but also with practical questions. The participants addressed problems related to protection against tailor-made laws with regards to guaranteed rights, judicial review and due process. They discussed whether tailor-made laws are an unacceptable extension of legislative powers into the executive and if tailor-made laws are in their nature administrative acts (or not). Furthermore, the participants tried to find borders between frivolous and justifiable (if there is such) use of tailor-made laws and discussed requirements which tailor-made laws must meet to be compliant with rule of law and democracy. They analysed whether tailor-made laws are manifestations of despair or of progress. The participants also focused on the contrast between legal theory, law in force and the reality.

This issue of the Lawyer Quarterly contains written versions of the papers delivered at this round table. This conference report aims to supplement published articles with more detailed information on subsequent discussions between Czech and Italian academicians.

The round table was opened by **Professor Richard Pomahač** (Charles University) with his speech “*Framework Regulation and Tailor-Made Laws as a Problem of Public Administration*”. Professor Pomahač started the event by referring to Franz Kafka, asking questions about the clarity of law, its unavailability and ubiquity. Then he distinguished two basic forms of legislative measures as quasi-laws – tailor-made laws and framework regulation, explaining their nature in the context of current public administration. He stressed that in the field of public administration true legislative acts are characterized by abstractness and universality. However, quasi-legal measures may be both abstract and specific in nature. Professor Pomahač further reflected on living in the times of a permanent state of legislative emergency and in the reality of postmodern states where triparticism *fails* and legislative and executive powers *merge*.

Subsequently, **Professor Pierpaolo Forte** (University of Sannio in Benevento) delivered a presentation on “*Global and Local, General and Particular, Rules and Measure: A Post-Modern Reflection*”. He commenced by observing that the Italian constitution does not define the content of legal rules, only the legislative process. He described current state of the Italian legislation with focus on “a new type of law” – the government law. Professor Forte further stated that when it comes to tailor-made laws it is not useful anymore to argue against their existence in legal orders by theoretical limits and characteristics of laws for two following reasons. Firstly, must consider the reality and accept that tailor-made laws exist (the reality shows us that generality and abstractness are not uncrossable boundaries for a law). Secondly, it is important to realize that it is impossible for lawmakers to create only general and abstract laws. Professor Forte analysed attempts to limit tailor-made laws and

continued by assessing the approach of the Italian Constitutional Court towards tailor-made laws. He focused on the issue of protection against tailor-made laws, asking what kind of judge, jurisdiction, principles and procedures are fit for a provision in the form of a law. He further added that it is essential not only to assess the situation but also to find consequences for the lawmaker.

“*Tailor-Made Laws and Emergency Powers in Contemporary Public Law*” was the title of the presentation by **Professor Luca Perfetti** (University of Bari “Aldo Moro”) in which he suggested that Italy is currently finding itself in the crisis of the rule of law and in the crisis of a modern state and he pointed out a link between tailor-made laws and the emergency. Professor Perfetti gave several examples of Italian tailor-made laws and paid attention to protection against such measures. He addressed the issue of time for if a judge rules against a certain tailor-made law, it is only after it had been implemented so the only possible remedy would be damages. Moreover, Professor Perfetti described problems of constitutional review instead of an “ordinary” judicial protection (with regards to the Italian Constitutional Court that currently reviews such measures), especially mentioning an absence of a direct access to the constitutional court and that due process in constitutional and “ordinary” courts differs.

Next contribution by **Associate Professor Jakub Handrlica** (Charles University) on “*Two Faces of the Tailor-Made Laws in the Administrative Law*” stated examples of tailor-made laws in the Czech Republic in the context of the traditional legal theory (as taught and studied at the Charles University), the theory of public law and Czech Constitutional Court decisions. He distinguished several categories of tailor made-laws: *Einzelvollgesetze* and *Individualgesetze* which concern individually specified subjects and/or objects on one hand and, on the other, *Massnahmegesetze* and *Maßnahme-Rahmengesetze* which govern individually specified subjects and objects but use general terms and require additional measures in order to be realised. After the presentation was delivered, Professor Forte noted that it is always difficult to say in practice what is general or abstract (enough) since the law always applies to an individual case. Consequently, Professor Forte questioned, whether the above mentioned categories are still applicable today and whether realities of the 21st century do not call for a more comprehensive and less rigid methodological approach.

Associate Professor Handrlica then mentioned cases in which tailor-made laws are acceptable legal measures, suggesting that in view of the current European Union legislation tailor-made laws could be admissible even in situations in which they had been considered as violating constitutional principles by the Czech Constitutional Court. As examples of Czech tailor-made laws Associate Professor Handrlica inter alia mentioned a specific type of laws that have been issued since the first Czechoslovak Republic and that pay tribute to significant statesmen for their meritorious service to the state (such as *Lex Masaryk* or *Lex Beneš*). However, Associate Professor Karel Beran (Charles University) asked whether these kinds of laws can be considered as laws at all since they are merely a *declaration* without any *obligation* (leaving the specifics of *Lex Masaryk* aside¹). He added that if such a measure is not a law, it cannot be a tailor-made law either. Associate Professor Beran then reminded the participants that acts establishing companies can also be viewed as admissible tailor-made laws.

Subsequently **Associate Professor Luigi Ferrara** (University of Naples “Federico II”) presented his article entitled “*Specific Legislative Acts and “Reserved Domains” for administrative powers: some perspectives in Italian Public Law*”. Professor Ferrara stated that there are two dogmatic questions concerning tailor-made laws that need to be distinguished. He explained that cases of tailor-made laws that can be categorized as *Einzelvollgesetze* or *Individualgesetze* raise questions about nature and generality of law whereas tailor-made laws in the category of *Massnahmegesetze* affect separation of powers. Associate Professor Ferrara then gave thoughts about European countries sharing similar traditions regarding tailor-made laws and continued by assessing Italian legislation. He focused especially on the issues of “reserved domains” of the public administration.

¹ In fact, the Act No. 22/1930 Coll. provided for an obligation in its § 1, which called to inscribe the proclamation about merits of the first president into the stone in both chambers of the National Assembly.

Associate Professor Beran reacted with a summarizing yet provoking question, asking whether in emergency situations it should be said that there is a reserved domain or perhaps an act that can help to remedy the situation should be issued even if it would be a tailor-made law. Associate Professor Lenka Pítrová (Charles University) emphasized that since both Italy and Czech Republic have a totalitarian experience they have to and tend to be careful and sensitive about such measures. She further observed that in both countries the model of access of individuals to constitutional courts is very similar and quite limited.

Assistant Professor Marek Antoš (Charles University) in his presentation on “*Tailor-Made Laws under Scrutiny of the Czech Constitutional Court*” reminded the participants that also the Czech Constitution does not explicitly state that a law must be general although it can be concluded from certain articles of the Constitution. Assistant Professor Antoš provided description and interpretation of Czech Constitutional Court rulings regarding tailor-made laws. He then argued that the Constitution gives the Parliament a possibility to pass constitutional single purpose acts if the Constitution provides support for it and therefore it should be acceptable for the Parliament to adopt also non-constitutional single purpose legislative measures should the same criteria be met, especially mentioning Czech acts on the state budget. Then he followed up the discussion after Associate Professor Handrlica’s contribution and stated that acts declaring public interest are usually mere declarations (without obligations). So, in the view of the argumentation regarding laws declaring merits of certain statesmen, these acts merely declaring public interest should also not be considered laws which, however, seems strange.

The final presentation on “*Dealing with Public Interest in the Framework Regulations and in the Tailor-Made Laws*” was given by **Vratislav Košťál** (Charles University) and dealt with qualified public interest. Košťál especially focused on problems that arise when public interest is required for a certain administrative measure to be adopted, pointing out the difficulties of not only defining “public interest” by legal theory but also applying it as a criterion in practice by the executive. In response to the presentation, Professor Pomahač said that in public administration and/or administrative law public interest is almost always either a *fuzzy* or an *empty* notion and asked what the personal experience of the presenter is. Košťál opposed this idea, explaining that public interest is not an empty notion, nonetheless it must be “filled” ad hoc however circumstances so require, and stressed that he finds stating what is (in) the public interest in concrete legal regulations (which very often means in tailor-made laws) quite problematic. Košťál added that stating what is (in) the public interest in a law by the legislative power can sometimes be done only to prevent uncertainty associated with concrete application of the law by the executive power. He however admitted that his personal experience with administrative authorities deciding what is (in) the public interest is not all good because of unprofessional, unskilled and sometimes even fearful or corrupt personnel; however, according to Košťál, the problem of bad personnel in public administration cannot be bypassed or solved by tailor-made laws. Furthermore, Associate Professor Ferrara added that in his opinion no discretionary power can find public interest as every situation is always assessed from a personal perspective (of such discretionary power). Moreover, according to Associate Professor Ferrara there is a contradiction between representation of unity of people and representation of public interest. Therefore, public interest *always* has a personal perspective.

Because all good things must come to an end, the round table was concluded by this. The presentations brought a lot of new information and inspirational thoughts and even offered experience from abroad. The round table thus provided a new perspective on the phenomenon of tailor-made laws. Some participants therefore continued to discuss tailor-made laws over coffee and cakes, however some had to leave in order to catch their trains, buses and planes as the event took place on the afternoon before the Victory Day.

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