*DOI: 10.17573/cepar.2024.2.07* *1.01 Original scientific article*

# Shaping Administrative Activity (Legal Forms): A Legislative Approach[1]

Sára Hrubešová
Masaryk University, Faculty of Law, Czech Republic
hrubesova@mail.muni.cz
http://orcid.org/0009-0000-2821-5693

Received: 1. 10. 2024
Revised: 5. 11. 2024
Accepted: 8. 11. 2024
Published: 27. 11. 2024

ABSTRACT

**Purpose:** The topic of legal forms in public administration is strongly influenced by the principles of good administration. In the Czech legal order, the Parliament acts as the rule-maker of statutory foundations for public administration, making it crucial to focus on the legislative approach to enacting legal forms. This paper examines the weaknesses in legislation related to the enactment of legal forms of public administration, specifically through the principles of legal certainty and predictability of law.

**Design/Methodology/Approach:** The author analyses Czech legal norms, existing legal doctrine, and administrative court's rulings in relation to the legislative enactment of legal forms of public administration. This analysis leads to categorisation of legislative techniques based on the clarity with which the legal form of public administration activity is enacted. The paper also includes a case study consisting of a qualitative analysis of the legislative process in a specific case, based on publicly available records of parliamentary debates during the legislative process.

**Findings:** In the case under review, there was no proper discussion of the implications of removing the explicit designation of legal form during the legislative process. No case has been found in which the Constitutional Court, acting as a negative legislator, annulled a statute for failing to explicitly specify a legal form, either due to its removal or its absence from the outset.

**Academic contribution to the field**: The article highlights that, for the public administration to function effectively as good administration, the rules governing its activities must be clearly defined. The findings encourage legislators to ensure that proper discussions regarding the legal form of administrative activity take place when enacting laws. Such expert debate during the legislative process is essential to ensuring the clarity of the laws under which public administration operates in a

1 The article is a result of the project *Current Questions and Issues in the Field of Public Law Studies (Aktuální otázky a problémy v oblasti veřejnoprávních studií)*, No. MUNI/A/1573/2023, supported by the Ministry of Education, Youth and Sports of the Czech Republic in the year 2024.

particular legal form. Circumventing the legislative process or failing to engage in proper debate disproportionately impacts legal certainty and the predictability of law.

**Originality/Value:** This article presents arguments emphasising the irrefutable role of the legislature in creating clear rules for the exercise of public administration and, as a direct result, enabling public administration to function as good administration. It points out the importance of clearly referencing the legal form of public administration in the law. The categorisation of legal form designation aids in identifying patterns and trends, helping to isolate relevant issues and focusing research on specific legal questions.

*Keywords:* *administrative procedural rules, Constitutional Court, good administration, legislature, legislative process, legal forms of public administration*

*JEL: K23*

## 1 Introduction

Administrative activities, defined as activity of public authorities directed towards individuals, encompass instances where authority is exercised through mechanisms of public law. To better understand the nature of these activities, it is helpful to categorise them into groups with similar features, referred to in this article as legal forms. Administrative activity formalised as legal forms are central tools of administrative activity and serve as the primary means by which public administration operates.

Legal forms of administrative activity fall under substantive administrative law. However, each legal form carries with it essential (inherent) procedural requirements.[2] These requirements determine how an administrative activity must be carried out to ensure that it is legally valid and fair. Consequently, the study of legal forms in public administration cannot be separated from the domain of administrative procedural rules, as these rules dictate the framework within which legal forms must be enacted. This interdependence reveals how the concept of substantive law (the actual administrative activities) is inextricably linked to procedural law (the processes governing how these activities are implemented).

Thus, the issue of legal forms illustrates that substantive and procedural law are not isolated fields but are interconnected aspects of the legal framework governing public administration. While substantive law determines *what* public authorities can do, procedural law sets out *how* these activities must be performed to ensure legality, transparency, and accountability in administrative processes. This connection also means that legal forms should be analysed through the principles of good administration. Procedural rules in

2 In context of Czech legal order there are legal forms for which the lack of a formalised procedure is significant. This includes factual operations, such as the intervention of police officers; although these activity lack formalised procedure, the basic principles of public administration still apply to them.

administration can be shaped by administrative practice and are often influenced by decisions of administrative courts. Nonetheless, in the Czech legal context, the primary foundation of administrative activity rules remains statutory law enacted by Parliament.[3]

Public administration undertakes a wide variety of tasks, which are carried out in many different ways. These methods differ in their legal nature and significance. Legal theory categorises the most common methods of performing public administration (forms of administrative activity) based on the shared characteristics. These categories are also reflected in the legal system as statutory forms of public administration activity. Legal (statutory) forms of public administration activity predetermine all procedural aspects related to the execution of these activities, such as participation in the proceedings, the elements of an administrative act, potential review within public administration, and the possibility of judicial review.

Theoretically and legally established categories of public administration activity—*legal forms*—are defined by both formal and material features. Therefore, in interpreting legal forms, we apply both formal and material concepts. These concepts examine the relationship between the format (form) and the substance (content) of administrative activity, serving as tools for identifying legal form. The *formal concept* emphasises that the form of an activity is defined by law or explicit legal authorisation, and the legal form can often be recognised by the wording of legal norm itself. Administrative courts using formal concept also assess the formal requirements of administrative acts; for instance, whether the administrative act in question includes the elements specified in the Administrative Procedure Code for the legal form of a decision. Such elements may include the label "decision" or any other legally required designation, the name of the issuing administrative authority, a reference number, the date of issuance, an official stamp, etc.

In contrast, the *material concept* focuses on the substance of the provision regulating a specific administrative activity or the actual content of the administrative activity itself. For example, in the case of a *decision* (an individual administrative act), the material characteristics would include that this administrative act establishes, modifies, or cancels the rights or obligations of a specified individual in a particular matter.

The formal and material concepts are essential for the application of law. The interpretation and application of legal norms cannot be separated from law-making. Therefore, this paper addresses law-making in the context of legal forms of administrative activity. Public administration may only be exercised in cases, within limits and in a manner provided by law. Legislation establishes the framework and rules for public administration activities that are bound by law. As a result, the paper examines the relationship between legislative methods and their impact on legal forms of administrative activity.

3 For arguments regarding the advantages and disadvantages of a particular administrative procedural rule maker, see Della Cananea and Parona, 2024, p. 14.

It should not be overlooked that public administration itself holds the power to create legal regulations, whether at the level central state administration – decrees and regulations, or at the level of self-government – for example, generally binding municipal decrees or internal regulations. This article, however, focuses on the statutory foundations of public administration activities, which are established by Parliament. Therefore, in examining legal forms, the subject of this research is not the norm-making activities of public administration which is considered only one among its many functions (one of legal forms) in this context.[4]

## 2 Legal Forms in Clouded Statutes

From a broad perspective, the regulation of rules for administrative activity varies significantly across European countries. The scope and precision of the legislative frameworks governing these rules differ widely. This is equally true for legal forms – provisions on specific legal forms in procedural law range from minimal requirements, such adherence to general principles of good administration and the protection of individual rights to highly detailed regulation (Della Cananea and Parona, 2024, p. 19). Both approaches – whether a comprehensive procedural framework or a general reliance on good administrative principles – can be effective. The Czech legal system, with few exceptions, tends to offer relatively detailed procedural regulation of public administration.

However the Czech legal system faces significant challenges, particularly in relation the fragmentation of procedural rules and inconsistencies in definition of legal forms. Although the Czech Republic has a general Administrative Procedure Code (APC), different sectors of public administration are governed by separate regulations; in other words APC or its individual provisions apply unless a special law provides otherwise. In many instances, these special statutes provide exceptions to or entirely exclude the use of general code. This fragmentation, while common in administrative law, creates confusion and complicates the application of legal norms.

A further issue arises from the differing approaches taken by administrative courts and public administration to legal forms. The Code of Administrative Justice (CAJ) ensures that no public administrative activity which affects individual rights is left without judicial protection. However, the courts follow definitions of legal forms that diverge from those used in public administration's procedural rules.

Additionally, the inconsistency between theoretical and statutory forms of administrative activity makes this complexity more difficult. In practice, a contextual understanding is often required to determine the appropriate legal form. The inconsistencies can create difficulties in ensuring that administra-

4 Nevertheless, public administration plays an active role in the legislative process. The vast majority of draft laws are prepared by the Government of the Czech Republic, specifically by individual ministries (see Section 4 of the Czech law-making process and rules for drafting laws).

tive activities are conducted within the bounds of the law, potentially compromising the protection of individual rights.

It should be noted that even when a legal form is explicitly designated in the statute, interpretation may not always be straightforward. For instance, the term "decision" does not necessarily refer to a decision under Section 67 of the APC.[5] Even the verb "decides" does not automatically indicate this legal form (Vedral, 2012, p. 1366).

For example:

- **Decision:** Defined by Sections 9 and 67 of the APC[6] as the outcome of an administrative procedure *stricto sensu*, it differs from decision defined by Section 65 CAJ[7] which represents a broader category.
- **Measure of general nature:** Defined by Section 171 of the APC as a binding administrative act that is neither a normative act (subordinate legislation) nor a decision. Section 101a of the CAJ mirrors this, covering every measure of general nature through material concept.
- **Public contracts:** Defined by Section 159 of the APC as bilateral or multilateral acts that create, modify or cancel rights and obligations in the field of public law. Disputes arising from public contracts are resolved by the superior administrative authority, and only authority's decision on a dispute is subject to review in administrative justice (Section 65 of the CAJ).
- **Statements, Certificates, Communications, Consents, Opinions, etc.:** There are other forms of administrative acts varying in name and procedural requirements depending on the special laws that govern them. The general rules are governed by Sections 154 et seq. of the APC and certain provisions on administrative procedure *stricto sensu* (leading to decision under Section 67) applies *in like manner*. Some do not affect individual rights (public subjective rights) and are therefore not subject to judicial review. However, where they do affect individual rights (public subjective rights), they may be challenged either by an action against a decision (Section 65 of the CAJ) or by an action for protection against unlawful interference (Section 82 of the CAJ);
- **Factual Operations of Public Administration:** A group of various administrative operations not preceded by a formal process. Those that affect public subjective rights can be challenged by an action for protection against unlawful interference (Section 82 of the CAJ).
- **Subordinate Legislation:** Act such as municipal decree, ministerial decree, government regulation are subordinate legislation and APC does not apply to this administration activities. The Constitutional Court is empowered to

5 For example Act No. 240/2000 Coll., on Crisis Management and on Amendments to Certain Acts. For more details Svoboda and Hejč, 2021, pp. 315–324.

6 Act No. 500/2004 Coll., Administrative Code.

7 Act No. 150/2002 Coll., Code of Administrative Justice.

review their legality, while administrative courts have no jurisdiction to assess such acts.

In this paper I categorise four groups of legislative methods for defining legal forms. Each group has a different relationship to the principles of the rule of law and a distinct impact on individual rights. These groups vary based on whether the legal form corresponds to the content of the administrative activity and how clearly the form is defined (articulated) in statute. The division into three groups is, in my view, important to see that the definition of legal form appears in varying degrees of (in)perfection.

The groups are as follows:

**Group 1**: The legal form of the administrative activity is explicitly (formally, by its term) determined (articulated) in the legislation and corresponds to the substantive features of the activity.

**Group 2**: The legal form of the administrative activity is explicitly (formally, by its term) determined (articulated) in the legislation, but does not corresponds to the substantive characteristics of the administrative activity. This group also includes cases where public administration has the discretion to choose between several legally prescribed legal forms of administrative activity. This group can be further divided into cases where the legal form is granting (a) a higher standard of rights protection or (b) a lower standard of rights protection.

**Group 3**: The legal form of the administrative activity is not explicitly established (articulated) in legislation and can only be inferred by characteristics of the activity.

For cases where the legal form is unclear, both the formal and material approaches to legal forms, as explained above, are used. The material approach prevents a denial of justice by ensuring procedural (including judicial) protection against acts of public administration that infringe individual rights (public subjective rights). However, applying the material approach is a complex legal issue, raising concerns about legal certainty and predictability. Legal predictability is essential for individuals to act in their own interest, as allows them to understand the law's impact on the promotion or restriction of their rights. In terms of legal forms, then, a key requirement for legal certainty and predictability, both core principles of good administration, is that the form of administrative activity should correspond to content of the activity (Hejč and Bahýľová, 2017, p. 57).

## 3 Good Legislature for Good Administration

The principle of good administration shapes and controls administrative activity through a framework of procedural rights, which if violated, may be invoked before a court. Good administration is recognised as a legal principle and, in many contexts, a right. Key elements of good administration include impartiality, fairness, timely conclusion of proceedings, legal certainty, pro-

portionality, non-discrimination, right to be heard, effectiveness, and efficiency. The concept is grounded in fundamental principles of the rule of law, including legality, equality, impartiality, proportionality, legal certainty, timely activity, participation, respect for privacy, and transparency. Good administration requires procedural mechanisms that are as integral as substantive outcomes themselves (Venice Commission – European Commission for Democracy through Law, 2011).

Improving legislation often entails reducing the number of statutes (Karpen, 2017, p. 4). The proliferation of modern legislation can be attributed to the expanding responsibilities of public administration, which can only act as prescribed by law. Consequently, reducing the volume of laws governing public administration does not automatically result in better regulation. For a public administration to function as good administration, it must be empowered by the legislative framework that clearly defines the scope and limits of its authority.

Striving for perfection in legislative drafting is, in my view, an unattainable ideal. Nevertheless, legislators in a democratic state governed by the rule of law should continuously aim to produce the best possible legislative. I agree with Filip's view that "*those who pass laws pursue entirely different goals than legislative excellence. Otherwise, they would not proceed as they do*." However, I am less sceptical than Filip regarding the conclusion that "*efforts to change will always miss the mark in this regard*." (Filip, 2007, p. 206). I share Kokeš's optimism about the potential for improvement (Kokeš, 2020, p. 165) as demonstrated by the recent advocacy in Czech doctrine for greater clarity in legislation.

When drafting legal text, legislators must anticipate how their work will be interpreted and strive to ensure it aligns with their intended meaning. To maintain legal certainty, it is essential that a legislator can reasonably predict the interpretation of their text. Ideally, each provision should lend itself to a single, intended interpretation based on the (linguistic) norm. The idea is that legal norm should be clear from the text itself, however, legal norms will always be subject to other methods of interpretation. As discussed earlier, it is crucial for legal predictability and certainty that the legal form of administrative activity corresponds with its material content.

In defining administrative activity techniques such a precise definitions and clear cross-referencing are essential. Legal forms often involve definitions that apply across multiple pieces of legislation, and references frequently bridge different legislative texts. Definitions enforce how a term must be understood and used linking them closely to principles of rule of law, legal certainty and the separation of powers. It would be unjust to delay resolution until irregularities arise, thereby placing the burden of interpretation on a single individual or entity (Ramos and Heydt, 2017, p. 133).

In the broader context of legal interpretation, vagueness and indeterminacy are common features of legal norms (Ramos and Heydt, 2017, p. 112).

However, in relation to procedural standards, the question of clarity is more straightforward. For this reason, the significant potential for improvement in determining the legal form for public administration activities. An ideal law, as envisioned, would be one that is perfect in terms of objectives, efficacy, transparency, and precise wording, drafted and enacted through an efficient process, and complaint with all content and formal requirements (Karpen, 2017. p. 4).

Good legislation regarding legal forms ensures that those subject to administrative activity know in advance the specific legal form an administrative body will adopt. Consistency in terminology is therefore essential, as terms should consistently express the same concepts (Ramos and Heydt, 2017, p. 131). Precision in legislative language should be a guiding objective (Smejkalová and Štěpáníková, 2019, p. 95).

In Czech laws, specific legal forms are often defined using ordinary Czech terms, which through legislative definitions, take on precise legal meanings. Some technical terms may acquire unique interpretations within individual statutes or even across statutes. Legislative definitions are prescriptive and authoritative: they dictate how terms are to be understood within a specific text, and any deviation from these definitions may result in legal non-compliance (Smejkalová and Štěpáníková, 2019, p. 94).

The importance on consistency in legislative drafting is reinforced by the Czech Government's Legislative Rules (GLR), which I will discuss below. These rules highlight the necessity for uniform terminology, reflecting the importance of textual precision and discouraging the use of synonyms in legal texts, thus upholding the principle of legal certainty (Smejkalová and Štěpáníková, 2019, p. 102).

## 4 Czech Law-making Process and Rules for Writing Laws

A well-functioning legislative process is essential for rational law-making (Kokeš, 2020, p. 98). To contextualise the role of legislator in defining legal forms of administrative activity, here is an overview of the legislative process in the Czech Republic. In the Czech system, bills may be proposed by group of MPs, the Senate (as a collective body only), the government, or regional councils. Statistically, the majority of bills are introduces by the government (Kokeš, 2020, p. 109), so this discussion will focus on process for drafting government bills.

Each bill should be accompanied by an explanatory memorandum, which assesses the current legal situation, explain the need for the new regulation, outlines expected impacts on public finances and evaluates the proposal's compatibility with the both constitutional order and international treaties. The obligation to create an explanatory memorandum together with the law stems from the law and its possible failure to create it means a violation of the law and not of the Constitution. While the explanatory memorandum is not legally binding and does not obligate the interpreting authority to a particular

interpretation (Šín, 2009, p. 90), it can serve as a valuable source of argument in administrative or judicial decision-making. Nevertheless, some scholars have criticised the inconsistent quality of explanatory memorandums provided by drafters (Boháč, 2011, p. 322).

The government is responsible for the quality of the legislation it proposes. The Government's Legislative Council, an advisory body, along with its specialised working committees, assists in the legislative process. The drafting is typically conducted by an official within a ministry or its legislative department. Also in this context Czech legal scholars have noted a shortage of skilled drafters in these roles and a lack of practical legislative training at Czech law schools (Boháč, 2011, p. 220 or Bražina, 2016, p. 1002).

The legislative process begins with the formulation of the bill's substantive intent. Once this plan is approved, the relevant ministry, government official or central administrative body drafts the legislation. The draft bill is then circulated for comments and revised based on feedback receiving during the consultation phase. The bill is subsequently uploaded to the Government Office's electronic library and submitted to the Government's Legislative Council which issues an opinion on the draft and may recommend revisions. Once the government approves the bill, incorporating any recommended changes, it is deemed a government bill.

The Government's Legislative Rules (GLR) is pivotal for government bill drafting. According to Article 2 of the GLR, each legislative proposal must be informed by a thorough analysis of the relevant legal and factual circumstances. Legislative drafting must strive for clarity, with precise language and coherent structure.

The GRL provide both procedural and technical guidelines, which rather than strict directives, reflect best practice in drafting, nevertheless they are legally binding upon government members (Smejkalová and Štěpáníková, 2019, p. 104). The GLR are not exhaustive; they often require interpretation and are supplemented by legislative practice and generally accepted drafting techniques (Smejkalová and Štěpáníková, 2019, p. 105). Since the GLR are formalised as government resolution, they constitute internal normative instructions binding upon government members. However, they do not codify rules of legal grammar. When nongovernmental bodies initiate legislation, they are not legally bound to follow the GLR (Smejkalová and Štěpáníková, 2019, p. 106–107). Even though, GLR significantly influence their legislative activities especially during bill drafting (Kokeš, 2020, p. 222). On the other hand, in practice, even bodies formally bound by the GLR sometimes regard them more as guidance than binding requirements (Wintr, 2021, p. 43).

### 4.1 The Constitutional Court as a Negative Legislator

The Constitutional Court acts as a "negative legislator", with the authority to annul laws that are found to contravene constitutional standards. This power is exercised through two types of reviews. An abstract norm control can be

initiated by designated entities with standing, allowing constitutional review of a law or regulation at any time during the validity, independent of any specific case. The Constitutional Court assesses weather the norm aligns with the Constitution, assessing all general aspects that could arise in its interpretation and application. The second type of review is concrete norm control, which is triggered by a court encountering a constitutional issue with a law during a specific case or an individual together with a constitutional complaint. Here the Constitutional Court's assessment is limited to the constitutional concerns arising in that specific case (Stone-Sweet, 2000, pp. 44–45).

The Constitutional Court has clarified that the GLR cannot serve as criteria for determining the constitutionality of enacted legislation.[8] Violation of the GLR alone, do not render a law unconstitutional.[9] However, the Constitutional Court has acknowledged that severe deviations from GLR guidelines – such as significant lapses in categorising legislation correctly – could breach the constitutional principle of the rule of law. For instance, if a law's classification is unclear making it indistinguishable from other statutes.[10] According to Kokeš, such a serious violation of the GLR could violate legislative clarity and comprehensibility requirements, potentially leading to a finding of inapplicability. Additionally, circumvention of Government's Legislative Council's negative opinion or complete lacking of cooperation with the Council might indicate disregard for procedural integrity, as Kokeš argues (Kokeš, 2020, p. 224).

To date, there is no precedent in Constitutional Court's case law where a statute has been annulled due to deficiencies in definition the legal form of public administration activity. The Constitutional Court has yet to determine whether omitting or removing explicit legal form in a law could contravene the constitutional order.[11]

## 5 To Give an Example

Examining the legal form of the measure of a general nature (relevant in the case study below), it is considered a mixed administrative act from the theoretical standpoint. Mixed administrative acts have characteristics of both individual and normative administrative activity. They feature either an abstractly defined circle of addressees with a concretely defined subject of legal regulation or vice versa. Normative administrative acts, in contrast, are directed

8 Judgment of the Constitutional Court of 18 August 2004 Pl. ÚS 7/03 (N 113/34 SbNU 165; 512/2004 Coll.) or Judgment of the Constitutional Court ruling of 13 December 2016 Pl. ÚS 19/16 (N 237/83 SbNU 677; 8/2017 Coll.).

9 Kokeš addressed the question of what impact the government's adoption of legislative rules in the form of a lawmaking bill (legislation) could have. See Kokeš, 2020, p. 224.

10 Judgment of the Constitutional Court of 31 January 2008 Pl. ÚS 24/07 (N 26/48 SbNU 303; 88/2008 Coll.)

11 Discovered using the Constitutional Court case law search engine available on https://nalus.usoud.cz/; entering criteria: type of proceedings: for the annulment of laws and regulations and in the text: ‚legal form', ‚administrative act', ‚public administration activity'. In this study sample, I have only looked closely at statutory review proceedings in the field of administrative law (I have aliminated subordinate legislation).

at abstract group and regulate subject matter in general terms, while individual administrative act focus on specific individual(s) and issues (Hejč and Bahýľová, 2017, p. 27).

Measures of a general nature in the Czech system are reviewed by administrative courts, which protect public subjective rights concerned as defined in Section 2 of the CAJ. This provision establishes that administrative courts safeguard the public subjective rights of both natural and legal persons. Therefore, in my opinion, defining a measure of a general nature for judicial review implies that it directly affects public subjective rights. In contrast, Czech courts do not consider interference with public subjective rights a characteristic of normative administrative acts. In Czech legal framework, normative administrative acts are subject to review by the Constitutional Court, through either concrete or abstract norms reviews. This distinction arises because normative administrative acts are seen as not directly infringing on individual rights. However, some legal scholars have questioned this distinction, noting that subordinate legislation (normative administrative acts) may itself affect individual rights, even without an individual decision (act of application).[12]

To better understand the legal form of the measure of a general nature, a comparative approach is helpful. Hejč and Bahýľová in study comparing Czech and several European legal systems found that German's laws explicitly recognise measures of a general nature under the term *Allgemeinverfügung*. German law defines an *Allgemeinverfügung* as an administrative act issued by an authority to regulate a specific case in the field of public law, producing immediate external legal effects. An *Allgemeinverfügung* is directed at a generally characterised group of persons and concerns a public characteristic of an object, creating direct legal consequences (Hejč and Bahýľová, 2017, pp. 30–47).

In the Czech Republic, the Ministry of the Environment has issued Air Quality Plans (AQPs)[13] as measure of a general nature under Section 9 of Act No. 201/2012 Coll. on Air Protection. However, a legislative amendment effective from September 1, 2018, removed the explicit designation of the legal form in this provision, leaving AQPs without a defined legal form. As a result, AQPs now exist in a *sui generis* legal form. This change was included not through a government bill but as parliamentary amendment,[14] bypassing the Government's Legislative Council and a Regulatory Impact Assessment.

12 Accoarding to Brož, 2016, pp. 22-23 *normative administrative acts are able to affect or even interfere with the subjective rights of the addressees. (...) Thus, if normative administrative acts contain legal norms (which is an elementary feature for them to be materially considered as legal regulations), then they establish subjective rights and subjective obligations of unspecified persons. Even without the application of the given legal regulations (of course, after their interpretation), it occurs that a particular person has some obligation or some right that can be limited by such acts, or in the case of an obligation, it can be enforced.* See also Kadečka, S., Bražina, R. and Hejč, D. (2017), p. 295.

13 AQPs are defined by the Ambient Air Quality Directive 2008/50/EC.

14 Resolution No 19 of the 6th meeting of the Environment Committee held on 14 March 2018 (Print 13/6)

According to the parliamentary amendment's reasoning and discussion of the Environment Committee[15], the AQPs impose specific obligations making the form of a measure of a general nature inappropriate. In my view, the justification for removing the legal form designation, are unconvincing.

First it was argued that the issuance process for measure of a general nature is overly time-consuming and public input could be sufficiently addressed through the mandatory Strategic Environmental Assessment process (SEA). However, the APC sets out general procedure for adopting measures of a general nature, and these can be adapted or simplified special laws as needed.[16] This means that a complicated and time-consuming process is not necessary to issue a measure of a general nature. Furthermore, it is true that the public (and also an individual) can participate in the SEA. However, I do not see procedural participation in the SEA comparable to participation in the process of issuing a measure of a general nature. Also in this context, the question of the possibility of defending oneself against the inaction of the administrative authority in issuing the AQP arises.

Secondly, during the Environment Committee discussion, it was noted, that the removal of the form intended to make AQPs more binding. According to parliamentary amendment, AQPs in the form of measure of a general nature could not impose obligations on municipalities exceeding the scope allowed by law. This argument was supported by a judgment[17] annulling an AQP issued in the form of a measure of a general nature (before discussed amendment). Supreme Administrative Court held in this judgement that this legal form was inappropriate, as a measure of a general nature could not impose obligations on municipalities beyond the scope permitted by law. It seems that this is not a problem of the legal form of a measure of a general nature, but a lack of the statutory authorisation required by the Constitution. In paragraph 59 of the judgment, the Supreme Administrative Court stated that the Czech legislator did not equip the Ministry of the Environment, as the preparer of the AQP, with any powers that would allow it to impose obligations on local authorities through the AQP. According to article 101(4) of the Constitution such a statutory authorisation would be a necessary condition for interference with local government. Only that the AQP is issued in the form of a measure of a general nature cannot be regarded as a statutory authorisation in this respect.

Thirdly, it was also noted in the discussion that the form of a measure of a general nature had originally been introduced into the Act at the request of the Government's Legislative Council. Also this argument implies that the removal of this legal form is intended to make AQPs more binding, however, it

15 Audio record of the Environment Committee meeting is available at: https://www.psp.cz/sqw/hp.sqw?k=4606&o=8&td=22&cu=6

16 For example see measures of a general nature under the Road Traffic Act.

17 Judgment of the Supreme Administrative Court of 20 December 2017, No. 6 As 288/2016-146, No. 3696/2018 Coll. The Supreme Administrative Court stated in its judgment that the Ministry of the Environment, which issues the AQP, has no statutory authority to impose obligations on local government, as required by Article 101(4) of the Constitution, and stated that the authority to issue measures of a general nature is not in itself an authority to impose obligations on local government.

is not explained why AQP was not established in the form of a subordinate legislature. The legal form of subordinate legislature would lead to lower standard of right protection (as it is normative administrative act), but legal certainty would not be compromised. The *sui generis* legal form creates uncertainty also whether it is legally binding administrative act or a political act. Despite this rationale, the amendment's explanatory memorandum provides no further explanation.

Additionally, the claim that AQP's specific obligations require a different legal form is flawed, as a key feature of a measure of a general nature is to address specific regulatory needs within a defined scope. The specificity of the subject of regulation does not preclude general obligations; rather, it indicated that measure applies to a particular factual circumstances or cases, while potentially impacting a broad range of subjects. In relation to regulatory subjects, it is necessary to differentiate between the subject of regulation (the case at hand) and its substantive content. Even where the subject of regulation is specific, the obligations imposed may still hold a general character (Hejč and Bahýľová, p. 7). However, in my view, a measure of a general nature imposes specific rights and obligations; this is evident from its defining characteristic: the impact on public subjective rights (for further details, please refer to Section 3). Another essential material feature of this legal form is that it targets an indefinite number of addressees.

The lack of a clear legal form for AQPs has created uncertainty, as highlighted by legal scholars there is the discussion whether AQPs can be still materially conceived as measures of a general nature. AQPs now in force primarily involve measures that affect administrative authorities but do not impose obligations directly on individuals. However, they can influence individual's living conditions. Jančářová and Mrlina observe that without a designated legal form, AQPs face uncertain legal future. It remains to be seen how administrative courts will assess the AQPs in judicial review (Mrlina and Jančářová, 2021, pp. 779–799). Since the adoption of the first AQPs with uncertain legal form, no court ruling has yet addressed this issue. Furthermore, no abstract review by the Constitutional Court of the relevant legislative provision has been initiated.

In my assessment, the removal of the AQP's explicit legal form has compromised legal certainty for affected individuals – whose life conditions are affected by these AQPs. Individuals wishing to challenge the APQ now face ambiguity about which type of administrative action applies and on top of that whether they should seek protection though administrative or Constitutional Court, while these ways of protecting rights are fundamentally different. Administrative bodies also face uncertainty about proper procedures for issuing AQPs.

I do not deny that flexibility in public administration is essential and legislative approaches to administrative legal forms should allow for interpretive flexibility. Therefore, interpreting legal forms of administrative activity will always require understanding the context (such as the functioning of law as a system,

the interdependence and interrelationship of the various sources of law, the transferability of definitions, knowledge of the related process, etc.). However, legislators must keep in mind, that this context – essential for understanding the normative text – is usually lacking for those without a legal education and training (Smejkalová and Štěpáníková, 2019, pp. 115–116). Therefore the contextual understanding of administrative activity must remain accessible, especially to those without legal expertise.

There is no other known case in the Czech legal system where an explicit designation of legal form has been removed from an existing law. Nevertheless, I believe, that this case illustrates the importance of using clear legislative technique, such as directly specifying the legal form in the statute and that this designation should correspond to the material features of the particular administrative activity (referred to as Group 1 techniques in legislative drafting). Other legislative techniques should only be used sparingly and when justified by strong reasons. However, in the case of AQPs the legislative amendment was made through a substandard legislative process without sufficient governmental discussion, highlighting the need for careful deliberation and procedural integrity in legislative changes affecting administrative law.

## 6 Conclusions

The paper discusses the various forms of administrative activities carried out by public administrations, distinguishing between legal (statutory) forms and theoretical categories of administrative activities. It highlights the importance of understanding both formal and material concepts for the application of legal norms. The formal concept relies on explicit legal determination, while the material concept addresses the actual content of administrative activity.

The issue of legal forms also clarifies the interconnectedness between substantive and procedural law in administrative activity, showing how legal forms operate within a procedural framework that ensures they are both effective and lawful.

In Czech legal system, challenges arise due to procedural fragmentation and inconsistencies in defining and applying legal forms, alongside divergences between theoretical and statutory classifications of administrative activities. This fragmentation can create confusion and requires contextual understanding to identify the appropriate legal form. The paper categorises legislative techniques for defining legal forms into four groups, differentiated by the degree to which the designated legal form aligns with the content of the administrative activity and by how clearly the form is articulated within the legislation.

Additionally, the paper highlights the critical importance of clarity, precision, and consistency in legislative drafting to uphold legal certainty and predictability. The paper does not leave out the role of the Constitutional Court, particularly its limitations in assessing the constitutionality of legislation on the basis of the Government's Legislative Rules. Notably, the Czech Constitution-

al Court has yet to determine whether omitting the legal form designation in new laws or removing it in existing ones constitutes a constitutional violation.

The AQP case is characterised by a disorderly legislative process and a lack of debate. The removal of the legal form designation in the statute was not accompanied by a proper explanatory memorandum that sufficiently explains the procedural issues involved in issuing AQPs and protecting rights against them. With more persistent research, some of the reasons for the legislative change can be traced from public sources, however, arguments for this legislative change are unconvincing and in no way mitigate the lack of legal certainty.

The AQP case illustrates the practical implications of ambiguous legal form. The amendment that remove the explicit legal forms designation led to significant legal uncertainty, particularly affecting individuals whose life conditions may be impacted by AQPs. This legislative change has left both individuals and administrative bodies uncertain about the correct legal channels for challenging AQPs and the appropriate procedures for issuing them. While flexibility in public administration is necessary, especially in complex regulatory areas, legislative changes that introduce uncertainty about legal form can weaken legal certainty and accessibility—particularly for those without legal expertise. The lack of clear legislative guidance in this case underscores the importance of deliberate and transparent legislative techniques.

Perspectives in this paper should also remind Czech legislators, that case law and legal doctrine have developed a material concept to ensure that any infringed rights are not left without judicial protection. However, the legislature cannot depend solely on this judicial safety net; rather, it must minimise the need for material concept application by drafting clear and explicit legal forms. The author therefore advocates for the legislative technique that explicitly defines legal form which also corresponds to the content and nature of the administrative activity. Prioritising this technique would reduce the need for extensive contextual interpretation, fostering greater legal certainty. By adopting this technique within legislative process, Czech law could achieve greater predictability, accessibility, and enforceability, thereby strengthening individual rights protection and reinforcing the rule of law.

## References

Boháč, R. (2011). Důvodová zpráva. In R. Boháč et al., Legislativní proces: (teorie a praxe). Prague: Tiskárna Ministerstva vnitra.

Bražina, R. (2016.) Odůvodnění normativních (s)právních aktů a jejich vztah k ochraně práv adresátů veřejné správy. Právník, 155(11), pp. 999–1010.

Brož, J. (2016). Prostředky ochrany subjektivních práv dotčených normativními správními akty. Diploma thesis. Masaryk University, Faculty of Law.

Della Cananea, G. and Parona L. (2024). Administrative Procedure Acts in Europe: An Emerging "Common Core"? The American Journal of Comparative Law, 72(2).

Filip, J. (2007). Vliv Ústavního soudu a obecných soudů na tvorbu práva v ČR. In J. Filip et al., eds., Tvorba práva v České republice po vstupu do Evropské unie. Prague: Sborník ASPI, pp. 205–217.

Hejč, D. and Bahýľová, L. (2017). Opatření obecné povahy v teorii a praxi. Prague: C.H. Beck.

Judgment of the Constitutional Court of 18 August 2004 Pl. ÚS 7/03 (N 113/34 SbNU 165; 512/2004 Coll..)

Judgment of the Constitutional Court of 31 January 2008 Pl. ÚS 24/07 (N 26/48 SbNU 303; 88/2008 Coll.)

Judgment of the Constitutional Court ruling of 13 December 2016 Pl. ÚS 19/16 (N 237/83 SbNU 677 8/2017 Coll.).

Judgment of the Supreme Administrative Court of 20 December 2017, No. 6 As 288/2016-146, No. 3696/2018 Coll.

Kadečka, S., Bražina, R. and Hejč, D. (2017). Ochrana subjektivních práv proti normativním správním aktům. In S. Skulová et al., eds., Prostředky ochrany subjektivních práv ve veřejné správě - jejich systém a efektivnost. Prague: C.H. Beck, pp. 290–301.

Karpen, U. (2017). Legislation and Legisprudence. In U. Karpen and H. Xanthaki, eds., Legislation in Europe: a comprehensive guide for scholars and practitioners. Oxford: Hart publishing.

Kokeš, M. (2020.) Temná zákoutí legislativního procesu: příprava vládních návrhů zákonů v ČR. Prague: Leges.

Mrlina, M. and Jančářová, I. (2021). Programy zlepšování kvality ovzduší - právní forma v průběhu času. Časopis pro právní vědu a praxi, 29(4), pp. 779–799.

Ramos, H. M. and Heydt, V. (2017). Legislative Language and Style. In U. Karpen et al., eds., Legislation in Europe: a comprehensive guide for scholars and practitioners. Oxford: Hart publishing.

Resolution No 19 of the 6th meeting of the Environment Committee held on 14 March 2018 (Print 13/6)

Šín, Z. (2009). Tvorba práva: pravidla, metodika, technika. Prague: C.H. Beck.

Smejkalová, T. and Štěpáníková M. (2019). Jazykové zvláštnosti textů právních předpisů. In M. Škop et al., eds., Tvorba práva - empirické studie. Brno: Masaryk University, pp. 93–127.

Stone Sweet, A. (2000). Governing with judges: constitutional politics in Europe. New York: Oxford University Press.

Svoboda, T. and Hejč, D. (2021). K povaze „krizových opatření", odpovědnosti za škodu a ochraně subjektivních práv (1. část). Právní rozhledy, 29(9), pp. 315–324.

Vedral, J. (2012). Správní řád: komentář. 2. editon. Prague: Ivana Hexnerová - Bova Polygon.

Venice Commission – European Commission for Democracy through Law. 2011. Stocktaking on the Notions of »Good Governance« and »Good Administration«, Study No. 470/2008, CDL-AD(2001)009.

Wintr, J. (2021). Proměny parlamentní kultury. Prague: Auditorium.