

TWO FACES OF “TAILOR-MADE LAWS” IN ADMINISTRATIVE LAW

Jakub Handrlica*¹

Abstract: A rather clear distinction between the functions of the legislative and executive power has been traditionally provided by the theory of public law. Under this scheme, the main task of the legislative power was to issue binding norms (statutory laws), while the main task of the executive power was to apply these binding norms in individual cases by issuing administrative acts. However, also under this scheme, executive power was provided with competence to issue certain binding norms (decrees). While this norm-making competence of the executive power has been frequently subject of academic interest, the opposite form of extension (i.e. deciding about individual cases by an act of Parliament) has been only occasionally addressed in the past. This article aims to deal with these “tailor-made laws”, to classify them into categories and to evaluate feasibility of this model of decision-making.

Key words: tailor-made laws, *Einzelgesetze*, *Individualgesetze*, *Maßnahmegesetze*, extension of legislation, administrative acts, public interest

INTRODUCTION

The theory of public law has traditionally² provided for a rather clear distinction between the functions of the legislative and executive power. Under this understanding, the main task of the legislative power was issuing binding norms (statutory laws), which are general in their nature (*legis latio*). In this respect, reference to Ulpian’s “*Iura non in singulas personas, sed generaliter constituuntur*” has been frequently made.³ In parallel, the executive power must apply these norms by issuing administrative acts,⁴ which are characteristic by their individual nature (*legis executio*). It is a matter of fact, that the legislative power is not the only source of general norms – certain powers to issue such norms (decrees) have been traditionally transferred to the executive. Consequently, the norm-mak-

* Associate Professor JUDr. Jakub Handrlica, Ph.D., Department of Administrative Law and Administrative Science, Faculty of Law, Charles University, Prague, Czech Republic

¹ This is written and expanded version of my contribution, presented at the seminar “Tailor-Made Laws in Public Law: Mirage and Reality”, organised by the Faculty of Law, Charles University in Prague and the Department of Law, University of Naples “Federico II”. Sincere thanks go to Professor Richard Pomahač, Professor Luca Perfetti and to Associate Professor Karel Beran for their valuable comments and advises concerning the final version of this paper.

² See HOETZEL, J. *Československé správní právo. Část všeobecná* [Czechoslovak Administrative Law. General Part]. 2nd revised edition. Prague: Melantrich, 1937. This very classical textbook of administrative law, written by Professor Jiří Hoetzel (1874–1961) and used at the Law Faculty of the Charles University in the 1930s, addressed the issue of distinction between the legislative and executive power right at the beginning (at pp. 13–14). This approach has been reflected in the textbooks on administrative law, published after the Velvet Revolution. See HENDRYCH, D. (ed.). *Správní právo. Obecná část* [Administrative Law. General Part]. 9th revised edition. Prague: C. H. Beck, 2016, pp. 4–6; SLÁDEČEK, V. *Obecné správní právo* [General Administrative Law]. 3rd revised edition. Prague: Wolters Kluwer, 2013, pp. 30–31 and most recently KOPECKÝ, M. *Správní právo. Obecná část* [Administrative Law. General Part]. Prague: C. H. Beck, 2019, pp. 1–9.

³ And also to Papinian (“*Lex est commune praeceptum*”). See SCHNEIDER, H. *Gesetzgebung. Ein Lehr- und Handbuch*. 3rd edition. Heidelberg: C.F. Müller Verlag, 2002, p. 22.

⁴ In this paper, the term “administrative acts” will be used as an umbrella term to refer to all individual forms of administrative measures.

ing competencies of the executive branch have been traditionally addressed by the scholarship of administrative law.⁵ This article will be dealing with opposite form of transferring of powers, which has been only occasionally addressed by our legal scholarship in the past.⁶ In which situations can the legislative power issue statutory laws, which are of individual nature ("tailor-made laws")?⁷

The textbook on "Theory of Law", written by Professors Jiří Boguszak, Jiří Čapek and Aleš Gerloch, which has been used for several decades as obligatory reading for the students of the Faculty of Law in Prague, condemned⁸ cases of an *extension* of legislative powers into the executive. Here, the authors presented a very traditional distinction between the functions of the legislative and executive branch. Under this understanding, the main task of the legislative branch was issuing norms in the form of statutory law, which are general in their nature.⁹ In parallel, the executive branch must apply these norms by issuing administrative acts, which are characteristic by their individual nature.¹⁰ In this respect, the authors provide two examples of such pieces of legislation, which provided for a nonconform penetration of the legislative power into the "*domaine reserve*" of the executive branch (i.e. regulating individual cases by the means of administrative acts):

The Act No. 298/1990 Coll., transferring certain real-estates to the ownership of the monastic congregations or of the Archbishopric of Olomouc, represents the first such example. Here, the objects that were being transferred to the ownership of the ecclesial subjects, were identified in the annex to the act by individual characteristics (i.e. by plot numbers and evidence numbers of buildings as being registered in the cadastre), rather by abstract features. Instead of providing for abstract rules, this statutory law did consequently provide for authoritative solution of individual cases. However, a tiny mistake in the materials, which had been used for the wording of this statutory law, caused that a building, constructed for the National Theatre, was erroneously transferred into the ownership of the monastic order of the Ursulines of the Roman Union.¹¹

The Act No. 59/1996 Coll., on the seat of the Parliament of the Czech Republic, represents another example of such *extension* of legislative power into the executive. This statu-

⁵ See HOETZEL, J. Nařízení [Decree]. In: E. Hácha – J. Hoetzel – F. Weyr – K. Laštovka (eds.). *Slovník veřejného práva československého. Vol. II.* [Dictionary of Public Law in Czechoslovakia. Vol. II.]. Brno: Polygrafia – Rudolf M. Rohrer, 1932, pp. 793–807.

⁶ See e.g. HOETZEL, J. *Československé správní právo. Část všeobecná* [Czechoslovak Administrative Law. General Part], pp. 50–51.

⁷ The issue was discussed extensively in German theory of public law. See in particular: SCHNEIDER, H. Über Einzelfallgesetze. In: *Festschrift für Carl Schmitt zum 70. Geburtstag: dargebracht von Freunden und Schülern.* Berlin: Duncker & Humblot, 1959, pp. 159–168; VOLKMAR, D. *Allgemeiner Rechtssatz und Einzelakt: Versuch einer begrifflichen Abgrenzung.* Berlin: Duncker & Humblot, 1962, pp. 22–42; KRÜGER, H. *Allgemeine Staatslehre.* Stuttgart: Kohlhammer, 1964, pp. 296–308; MEESSEN, K. *Maßnahmegesetze, Individualgesetze und Vollziehungsgesetze. Die öffentliche Verwaltung,* 1970, pp. 314–324; BAUERNEFEIND, H. Zum Verbot von Einzelfallgesetzen gem. Art. 19 I GG. *Deutsches Verwaltungsblatt,* 1976, pp. 193–212 etc.

⁸ BOGUSZAK, J., ČAPEK, J., GERLOCH, A. *Teorie práva [Theory of Law].* 2nd revised edition. Prague: Aspi, 2004, pp. 47–48.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Ursulines of the Roman Union do represent one of several monastic orders of the Ursulines, a female congregation devoted principally to education of girls, and the care of the sick and needy.

tory law did *inter alia* proclaim the seat of the Parliament to be a site of national heritage, which is *ex lege* subject of the ownership of the State. Also here, the real-estates belonging to the seat of the Parliament were identified by individual characteristics in the annex to the statutory law. Again, a mistake in the text caused, that also the plot, serving for a nearby subway station, became part of the annex. Consequently, this caused the transfer of this ownership to this particular plot to the State.

Both above mentioned statutory laws were not general in their nature, but possessed features of (individual) administrative acts and led *via facti* to expropriation of the property of the existing owner and to transfer of this property to a new subject. Consequently, both above mentioned “tailor-made laws” do possess in fact features of an act of expropriation. In this context, the authors of the above-mentioned textbook identified key weaknesses of this legislative approach:

When an administrative authority decides about an individual case in the form of an individual administrative act, the potential errors are to be healed by either the ordinary (or extraordinary) remedies of administrative proceedings, or by the remedies of judicial review. On the contrary, when legislative power decides about individual case in the form of statutory law, potential errors can be healed only by the means of the proceedings before the Constitutional Court, when a contradiction to the constitutional order is given. Otherwise, only amending, or cancelling of the respective statutory law is capable to address the whole issue.¹² Obviously, such approach does not contribute to legal certainty and does not guarantee appropriate remedies to the potential addressees of these “tailor-made acts”.

Despite these theoretical considerations, our legal framework has provided for several types of such “extensions” of the legislative power into the executive, i.e. “tailor-made laws”: Traditionally, this has been the case of statutory laws on state budget.¹³ The statutory laws, proclaiming honours of certain statesmen (*lex Masaryk* - Act No. 22/1930 Coll., *lex Štefanik* - Act. No. 117/1990 Coll., *lex Beneš* - Act No. 292/2004 Coll. and *lex Havel* - Act No. 94/2012 Coll.)¹⁴, do also have some tradition in our public law.¹⁵

Very recently, the Act No. 416/2009 Coll., accelerating construction of water, transport, energy and communication infrastructure, represents another such example. On one hand, this statutory law provided for certain special rules, applicable to permitting and expropriation proceedings concerning infrastructure projects. Further, the Act contains a list of individually specified projects of highways, waterways and airports, to which a special accelerated proceeding is applicable.

With this respect, this article aims to classify such “extensions” into specific categories and to address their characteristic features in our administrative law. With regard to these categories, this article also aims to analyse limits of these “extensions” of legislative power into the executive in the form of “tailor-made laws”.

¹² BOGUSZAK, J., ČAPEK, J., GERLOCH, A. *Teorie práva [Theory of Law]*, p. 47.

¹³ SLÁDEČEK, V. *Obecné správní právo [General Administrative Law]*. 3rd revised edition. Prague: Wolters Kluwer, 2013, p. 58.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

1. “TAILOR-MADE LAWS” IN THE THEORY OF PUBLIC LAW

In the theory of public law, two different approaches to the question of feasibility to govern individual cases by the acts of Parliament have been expressed:

First approach: “Tailor-made laws” as generally acceptable measures

In his legendary textbook on administrative law, Professor Jiří Hoetzel identified two distinctive figures of administrative law.¹⁶ On one hand, there were decrees (*nařízení*; *Verordnung*), which must always be *general*. This *general nature* of a decree was interpreted as being binding for a group of addressees, which are to be determined by certain *general* characteristics. Under this understanding, it would be theoretically possible, that a decree will be applicable to one single addressee exclusively, however only as consequence of the fact, that only such addressee will fit under a certain general characteristic.¹⁷ On the other hand, there were administrative acts, which must be always of *individual nature*. Such *individual nature* was interpreted in the way; an administrative act is issued towards certain individually specified persons.¹⁸ Thus, Hoetzel understood *decrees* and *administrative acts* as being two *opposite* figures of administrative law, having different legal nature, different form and process of publication and also different consequences.

In relation to this distinction between *decrees* and *administrative acts*, Hoetzel also addressed the issue of “tailor-made laws”, issued by the legislative power. Here, he argues: “With respect to statutory law, it has been acknowledged, that it can address also certain individual issue (a case). However, a constitutional norm could theoretically disable issuing such individual norms.”¹⁹ This way of argumentation clearly reflected the fact, certain “tailor-made laws” were issued also in the period of the first Czechoslovak Republic (1918–1938). The Act No. 22/1930 Coll., declaring the merits of President Tomáš Garrigue Masaryk for the Czechoslovak Republic, can serve as an example of such a statutory law.²⁰ Consequently, in principle, Hoetzel admitted the possibility, that certain “tailor-made laws” can exist in public law.²¹ At the same time, he also admitted, that certain principles, governing issuing of “tailor-made laws”, can be provided by the norms of constitutional law.

The position of Hoetzel towards the “tailor-made laws” has been considered in the theory of administrative law, as developed after the Velvet Revolution. In this respect, Professor Dušan Hendrych reflects²² distinction between a decree (i.e. an abstract form of ad-

¹⁶ HOETZEL, J. *Československé správní právo. Část všeobecná* [Czechoslovak Administrative Law. General Part], pp. 50–51.

¹⁷ HOETZEL, J. *Nařízení* [Decree], pp. 794–795.

¹⁸ *Ibid.*, pp. 793–794.

¹⁹ *Ibid.*, pp. 794–795.

²⁰ The Act No. 22/1930 Coll. contained two rules. Firstly, it declared merits of Tomáš Garrigue Masaryk for the Czechoslovak Republic. Secondly, it provided that this proclamation had to be set in stone in both chambers of the Parliament.

²¹ HOETZEL, J. *Československé správní právo. Část všeobecná* [Czechoslovak Administrative Law. General Part], p. 51.

²² HENDRYCH, D. *Správní právo. Obecná část* [Administrative Law. General Part], 9th revised edition. Prague: C. H. Beck, 2016, pp. 43–44.

ministrative measures) and an administrative act (i.e. an individual form of administrative measures) and argues, that “statutory law could theoretically address also individual case.”²³

Consequently, this approach to the question of the “tailor-made laws” did in general admitted, that the binding norms of the Parliament can have also *individual* character, i.e. they are capable to address certain individual case. At the same time, this approach also admitted, that the norms of constitutional law were capable to prohibit addressing certain individual issues in the form of a statutory law and consequently, transfer the competence for dealing with such issued exclusively in the form of an administrative act.

Second approach: “Tailor-made laws” as exceptionally acceptable measures

A second approach to the question of “tailor-made laws” has been developed from the point of view of general legal theory. This approach was presented by Professors Jiří Boguszak, Jiří Čapek and Aleš Gerloch in their textbook on “Theory of Law”. Here, the authors concluded quite explicitly, that – in principle - only the executive power is able to decide in individual cases, i.e. to issue administrative acts. The legislative power is not in position to decide in individual cases appropriately, as it lacks means and apparatus needed for such decision-making. Thus, the legislative power possesses such competence only in those cases, when a source of constitutional law so *explicitly* provides.²⁴ However, in such cases, “*the respective act of the legislative branch cannot be issued in the form of statutory law.*”²⁵

Consequently, according to this line of argumentation, addressing individual cases by “tailor-made laws” is admissible only *exceptionally*, when a norm of constitutional law so provides. However, according to this line of argumentation, in order to provide the addresses of such a law appropriate degree of legal protection, such “tailor-made laws” cannot be issued in a form of *a law*, but in a form of an *administrative act*. Consequently, the addressee will be able to protect his rights by the means of administrative justice.

It is a matter of fact, that also this line of argumentation gained some degree of acceptance in the academic community. It was reflected, inter alia, by Professor Vladimír Sládeček in his textbook on “General Administrative Law”,²⁶ where “tailor-made laws” are labelled as “problematic”, because “they do not contain any general rules, but have nature of an individual administrative act.”²⁷ Also other scholars of administrative law also expressed this opinion.²⁸

²³ Ibid., p. 44.

²⁴ BOGUSZAK, J., ČAPEK, J., GERLOCH, A. *Teorie práva [Theory of Law]*, p. 47.

²⁵ Ibid.

²⁶ SLÁDEČEK, V. *Obecné správní právo [General Administrative Law]*, pp. 57–58.

²⁷ Ibid.

²⁸ Very recently, this opinion was shared by FRUMAROVÁ, K. (Ne)Způsobilost vyvlastnění být předmětem mezitimního rozhodnutí [(In)Eligibility of expropriation to be object of a preliminary decision]. *Správní právo*. 2019, Vol. LII, No. 3, pp. 135–136. Here, the author explicitly argues, that the fact, the No. 416/2009 Coll., accelerating construction of water, transport, energy and communication infrastructure provides for a list of individually specified projects does “violate the requirement of abstract nature of a binding norm (law), which must address abstractly specified objects and abstractly specified addressees.”

Consequently, these two approaches to the issue of “tailor-made laws” are in certain contradiction. In fact, both approaches classify “tailor-made laws” as representing certain exception *vis-à-vis* the general and usually abstract nature of statutory law, issued by the Parliament.²⁹ However, two major differences emerged among the two approaches: Firstly, while the first approach does generally admit the possibility to enact “tailor-made laws”, the second approach does generally restrict such possibility only to cases, a norm of constitutional law provides for such measure explicitly. Secondly, while the first approach does not challenge the fact, a “tailor-made law” remains *to represent a statutory law*, the second approach argues, that a “tailor-made law” cannot be issued in a form of a statutory law at all.

2. TWO FACES OF “TAILOR-MADE LAWS” IN ADMINISTRATIVE LAW

When dealing with the “tailor-made laws”, the legal scholarship did address the issue of their admissibility and their relation *vis-à-vis* the norms of constitutional law. However, the scholarship paid attention to classification of these laws so far. In fact, several categories of “tailor-made laws” are to be found in the Czech legal order. This part will deal with them and with their characteristic features.

Einzelfallgesetze and Individualgesetze

On one hand, several laws can be identified in our legal order, which have *material nature* of an administrative act. These “tailor-made laws” are in fact administrative acts, disguised as statutory law.³⁰ Act No. 251/1946 Coll., on expropriation of the Sanatorium in Prague-Podolí can serve as an excellent example. In its § 1, this Act provided, that certain *individually* specified real estates (determined as plots and buildings as being registered in the then existing land register) are being transferred (together with all equipment and related facilities) into the ownership of the Czechoslovak Republic as of 9th May 1945.³¹ Further, in its § 2, this Act provided for compensation for the transfer of ownership. This compensation was to be decided by the Supreme Price Authority in coordination with competent ministries. Also, the Act provided in its § 4 for transfer of employees of the Sanatorium to the civil service.

While being enacted in a form of a law, the Act No. 251/1946 Coll. bears undoubtedly certain characteristic features of an *act of expropriation*.³² Firstly, the Act was dealing with *individually* specified real estates, which were transferred from the ownership of the pre-

²⁹ HENDRYCH, D. *Správní právo. Obecná část [Administrative Law. General Part]*, p. 44; SLÁDEČEK, V. *Obecné správní právo [General Administrative Law]*, p. 58.

³⁰ See SCHNEIDER, H. *Gesetzgebung. Ein Lehr- und Handbuch*. 3rd edition. Heidelberg: C.F. Müller Verlag, 2002, pp. 22–23.

³¹ The Act was issued by the Constituent National Assembly on 20th December 1946 and entered into force on 30rd December 1946. Consequently, the transfer of the ownership was retroactive. § 1 provided in its Section 3, that the Act represents a title to enter the ownership right into the land register.

³² With the exception of the compensation, which wasn't specified in the provisions of the Act and was to be decided by a competent administrative authority in an administrative proceeding.

vious owner to the ownership of the State. Secondly, also the addressees of the Act are – at least *implicitly* – *individually* specified. Consequently, while being enacted by the legislative power in the form of a *law*, the Act bears *characteristic features* of an administrative act.³³ In the theory of public law, as developed in Germany, such a “tailor-made law” is being referred to as *Einzelfallgesetz*.³⁴

Further, we can identify several “tailor-made laws”, that fit into the category, referred to as *Individualgesetze* in German theory of public law.³⁵ That means, a law was “tailor-made” with regard to a specific person. In the past, such *Individualgesetze* were issued, establishing privileges of certain persons (such as inventors), or legal entities (such a publishing houses).³⁶ As mentioned above, *Individualgesetze* did also proclaimed honours of certain statesmen (*Lex Masaryk*, *Lex Beneš*, *Lex Štefánik* and most recently *Lex Havel*). The *lex Šejna* (Act No. 39/1968 Coll.) represents perhaps the most salient example of such *Individualgesetz*. With regard to General Jan Šejna, who escaped to the United States in February 1968, the Act provided that “in a case, the National Assembly consented with a criminal proceedings against a deputy and this deputy avoided such proceedings by escaping abroad, the mandate of such deputy ceases to exist.”³⁷

We can identify some examples of such *Einzelfallgesetze* and *Individualgesetze*, also in more recent legislation. In his textbook on “General Administrative Law”, Professor Vladimír Sládeček refers to the statutory laws, approving the state budget and laws proclaiming merits of certain statesmen.³⁸ Act No. 298/1990 Coll. and Act No. 59/1996 Coll. were mentioned already above in the introduction to this article. They bear undisputable some characteristic features of an administrative act. Also those laws, establishing certain entities of public law (e.g. the Act No. 47/2002 Coll., which established the Investment and Business Development Agency CzechInvest³⁹), rank into the category of *Individualgesetze*.

Further, the Act No. 69/2010 Coll., on the ownership of the airport Prague-Ruzyně provides in its § 1, that the airport, including all related real estates, equipment and runways must be in the ownership of the Czech Republic, or in the ownership of a legal entity (corporation) with the seat in the territory of the Czech Republic, in which the State holds 100 percent of shares. While in the above-mentioned cases, the real estates were *individually* specified by respective plots and buildings as registered in the cadastre, the *object* of regulation is referred to in a *general* way here, i.e. the Act makes reference to the airport as it

³³ HOETZEL, J. *Československé správní právo. Část všeobecná [Czechoslovak Administrative Law. General Part]*, pp. 311–312.

³⁴ SCHNEIDER, H. *Gesetzgebung. Ein Lehr- und Handbuch*, pp. 22–45.

³⁵ *Ibid.*, pp. 32–34.

³⁶ *Ibid.*

³⁷ General Jan Šejna (1927–1997) was a high-ranking army officer. In the 1960s, he became involved in criminal activities in the field of supply of shamrock to the agricultural cooperatives. After a criminal proceeding were initiated by the military prosecutor, Šejna escaped from Czechoslovakia in February 1968. The United States became the place of his final destination and he worked there for CIA until 1976.

³⁸ SLÁDEČEK, V. *Obecné správní právo [General Administrative Law]*, p. 58.

³⁹ Also the Act No. 234/2014 Coll., on Civil Service, contains a specific norm (§ 7), which provides, that education gained at political and security schools and universities in the former Soviet Union cannot be considered as fulfilling the requirements provided by this Act. Only one exemption is made here with regard to the education, gained at the Moscow State Institute of International Relations (MGIMO).

exists. At the same time, the addressee (i.e. the State as exclusive owner) of the Act is also to be considered as being *individual*. From this perspective, the Act No. 69/2010 Coll. also bears certain characteristic features of an administrative act.

Thus, there is a specific category of “tailor-made laws” in our legislation, which do address certain legal relations related to *individually* specified objects and subjects. Consequently, legal consequences - typically a transfer of ownership (or the limitation of such transfer, as is the case of the Act on the ownership of the airport Prague-Ruzyně)⁴⁰ - is provided *directly* by these “tailor-made laws”.⁴¹ The legal consequences do not require any intermediary measure, e.g. existence of a decree, or of an administrative act.⁴² For existence of these legal consequences, merely the validity of the statutory law is relevant. However, the form of the *statutory law* hinders a potential addressee to appeal against, or to submit an administrative motion to an administrative court. In this respect, the only way of legal protection against these “administrative acts, disguised as statutory laws” is to be identified in a constitutional complaint.

Most recently, the Act No. 416/2009 Coll., accelerating construction of water, transport, energy and communication infrastructure, represents another example of a “tailor-made law”. The Act provides for special rules on permitting and expropriation procedures, which are applicable to water, transport, energy and communication infrastructure, which is specified in *general* terms here.⁴³ As of 31st August 2018, a list of certain *individually* specified projects (highways, railways, waterways, infrastructure for civil aviation) is annexed to this Act in the form of an Addendum. The projects, listed here, are specified by their names, rather than by *individually* specified plots, or buildings. Consequently, the projects are described here in a way, which is very similar to the description of the airport in the above-mentioned Act No. 69/2010 Coll.

The fact, a project has been incorporated into the Addendum, causes no direct consequences in public law. This fact represents major difference to the above-mentioned “tailor-made laws”, which provided for such direct consequences. The Act No. 416/2009 Coll. provides in its § 4a, that such project needs to be incorporated in the zoning plans of the respective regions. If this requirement is fulfilled, the project is entitled to be subject of certain beneficial (accelerated) treatment. This concerns the expropriation proceedings, where a preliminary decision can be issued by the competent authority. Such decision will establish a right of way for construction of the concerned project and will enter into the legal force immediately after being delivered to the owner of the plot. Further, § 4a excludes a possibility to appeal against such preliminary decision. Consequently, the concerned owner of the plot is capable to protect his rights only by submitting a motion to the administrative court, while the court has to decide in the matter not later than in 60 days.

⁴⁰ In case of the Act No. 69/2010 Coll., the legal consequences hindered any transfer of the ownership to the particular airport from the State to any other entity.

⁴¹ SCHNEIDER, H. *Gesetzgebung*, pp. 22–30.

⁴² SCHNEIDER, H. *Über Einzelfallgesetze*, pp. 159–163.

⁴³ Consequently, the Act is applicable on all highways and roads of the 1st category, nationwide railways and also to those roads, which have been incorporated into the Politics of Regional Development.

Consequently, due to the specification of objects of regulation, the Act No. 416/2009 Coll. ranks also under the category of the *Einzelfallgesetze*. However, while *individually* specified projects have been listed in the Addendum to the Act, this fact does not cause any direct legal consequence. Any legal consequences (in particular the expropriation in order to construct one of the concerned projects) can arise only, when additional administrative proceedings will be realised. In this respect, potential addressee of this *Einzelfallgesetz* will be able to protect his rights in the respective administrative proceedings and subsequently submit a motion to the administrative court.

Maßnahmegesetze and Plangesetze

While the above-mentioned statutory laws address certain right and obligations of *individually* specified addresses as related to individually specified objects, there are also other examples of “tailor-made laws” in our legislation.

The Act No. 100/2001 Coll., on environmental impact assessment, provides in its § 23a, that certain “priority transport projects” do have a special treatment. These “priority transport projects” are not⁴⁴ specified *individually*, but in *general* terms, which – however – refer in consequence to certain individual projects. The Act provides for a special proceeding concerning issuing of binding opinions on environmental impact assessment regarding these “priority transport projects.”

Thus, while the § 23a lacks any explicit reference to any *individually* specified projects, it consequently governs only them. It was *tailor-made* for them. The act on deep geological repository of spent nuclear fuel and radioactive waste, which was being prepared under the auspices of the Ministry of Industry and Trade in the past and intended to govern certain aspects of the administrative proceedings necessary to permit the repository, can serve as another example.⁴⁵ These “tailor-made laws” are traditionally referred as *Maßnahmegesetze* in German theory of public law.⁴⁶

While the above-mentioned examples concerned cases, when the *object* of the regulation was described in general terms, causing legal consequences for individually specified projects, there are also examples of statutory laws, which address *subjects* in a similar fashion. Thus, the Act No. 458/2000 Coll., on business conditions and public administration in the energy sectors (Energy Act), provides for several obligations of the operators of electricity transmission network and of the gas transit network. In this regard, it deals – *inter*

⁴⁴ Here, § 23a provides, that “priority transport projects” are to be considered those projects, which a) belong to the trans-European transport network, b) which were permitted by a land permit issued not later than on 31st March 2015, c) which were addressed by an EIA issued according to the previously valid Act No. 244/1992 Coll., d) which will be listed in a decree as issued by the government.

⁴⁵ This act was dealing with a deep geological repository, which is to be established in the territory of the Czech Republic in order to accommodate spent fuel and high-level radioactive wastes produced in nuclear power plants being operated here. Although not referring to an *individually* specified repository, there is a common understanding, that there will be no more than one single deep geological repository in the territory of the State.

⁴⁶ See ZEIDLER, K. *Maßnahmegesetz und “klassisches” Gesetz*. Karlsruhe: C. F. Müller, 1961; HUBER, K. *Maßnahmegesetz und Rechtsgesetz. Eine Studie zum rechtsstaatlichen Gesetzesbegriff*. Berlin: Duncker & Humblot, 1963; MEESSEN, K. *Maßnahmegesetze, Individualgesetze und Vollziehungsgesetze. Die öffentliche Verwaltung*, 1970, pp. 314–324 etc.

alia – with “ten years development plans”, which are to certain extent binding both for the operators and for the administrative authorities concerned (§ 58k).

In fact, these provisions are applicable only to two specific subjects in the territory of the Czech Republic, as the licences to operate the electricity transmission network and gas transit network do have *exclusive* nature (§ 4). Consequently, while using certain *general* terms, the provisions of the Act are consequently applicable only to one *individually* specified subject and to one *individually* specified plan.

Such particular type of the *Maßnahmegesetze* was referred to as *Plangesetze* by certain German authors.⁴⁷ These *Plangesetze* provide for certain plans, which are describe in *general* terms, but do exist only in individual cases.

The *Politics of Regional Development*, which is provided by the Act No. 183/2006 Coll., Construction Code (§§ 31-35), represents another example of such specific *plan*, which is provided by a statutory law.

Lastly, certain “tailor-made laws” bear characteristic features of both above mentioned categories. This is the case of the Act No. 428/2012 Coll., on financial settlement with the churches and certain other religious entities. The Act provides (§ 15) for individually specified financial compensations to 17 subjects,⁴⁸ which are to be paid by the Czech Republic in 30 subsequent yearly payments. In this respect, the Act bears characteristic features of an *Individualgesetz*. At the same time, the Act bears also certain features of a *Maßnahmegesetz*, when specifying the real estates to be subject of financial settlement (§ 2).

Two faces of “tailor-made laws”: Preliminary conclusions

In line with the conclusions made in the past by German scholars of public law,⁴⁹ we observe two basic types of “tailor-made laws” in our administrative law. On one hand, there are statutory laws (referred to as *Einzelfallgesetze* and *Individualgesetze*) which do typically *directly* refer to certain *individually* specified causes (projects, persons, real estates etc.). As provided by Luca Perfetti in his article in this issue of “The Lawyer Quarterly”, these “tailor-made laws” are regularly reaction to certain emergency.⁵⁰ On the other hand, the *Maßnahmegesetze* and *Maßnahme-Rahmengesetze* are also governing *individually* specified objects and subjects, however, they refer to them in *general* terms.

In parallel, another classification of the tailor-made laws can be proposed. When analysing the content of existing tailor-made laws, we see that some of them do provide

⁴⁷ HUBER, K. *Maßnahmegesetz und Rechtsgesetz*, pp. 82–84.

⁴⁸ Apostolic Church, Baptist Union, Seventh-day Adventist Church, Church of Brethren, Czechoslovak Hussite Church, Greek Catholic Church, Roman Catholic Church, Evangelical Church of Czech Brethren, Evangelical Church of the Augsburg Confession, United Methodist Church, Federation of Jewish Communities, Unity of the Brethren, Lutheran Church of the Augsburg Confession, Unitarian Church, Orthodox Church, Silesian Church of the Augsburg Confession and the Old Catholic Church. It was the Baptist Union, which refused the financial compensation and decided to stay in the previous financing system. Consequently, the Act will be applicable to 16 churches and religious entities, being active in the territory of the Czech Republic.

⁴⁹ *Ibid.*

⁵⁰ PERFETTI, L. *Massnahmeforschriften* and emergency powers in contemporary public law. *The Lawyer Quarterly*. 2020, Vol. 10, No. 1, pp. 23–33.

for direct legal consequences *vis-à-vis* third subjects: a tailor-made law, which provides for an expropriation of a property can serve as an excellent example. The statutory laws, which provide for an establishment of a certain subject of public, also rank in this category.

On the other hand, there are certain *Einzelfallgesetze* and *Individualgesetze*, which do not cause any *direct* consequences for individuals, as they require further administrative proceedings to be realised. This is the case of the above-mentioned Act No. 416/2009 Coll., which provides specific rules for certain *individually* specified projects on one hand, on the other hand requires additional proceedings to be done for permitting of these projects.

Consequently, this second classification reflects criterion of material impacts. Due to the fact, there is no direct way of remedies against an administrative act, distinguished as a statutory law, “tailor-made laws” causing direct legal consequences *vis-à-vis* third subject must be always considered with caution. On the other hand, if a “tailor-made law” presumed further administrative proceedings, the means of legal defence are guaranteed.⁵¹

3. “TAILOR-MADE LAWS” IN ADMINISTRATIVE LAW: A CRITICAL APPRAISAL

In the past, the Constitutional Court addressed this issue in its two decisions. The first was dealing with the Act No. 114/1995 Coll., on inland navigation, which provided its § 3a, that modernisation of an *individually* specified waterway is *in public interest*.⁵² The second was dealing with the Act No. 544/2005 Coll., on construction of the runway 06R-24L at the airport Prague-Ruzyně, which provided for certain acceleration of permitting procedures in order to construct this project.⁵³ Here, the Constitutional Court argued, that “tailor-made laws” are in principle admissible in our legal order, however, they have to fulfil certain strict requirements. In particular, a “tailor-made law” must not – pursuant to the argumentation of the Constitutional Court – violate the principle of equal treatment of concerned persons. In this respect, the Court ruled, that establishing special (accelerated) rules of administrative proceedings, applicable to certain *individually* specified projects, does violate such principle.

With regard to current legislation of the EU, question arises, whether the above-mentioned argumentation of the Constitutional Court is still applicable. In fact, we can identify the model of *Maßnahmegesetze* and *Maßnahme-Rahmengesetze* also in the EU law. Here, in particular the Regulation (EU) No. 347/2013, on guidelines for trans-European energy infrastructure is to be mentioned.⁵⁴ This Regulation provides for certain special rules concerning permitting of the “projects of common interest”, which are identified as *individ-*

⁵¹ BAUERNFEIND, H. Zum Verbot von Einzelfallgesetze gem. Art. 19 I GG. pp. 197–198.

⁵² Judgement of the Constitutional Court 24/04 of 28th June 2005.

⁵³ Judgement of the Constitutional Court 24/08 of 17th March 2009.

⁵⁴ Regulation (EU) No. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, OJ L 115/39.

ually specified projects by a special delegated regulation.⁵⁵ We need to bear in mind, that selection of these projects is always result of long-lasting and very complicated selection proceedings, which is done both at national and EU level.⁵⁶

With this respect, the Regulation (EU) No. 347/2013 provides in its Recital 28, that “*the projects of common interest should be given ‘priority status’ at national level to ensure rapid administrative treatment. Projects of common interest should be considered by competent authorities as being in the public interest. Authorisation should be given to projects which have an adverse impact on the environment, for reasons of overriding public interest, when all the conditions under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy are met.*” Consequently, the Regulation provides for a very similar model of proclaiming existence of a *public interest* towards certain *individually* specified projects, as did the above-mentioned Act No. 114/1995 Coll. Further, the Regulation also provides for rules, facilitating the “priority status” of the “projects of common interest”. Thus, Article 7/2 provides, that for the purpose of ensuring efficient administrative processing of the application files related to projects of common interest, project promoters and all authorities concerned shall ensure that the most rapid treatment legally possible is given to these files. Furthermore, Article 7/3 provides, that “*where such status exists in national law, projects of common interest shall be allocated the status of the highest national significance possible and be treated as such in permit granting processes — and if national law so provides, in spatial planning — including those relating to environmental assessments, in the manner such treatment is provided for in national law applicable to the corresponding type of energy infrastructure.*” In this regard, the Regulation provides for a model, that is very similar to the provisions of the above-mentioned Act No. 544/2005 Coll.

Consequently, the Regulation (EU) No. 347/2013 explicitly declares, that there is *public interest* present with respect to certain *individually* specified projects. Also, the Regulation provides, that permitting proceedings concerning these projects must have accelerated and preferential treatment. Under this situation, it remains questionable, whether the argumentation, as presented by the Constitutional Court *vis-à-vis* the Act No. 114/1995 Coll. and the Act No. 544/2005 Coll. would be still applicable.

On contrary, one may argue, that “tailor-made laws” in the form of *Maßnahmegesetze* and *Maßnahme-Rahmengesetze*, which address certain *individually* specified projects, gained some degree of legitimisation by the introduction of the legal framework for the “projects of common interest” in the EU law. It would be hardly to argue, that while the EU legislation is able to provide a preferential treatment for certain *individually* specified projects, the national legislation is precluded to do so.⁵⁷

⁵⁵ Commission Delegated Regulation (EU) 2018/540 of 23 November 2017 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest, OJ L 90/38.

⁵⁶ Regulation (EU) No. 347/2013, Articles 3 – 6.

⁵⁷ HANDRLICA, J. Vylastňovací tituly podnikatelů všeužitečných děl. *Právní rozhledy*. 2018, Vol. 26, No. 2, pp. 44–50.

It is a matter of fact, that at the time when this article is written, proceedings before the Constitutional Court are pending concerning the compliance of the Act No. 416/2009 Coll. (its § 4a and the Addendum) with the constitutional order. Consequently, the Court will have to face these arguments, when dealing with the topic in the near future.

At the same time, the Court will also need to reflect *other* circumstances when addressing the compliance with the constitutional order – in particular the question, which strategic considerations led to selection of the particular projects, as provided by the Act No. 416/2009 Coll. It is a matter of fact, that any explanation how the projects were selected to the Addendum is missing in the explanatory documents, provided with regard to the proposal of the Act. Consequently, one can only hardly interpret, why certain projects have been chosen to benefit from the accelerated proceedings and why other projects remained unselected.⁵⁸

4. CONCLUSIONS

Two different approaches to the issue of “tailor-made laws” were identified in the first part of this article. On one hand, there is the approach, presented by Hoetzl⁵⁹ and later shared by Hendrych,⁶⁰ which generally admitted the possibility of the “tailor-made laws”. However, according to this approach, a norm of the constitutional law can prohibit issuing such “tailor-made laws”. On the other hand, there is the approach presented by Boguszak, Čapek and Gerloch.⁶¹ They argued, that “tailor-made laws” are admitted only in cases, a norm of constitutional law so provides.

With respect to the two different approaches to the issue of “tailor-made laws”, as presented above, the first approach can be identified as being a viable option. This has been confirmed to some extent by the decision-making of the Constitutional Court and can be supported by the existence of certain legal norms of the EU law.

Thus, it can be argued, that “tailor-made laws” can be accepted under the condition, they do not contradict the norms of constitutional law. Most of those “tailor-made laws”, which fall under the category of the *Maßnahmegesetze*, do not provide for direct legal consequences for *individually* specified subjects. Therefore, one can argue, unless the *Maßnahmegesetze* do provide for such direct legal consequences, they are acceptable in our administrative law. At the same time, the *Maßnahmegesetze* do represent a valuable tool of the Parliament to cope with certain emergency situation.⁶²

⁵⁸ In this respect, the question arises, why the “projects of common interest”, situated in the territory of the Czech Republic, were not introduced into the Addendum. Such approach is obviously in contrast with the Regulation (EU) No. 347/2013, which explicitly provides in its Article 7/3, that “Where such status exists in national law, projects of common interest shall be allocated the status of the highest national significance possible and be treated as such in permit granting processes”.

⁵⁹ HOETZEL, J. *Československé správní právo. Část všeobecná [Czechoslovak Administrative Law. General Part]*, pp. 50–51.

⁶⁰ HENDRYCH, D. *Správní právo. Obecná část [Administrative Law. General Part]*, pp. 43–44.

⁶¹ BOGUSZAK, J., ČAPEK, J., GERLOCH, A. *Teorie práva [Theory of Law]*, p. 47.

⁶² PERFETTI, L. *Massnahmeforschriften and emergency powers in contemporary public law*. pp. 32–33.

Unless establishing direct legal consequences, the above-mentioned conclusions are applicable also *vis-à-vis Einzelfallgesetze*. With regard to the existing EU legislation, it would be hard to argue, that a law cannot provide for a preferential, or accelerated treatment of an *individually* specified project. At the same time, such “tailor-made laws” can certainly not provide for *direct* legal consequences (such as issuing of a permit, expropriation etc.) *vis-à-vis* third subjects. Such consequences must always represent a consequence of the application of such “tailor-made act” and can be realised only by means of administrative acts.