DISCUSSION

WHEN "TAILOR-MADE LAWS" ARE NOT LAWS INDEED

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Abstract: *Tailor-made laws could be generally defined as laws lacking the element of generality and "tailored" particularly for a certain situation or person. Whilst some cases of the use of tailor-made laws pursue the purpose of legislative intervention in the executive power as another component under the checks-and-balances model of division of power, in other cases, these laws do not interfere with the division of power per se, as such laws establish no rule of conduct whatsoever. In this note, attention will be paid to the second type of tailor-made laws and the author will attempt to clarify whether the latter kind of laws meets the requirements imposed on normative legal acts, which can be characterised by the very fact that such acts contain legal norms, and whether they can be considered rules of conduct.*

Keywords: *tailor-made laws, modes of legal norm, normative legal acts, declaratory legal norms*

INTRODUCTION

Tailor-made laws could be generally defined as laws lacking the element of generality and "tailored" particularly for a certain situation or person. At the same time, the generality element is traditionally considered to be one of the basic building blocks of the statutory law,[1] while universality and generality distinguish statutory law establishing a universally binding standard of conduct, from individual [administrative] acts, which establish the rights and obligations of specifically named persons[2] in a particular case. Nevertheless, tailor-made laws are commonly used by many legislators in many countries to meet different goals. Whilst some cases of the use of tailor-made laws pursue the purpose of legislative intervention in the executive power as another component under the checks-and-balances model of division of power,[3] where the legislator *ex lege* replaces a certain part of the administrative authority's decision-making, in other cases, these laws do not interfere with the division of power *per se*, as such laws establish no

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[1] The principle of universality of legislation can be found already in the traditional Digest of Justinian. See Dig., Liber Primus, 1.3.8 Ulpianus III ad Sabinum: *"Iura non in singulas personas, sed generaliter constituuntur*" [The law is not created for individuals, but generally for all].

[2] BOGUSZAK, J., ČAPEK, J., GERLOCH, A. *Teorie práva* [*Theory of Law*]. 2nd revised edition. Prague: Aspi, 2004, pp. 47–48.

[3] The traditional theory of separation of powers is based on strict distinction between the functions of legislative and executive power (see HOETZEL, J. *Československé správní právo. Část všeobecná* [*Czechoslovak Administrative Law. General Part*]. 2nd revised edition. Prague: Melantrich, 1937, pp. 13–14). Handrlica describes the main task of the legislative power as *"issuing [of] binding norms (laws), which are abstract in their nature (legis latio)*", meanwhile the main task of the executive power it to *"apply these norms by issuing administrative acts, which are characteristic by their individual nature (legis executio)*" (see HANDRLICA, J. Two faces of "tailor-made laws" in administrative law. *The Lawyer Quarterly*. 2020, Vol. 10, No. 1, pp. xx–yy.).

rule of conduct whatsoever.[4] In this article, attention will be paid to the second type of tailor-made laws and the author will attempt to clarify whether the latter kind of laws meet the requirements imposed on legal norms and whether such can be considered rules of conduct.

MODALITY OF LEGAL NORMS

The normativity of legal norms is based on the concept that such norms must be of a prescriptive nature, i.e. regulate *what is ought to be*.[5] The specific ways of regulation of a certain behaviour are represented by *modi* (sg. *modus*) or modalities of legal norms, whereas legal theory distinguishes *objective modes*, which are expressed in objective law (i.e. command, prohibition and permission) and *subjective modes* representing the possibility or necessity of certain behaviour resulting from objective mode (right or obligation).[6] The opposite of such prescriptive provisions are descriptive provisions, which determine *what is*;[7] in addition to that, it is desirable to distinguish evaluating sentences that may evaluate both facts and norms. In the case of tailor-made laws, the distinction between prescriptive and descriptive provisions may not always be easy, since some tailor-made laws may *prima vista* have a descriptive or declaratory character, although even descriptive sentences must have prescriptive effect to be considered legal norms. Thus, the true meaning of the sentence will be essential in assessing the true nature of the rule of law rather than its grammatical form.

The expression of the modality of legal norms in legislation is traditionally based on the *trichotomic* structure of such norms. The trichotomic norm, having a form of a conditional sentence, contains (i) the hypothesis [*if*], (ii) the disposition [*then*] and (iii) the sanction [*otherwise*].[8] The hypothesis sets forth the conditions under which an individual should be guided by the given legal norm; the disposition indicates the rights or/and duties of such individual under the circumstances envisioned in the hypothesis; finally, the sanction defines the consequences of violation of the rule of conduct contained in the disposition of a particular norm.[9] However, it should be emphasized that this structure is not always strictly adhered to and there are a number of legal norms that do not have trichotomic structure; these norms are referred to as norms with specific structure.

[4] The legal norm in the classical European concept can be defined as a generally binding rule of conduct, i.e. obligation of the addressees of the norm to obey a certain pattern of behaviour. See GERLOCH, A. *Teorie práva* [*Theory of Law*]. 6th revised edition. Pilsen: Publishing house Aleš Čeněk, 2013, pp. 29–32.

[5] Ibid., p. 29

[6] KNAPP, V. *Teorie práva* [*Theory of Law*]. Prague: C. H. Beck, 1995, pp. 153–154.

[7] GERLOCH, A. *Teorie práva*, p. 29.

[8] GERLOCH, A. *Teorie práva*, pp. 38–39.

[9] ILKOVÁ, V., ILKA, A. *Legal Cybernetics: An Educational Perspective*. Preprints of the 11th IFAC Symposium on Advances in Control Education, Bratislava, Slovakia, June 1-3, 2016, p. 327. See also PRUSÁK, J. *Teória práva* [*Theory of Law*]. 2nd revised edition. Bratislava: Faculty of Law of Comenius University in Bratislava, 2001.

MODALITY OF TAILOR-MADE LAWS

Evaluating character often manifests itself in declaratory tailor-made laws, such as those pursuing the purpose of proclaiming merits of certain statesmen.[10] Such laws can be said to have a long-lasting tradition in Czech public law[11]: as a kind of a textbook-example of such statutory law it is often referred to the Act No. 22/1930 Coll., on the merits of Tomáš Garrigue Masaryk, commonly referred to as "*Lex Masaryk*".[12] The law, which only consists of two sections, provides: *"T. G. Masaryk contributed to the state. Be these words put into stone in both chambers of the National Assembly for everlasting memory."*[13] As it can be seen, while the latter sentence contains a modus (i.e. command to put a statement in stone), the first sentence of the provision has a purely declaratory character. Within the structure of the above-mentioned norm, it is vital to distinguish whether the first sentence belongs to the hypothesis or the disposition of the norm. In the presented case, the words *"T. G. Masaryk contributed to the state*" form the hypothesis of the norm, as the following command for *"these words* [to be] *put into stone*" make its disposition, and as such represent the normativity of the provision. The difference between evaluating provisions being part of a hypothesis and those being part of disposition can be demonstrated on the Act No. 292/2004 Coll. on the merits of Edvard Beneš (commonly referred to as *"Lex Beneš*"). The law proclaiming merits of further Czech statesman has *prima vista* the same structure as Lex Masaryk, yet lacking rule of conduct: *"Edvard Beneš contributed to the state."*[14] In case of Lex Beneš, the provision does not contain any command whatsoever, which makes it a mere political proclamation. To assess whether the analysed sentence provides the addressee of the norm with a binding rule of conduct, the normativity of the norm has to be questioned in a way providing the conclusion whether (i) the establishment of rule of conduct is possible in presented case[15], whether (ii) it was intention of the legislator to establish such rule, and (iii) whether the provision *per se* is declaratory in its nature. The statement that *"Beneš contributed to the state*" is rather a political proclamation,[16] which is declaratory in its nature, which also reflects the intention of the legislator; the provision further does not contain a generally binding rule of behaviour, whereas the opposite conclusion (i.e. that everyone should treat Beneš in a way that reflects his contribution to the state) would imply the constitutional non-conformity of this provision, since such norm

[10] SLÁDEČEK, V. *Obecné správní právo* [*General Administrative Law*]. 3rd revised edition. Prague: Wolters Kluwer, 2013, p. 58.

[11] According to the example of Lex Masaryk, other similar laws were adopted, e.g. Lex Hlinka, Lex Stefanik, Lex Beneš etc.

[12] Ibid.

[13] Translated by the author.

[14] See Sec. 1 of the Act No. 292/2004 Coll. on the merits of Edvard Beneš.

[15] I.e. the legislator is provided with power to adopt such norm, e.g. by the constitution.

[16] The said provision does therefore represent some sort of political distinction; the situation would be different in case the law granted Beneš a distinction, which would otherwise have had be granted by different public authority representing another component of power. An example of such situation can be found in Act No. 59/1996 Coll., on the seat of the Parliament of the Czech Republic, which inter alia proclaimed the seat of the Parliament to be a site of national heritage. (see HANDRLICA, J. Two faces of "tailor-made laws" in administrative law. *The Lawyer Quarterly*. 2020, Vol. 10, No. 1, pp. xx–yy).

would explicitly restrict constitutionally guaranteed freedom of speech.[17] Lex Masaryk, on the other hand, contains a generally binding rule of conduct commanding the addressee of the norm to carry out a certain action, which in this case changes the nature and purpose of the law.

The grammatical structure of a legal provision, however, may not be decisive in all cases.[18] An opposite example of a norm that could be *prima vista* grammatically conceived as declaratory can be found in the Article 13 of the Constitution of the Czech Republic, which stipulates that *"the capital of the Czech Republic is Prague*". This provision, although it, too, does not have a trichotomic structure and lacks both a sanction and a hypothesis, has – unlike the abovementioned – the nature of a generally binding rule of conduct, as it orders everyone to respect the fact that Prague is the capital of the state.[19] The statement as a matter of fact cannot be considered a declaration, provided that the position of Prague as a capital city is not a characteristic of the city *per se*, but rather a function conferred to it by the law. Since the status of a capital city could be as well given to another city of the Czech Republic, the Constitution in its Article 13 determines which city will shall be the capital of the state. The difference between the two norms lies, in particular, in the fact that while the specificity of the law is necessary in case of capital city determination, the declaratory provisions raise the question of appropriateness of the adoption of political declarations in the form of law, whereas the main function of the law is the regulatory.

CONCLUSION

Although tailor-made laws containing declaratory statements are provided with the form of a full-fledged regulations, such laws do not contain a generally binding rule of conduct (and in fact do not set a mode of behaviour at all), and thus lack the normative nature. The declaratory provisions of tailor-made laws, while not containing a command, prohibition nor permission, further lack – within the trichotomic structure of legal norms – both the hypothesis and the sanction. Thus, such statutory laws could be considered an unsolicited excess from the legislative technique, whereas a rather philosophical question may be raised on whether it is appropriate to use the forms of law in cases for which they are not designed and in which their use is not a necessity. It is, however, vital to distinguish the normative legal provisions with grammatically declaratory structure and those of pure declaratory nature.

[17] Art. 17 of the Charter of Fundamental Rights and Freedoms, which is part of the constitutional order of the Czech Republic, states: *"Freedom of expression and the right to information are guaranteed. Everyone has the right to express their views (…) as well as to freely seek, receive and disseminate ideas and information regardless of national borders."* The statement that Masaryk had contributed to the state thus may not be accepted by everyone, even though such conclusion is generally considered rather undisputed.

[18] GERLOCH, A. *Teorie práva*, p. 29.

[19] Ibid.