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ARTICLE

Emergencies Under Czech Law

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Abstract

The paper outlines Czech constitutional law and the development of emergency law. Initially, the legislature did not expect emergencies to occur, perhaps due to the idealistic optimism associated with the general atmosphere of the collapse of the Eastern Bloc in 1989 and the "End of History" thesis. As a result, emergencies were not regulated by Czech law in the 1990s. This changed after the great floods at the end of the 1990s, when "history returned," and the need for some special rules for emergencies became clear. The first decades of this century showed that Czech emergency law worked well for short-term natural disasters. The game-changer came in 2020, with the emergence of the COVID-19 pandemic and the need for a long-term state of emergency. It soon became clear that the rules that worked for floods and other disasters did not work for long-term global pandemics. In other words, the legal system was not prepared for a situation in which emergencies were the rule rather than the exception. Legislators were unable to prepare a long-term legislative response to fill this gap. The memory of COVID-19 is fading fast, and there are no plans to reform the relevant legislation. Accordingly, any new pandemic or similar event will lead to the same problems that the Czech legal system had to deal with from 2020 to 2022.

Keywords: Central Eastern Europe; COVID-19; emergency; judicial review

I. Introduction

In this article, I will first briefly outline Czech constitutional law and the development of emergency law. I will show that during the 1990s, emergencies were not regulated by Czech law. This changed after the great floods at the end of the 1990s when the need for some special rules for emergencies became clear. I then proceed with a detailed explanation of how emergency law has been applied this century, with particular emphasis on the legal battle associated with COVID-19. Finally, I offer some conclusions and recommendations for the future.

II. Emergencies in Czech law in a nutshell

1. The origins of the current law and the general legal framework of states of emergency

The Czech Constitution was adopted in December 1992, after several months of hard work on its text following the political crisis after the June 1992 elections and the impending end of the Czechoslovakia (the union of the Czechs and Slovaks ceased to exist on 1 January 1993). The 1992 Constitution was enacted three years after the fall of the Communist

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regime and must be interpreted against this backdrop. The drafters of the Constitution did not strive for continuity with the old communist regime; quite the contrary, the Constitution was associated with the revolutionary fervour of the 1989 Velvet Revolution and attempted to annihilate the Communist heritage.[1]

The text of the Constitution is rather brief. It is less detailed than its Central European counterparts, e.g., the Slovak Constitution of 1992, the Polish Constitution of 1997, and the Hungarian Constitution of 2011.

Perhaps because of the lack of time, in late 1992, when the Czechoslovakia was about to be dissolved within a few months, the drafters of the Constitution did not aspire to cover all constitutional matters in a single constitutional document. They left out all controversial issues to be determined by the future consensus of the political elite (thus, the regional self-government was finally enacted by a separate constitutional act in 1997), moreover, some hot political potatoes have never been resolved (such as the provision for holding general referendums, which still does not exist in the Czech legal system).[2]

The Czech Constitution includes only organizational matters and almost completely leaves out the substance of fundamental rights. This was caused, at the time of drafting in the fall of 1992, by political disagreement over the content of the bill of rights. As a sort of compromise, the federal Czechoslovak Charter of Fundamental Rights of 1991 was reaffirmed as part of the Czech legal system, and the Constitution referred to it as a part of the "constitutional order." Those are the fundamental rights which dominate much of the workload of the Czech Constitutional Court (CCC). It is, therefore, fair to say that even though the Constitution itself deals strictly with organizational matters, fundamental rights protection is a central element of the broader constitutional culture of the Czech Republic.

To sum up, the Czech Constitution is not the only constitutional law of the land but part of the so-called "constitutional order" composed of a plethora of constitutional acts (including the Charter of Fundamental Rights). All those acts are formally equal, and the Constitution does not enjoy any primacy among them. One of those "other" constitutional acts is the Constitutional Act on the Security of the Republic, enacted in 1998 (see below).

Both the 1992 Constitution and the 1991 Charter of Fundamental Rights were laws typical of the era of the "End of History" and liberal constitutionalism of the 1990s, i.e., the thesis of the ultimate triumph of liberal capitalism, often presented through its neoliberal manifestations and a plethora of free market policies.[3] No one dared to question "the only possible" road to the future. The latter simply prescribed peaceful future development and

[1] For the Czech Constitution in English see David Kosař and Ladislav Vyhnánek, *The Constitution of Czechia. A Contextual Analysis* (Oxford, Hart Publishing 2021). More specifically on the history of states of emergency in Czechia and Czechoslovakia see in Czech Jakub Dienstbier "Mimořádné situace a stavy v ústavní historii" [The States of Emergency in Constitutional History]" in Jan Wintr and Marek Antoš (eds), *Vybrané problémy ústavního práva v historické perspektivě* (Prague, Charles University 2016) 26 ff.

[2] This notion reflects the rightist and conservative political majority of the early 1990s, which was very cautious with respect to direct democracy. As a result of the compromise between the right and the left, the Constitution only briefly mentions the possibility of enacting a new constitutional law on referendums in Art 2 para 2. This effectively means that regulation of the issue of referendums was left to a constitutional law with the required supermajority in both chambers of Parliament. Consequently, during the three decades of Czech democracy, no general law on referendums has ever been enacted (the only exception was a special law on referendum on the EU accession). See Zdenek Kühn, "The Czech Republic: From a Euro-Friendly Approach of the Constitutional Court to Proclaiming a Court of Justice Judgment Ultra Vires" in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Hague, T.M.C. Asser Press, 2019) p 795.

[3] Adam Sulikowski, "Government of Judges and Neoliberal Ideology" in Rafał Mańko, Cosmin Cercel and Adam Sulikowski (eds), *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (1st edn. Oxford, Counterpress 2016) pp 16–31.

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a small liberal (or neoliberal?) state.[4] Because the future was supposed to be happy, the constitutional laws did not consider the potential of some emergency situations (the Czech Constitution of 1992 only dealt with one "traditional" emergency, the declaration of a state of war).

But the future is never set in stone. Emergencies did not wither away with the collapse of communism. The game changer in Czechia was a big Central European flood in July 1997, which affected Germany, Austria, Poland, Slovakia, and Czechia. In Czechia, the natural disaster impacted almost a third of the country's territory. Fifty people lost their lives as a result, and more than ten thousand were left homeless.[5] At the time, it was clear that the silence of the 1992 Constitution on emergency situations was a serious problem. Dozens of deaths in 1997 were more than visible proof that the constitutional order needed to be amended to include some emergency situations and the associated restrictions on fundamental rights.

Therefore, in the following year, a special on the Security of the Czech Republic was adopted.[6] Technically, the act is not an amendment to the Constitution but a short, separate constitutional law dealing with several types of states of emergency. The purpose of this short constitutional law (it has only thirteen brief articles) is to list all basic states of emergency and provide a constitutional basis for the enactment of "ordinary" law. It is to be this ordinary law that provides details for dealing with those emergencies under each respective category of the state of emergency. The lawmaker explained in the *travaux préparatoires* that the current law does not enable state authorities to deal with emergencies or limits basic rights when necessary.[7]

The 1998 constitutional law distinguishes between three categories of state of emergency. The first is a state of war (in Czech, *válečný stav*). As I have explained above, this is the only state of emergency dealt with by the text of the 1992 Constitution. Since 1992, a state of war has never been declared.

The second is a threat to the state (*stav ohrožení státu*). This is declared by both houses of the Parliament[8] on the proposal of the Government if the sovereignty of the state or the territorial integrity of the state or its democratic foundations are under imminent threat. The threat to the state may be applied either locally or to the entire territory of the state. As drafted, it appears to apply mainly to civil unrest or other internal threats to the state. In any case, even this special legal order has never been declared.

Third is a state of emergency (*nouzový stav*), which deals with natural disasters, environmental or industrial accidents, accidents or other dangers that significantly

[4] Critical scholarship thus explains judicial empowerment as "the by-product of a strategic interplay between three key groups: first, threatened political elites who seek to preserve or enhance their political hegemony" and "to insulate certain policy preferences from popular pressures"; second, "economic elites" trying to pursue their neoliberal agenda; and third, "judicial elites." If one considers the background of justices, it is easy to explain why they "tend to adhere to an agenda of relative cosmopolitanism, open markets," and formal (as opposed to substantive) equality. See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA, Harvard University Press 2004) pp 43–4, 213.

[5] "Flood of the Century" ravaged Czech Republic exactly 25 years ago. Radio Prague International 7 April 2022, available at https://english.radio.cz/flood-century-ravaged-czech-republic-exactly-25-years-ago-8755079 (accessed 9 July 2024).

[6] Constitutional Law No. 110/1998 Coll. ["Sbírka zákonů," Collection of Laws, hereinafter "Coll."]

[7] Not much literature prior to 2020 was dedicated to the state of emergency. For some examples in Czech, see Vojtěch Belling, "Výjimečný stav a hranice právního státu" [The State of Emergency and the Limits of the Rule of Law] (2018) 157 (3) Právník 200. After 2020 there is a flood of papers on this topic. In English, e.g., Jan Malíř and Jan Grinc, "Fundamental Rights Limitations in States of Emergency: The Czech Pattern" in Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (London – New York, Routledge, 2024) pp 103–23.

[8] The adoption of a resolution declaring a state of danger shall require the consent of a majority of all members of the House of Representatives and the consent of a majority of all senators.

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threaten life, health or property, values or internal order and security. It is the state of emergency that has been repeatedly used since 2000 and deserves the most attention. "In emergencies that may arise as a result of major natural disasters (floods, earthquakes), major industrial accidents and other incidents, it will be necessary to take a number of precautions that may also affect certain civil rights and freedoms," explains the *travaux préparatoires*. The state of emergency could be applied either locally or to the whole territory of the state. Although not explicitly mentioned, it could also be used for pandemics.

The 1998 Constitutional Law is general and does not contain any specific rules. It only states that some fundamental rights can be restricted in emergency situations without giving further details.[9] It is the task of the ordinary law to lay down detailed rules and list the fundamental rights that can be restricted under the respective emergency, of course within the limits of the 1998 Constitutional Law and subject to the requirements of proportionality. It took two more years to enact this ordinary law.

In 2000, a new law named the "Crisis Regulation Act" was adopted.[10] The law further specified the details of respective emergencies and state and local self-administration actions relating to various types of threats. The Crisis Regulation Act also describes which fundamental rights could be limited under the state of emergency or the threat to the state (the right to the inviolability of the person and the home; the right to property; freedom of movement and residence; the right to assemble peacefully; the right to engage in business activities; the right to strike) and defines general situations in which those rights could be limited (for instance, freedom of movement and residence within a defined area threatened or affected by a crisis situation; the right to property in order to protect life, health, property or the environment threatened by an emergency situation, for which adequate compensation shall be provided).[11]

In addition to the list of emergencies provided for in the 1998 Constitutional Act, the 2000 Act created a so-called state of danger (*stav nebezpečí*). This is the least invasive state of emergency, so there is no need for it to be expressly covered by the Constitutional Act. Unlike other emergencies, a state of danger can only be declared locally, for a region or part of a region. The state of danger may be declared if it is not possible to avert the threat through the normal activities of the administrative agencies. The governor of the region (or in Prague, its mayor) may declare a state of danger for a part of the region's territory or for the entire region. The scope of powers within the state of danger is also narrower. The governor of the region may impose labour assistance obligations or the obligation to provide in-kind resources to deal with a crisis situation, order the immediate execution of works, construction, landscaping or removal of structures to mitigate or avert the threat, ensure priority supply to children's and health care facilities and armed security and firefighting services, ensure an alternative method of deciding on and paying social security benefits, order the evacuation of the population, or prohibit the entry, stay and movement of persons in a defined place or territory, etc.

Finally, there is also the "special emergency" adopted by law in March 2021 due to the COVID-19 pandemic.[12] The new law[13] created a new type of emergency (pandemic alert; in Czech, *stav pandemické pohotovosti*). The pandemic alert started the moment the act was enacted (this took place at the peak of the COVID-19 crisis); later, it could be called into

[9] The only more detailed provision of Art 5 prohibits declaring a state of emergency because of a strike conducted to protect rights and legitimate economic and social interests.

[10] No. 240/2000 Coll.

[11] See in more detail the table listing the types of state of emergency and basic rights restrictions under Czech law.

[12] Law no. 94/2021 Coll. on emergency measures in the event of an epidemic of disease Covid-19.

[13] Act no. 94/2021 Coll.

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existence by the decision of the lower house of the Czech Parliament (this exceptional situation is not mentioned in the Constitution). The law provided an exhaustive list of all limitations which could be decided by different authorities during the pandemic alert (banning assemblies, prohibiting the operation of certain business activities such as restaurants and other services, limiting school education, etc.).[14] The law was modified in February 2022, and the Parliament prolonged its validity until November 2022 and further specified some powers of the authorities (for the reaction to the previous rigorous case law of the Czech Supreme Administrative Court, see below).

The most important novelty of the law is that it gave people the right to challenge the measures enacted during the pandemic alert before the judiciary. A special expedited procedure was created to resolve all lawsuits in due time. The law ceased to be effective on 1 December 2022 when COVID-19 no longer posed a serious threat. This means the "pandemic alert" is now a purely historical piece of legislature.

2. *Checks and balances in emergency situations*

The comprehensive legal regulation of both the 1998 Constitutional Act and the 2000 Crisis Regulation Act strives for checks and balances in declaring and applying emergency situations.

With respect to a state of war, this involves the consent of both houses of Parliament (the majority of all deputies and all senators). According to the Constitution, Parliament decides whether to declare a state of war if the Czech Republic is attacked or if it is necessary to fulfil international treaty obligations concerning joint defence against attack. The checks and balances in this exceptional situation are guaranteed by the fact that both houses of Parliament must consent. The law is silent on whether such a decision could be reviewed by the Constitutional Court, but I doubt the Court would be willing to rule on such an openly political issue. After all, the Court was unwilling to review the constitutionality of the declaration of a state of emergency in March 2020 (see the following text).

Unlike the state of war, threat to the state better fits the classical description of checks and balances. It requires cooperation between both the executive and legislative branches (this emergency is declared by both houses of Parliament at the proposal of the Government). As I have noted above, neither a state of war nor a threat to the state has ever been used.

More practically, the power to declare and prolong a state of emergency is also divided between the executive branch and legislature. A state of emergency is declared by the Government. The Government shall immediately inform the House of Representatives (the lower house of Parliament) of the declaration of a state of emergency. The House may cancel the declaration at any time. A state of emergency may be declared for a maximum period of 30 days, which may be extended only with the prior consent of the House.

When, in March 2020, the declaration of a ("COVID-19") state of emergency was challenged before the Constitutional Court, the Court did not hesitate to emphasize its self-restraint. In the Court's view, the responsibility for the lawfulness of the declaration rests with the Government, which is reviewed by the legislature (the House). The Court emphasized that the mere declaration of a state of emergency in 2020 had not (yet) restrained any rights (unlike previous declarations, which listed measures adopted to fight floods or other natural disasters; see II.1. below):

[14] See Jan Malíř and Jan Grinc, "States of Emergency and COVID19: Czech Republic" in Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř and Max Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (London – New York, Routledge, 2024) pp 17–42.

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> The declaration of a state of emergency by the Government in the present case is primarily an act of application of constitutional law; it constitutes an »act of governance« which has a normative impact, is not subject to review by the Constitutional Court in principle and is »reviewable« primarily by a democratically elected political (»non-judicial«) body, which is the House of Representatives. Unless the legislator has set an appropriate standard of judicial review in the form of special procedural rules, the traditional constitutional law review of proportionality cannot be applied to a political decision on a state of emergency. The Government bears political responsibility for declaring a state of emergency, as it is accountable to the House of Representatives (Article 68(1) of the Constitution), which can then fulfil a monitoring function within the meaning of Article 5(4) of the Constitutional Law on the Security of the Republic. [. . .] [The resolution on the declaration of a state of emergency] declares a state of emergency without specifying specific restrictions on fundamental rights and without imposing any obligations . . .[15]

The Court would be less hesitant to review the declaration of a state of emergency if the declaration itself contained the rules capable of directly limiting the rights of individuals (this was the case of all declarations before 2020, which have not been challenged before the Court). As the Constitutional Court noted in a corresponding case, the declaration of a state of emergency . . .

> is an *ad hoc* decision – it concerns an individual case of an emergency and does not contain any general rule. The government decision itself on the declaration of a state of emergency also does not have a legal-normative content, as a result of which it does not fulfil the function of a legal regulation.[16]

There is no question that executive measures which restrict rights are subject to judicial review; if the latter are part of the declaration of a state of emergency (and generally they should be), the Constitutional Court will review them[17] (on this, see II.2. below).

The idea that the House of Representatives is a watchdog for the constitutionality of the declaration of a state of emergency might be good in theory and might even have worked well in a specific situation in 2020 when Czechia had a minority government (the government lacked a majority in the House of Representatives so it had to find support in the House on a case-by-case basis, so it is fair to say that the minority government was indeed carefully scrutinized by the lower house of Parliament). In a normal scenario, however, the government has a majority in the lower house, so one may wonder what kind of effective scrutiny it is subject to by the House composed of a majority of friendly members.

A good example is the state of emergency in 2022 related to the Ukrainian refugee crisis. The parliamentary elections of 2021 created a new political situation, with the government once again enjoying solid support in the House (a typical situation for most governments after the fall of the communist regime in 1989). A new government appointed in November 2021 soon faced a crisis arising from Russia's invasion of Ukraine. It declared a state of emergency initially for 30 days[18] but then extended it for two additional months.[19]

[15] The decision of the Czech Constitutional Court of 22 April 2020 No. Pl. ÚS 8/20, para 26. Cf Malíř and Grinc (note 15), 17.

[16] The decision of the Czech Constitutional Court of 12 May 2020 No. Pl. ÚS 11/20, para 17.

[17] Ibid, para 20.

[18] No. 43/2022 Coll. (the Government's decision to declare a state of emergency in order to address the migration wave).

[19] No. 77/2022 Coll.

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Even though there were some concerns about whether this was constitutionally permissible (if the Constitutional Act makes it clear that a state of emergency can be declared for a maximum of 30 days, how is it possible for it to be extended by twice this length?), the government did not face any trouble in this regard in the House, which approved the extension without many complications. It is true that the opposition parties complained that the extension was too long and, therefore, unconstitutional, but they were unable to do much about it. Since the state of emergency did not affect the rights of citizens (instead, it allowed the state authorities to simplify some procedures related to the Ukrainian refugees), the opposition saw no possible political gain in challenging the extension in Court for the sake of constitutional purity.[20]

Anyway, the Constitutional Court made it clear that the absence of judicial review of the declaration of a state of emergency is not absolute. One can imagine circumstances in which the Court itself could (and should) assess, based on a petition by a political minority, whether the state of emergency was duly declared and whether it had had the intended constitutional effects. An act declaring a state of emergency could be annulled by the Constitutional Court if it contravened the fundamental principles of the democratic rule of law and if it constituted a change in the essential elements of the democratic rule of law (the "core of the Constitution," which cannot be amended even by a constitutional supermajority of parliamentarians).[21]

III. Emergency situations in practice

1. Emergencies before 2020

The Czech Republic entered the 21st century prepared for potential emergencies. Following the adoption of the Constitutional Act of 1998, the legislature passed the detailed Crisis Regulation Act in 2000 (see I.1. above). This paid off two years later.

In August 2002, a week of heavy rainfall caused flooding across much of Europe. Czechia (more precisely, its Western part, Bohemia) was hit particularly hard.[22] The severe flooding put the new emergency regulation to the test. The government declared a state of emergency on 12 August 2002 (it lasted 20 days, until 31 August 2002). The state of emergency was not declared for the whole republic but only for five western regions. The declaration listed the emergency measures ordered by the government to handle the crisis (e.g., evacuation of endangered persons from the affected and endangered area; prohibition of the entry, stay and movement of persons in the affected territory; labour assistance and the obligation to provide material resources to deal with the crisis situation; carrying out construction work and the removal of structures as necessary in connection with the development of the crisis).[23] The 2002 floods proved that the new legislation was indeed a good tool for dealing with natural disasters. After all, the legislation was drafted by lawyers and politicians who had the 1997 floods in mind, so it was carefully tailored to deal with natural disasters. The state of emergency used in the summer of 2002 helped to manage the impending crisis and, unlike in 1997, resulted in far fewer deaths (17 in 2002 as opposed to 50 in 1997). The state of emergency was short and politically uncontroversial, so it was not challenged by anyone.

[20] Nouzový stav bude do konce května. Jste Putinova pátá kolona, slyšel Okamura [The State of Emergency will last till the end of May. You are Putin's Fifth Column, Okamura was told] iDNES 29 March 2022, available at https://www.idnes.cz/zpravy/domaci/snemovna-nouzovy-stav-vlada-uprchlici-valka-na-ukrajine.A220329_050611_domaci_kop (accessed 29 July 2024).

[21] The decision of the Czech Constitutional Court of 22 April 2020 No. Pl. ÚS 8/20, para 27.

[22] Central Europe Flooding, August 2002. Event Report. Available at https://forms2.rms.com/rs/729-DJX-565/images/fl_2002_central_europe_flooding.pdf (last accessed 29 July 2023).

[23] No. 373/2002 Coll.

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The following three states of emergency also addressed natural disasters, floods in 2006[24] and 2013,[25] and a devastating hurricane in 2007.[26] They were declared for several weeks only, never longer than a month (18 days in 2006, 28 days in 2013, 12 days in 2007) and never for the entire territory (always just for the regions affected by the natural disaster).

If there were any judicial disputes, they were related to compensation for damages that occurred during rescue activities. According to the 2000 Crisis Regulation Act, the State is liable for damage caused to corporations and individuals in causal connection with crisis measures and exercises carried out pursuant to this Act. A typical example was the removal of a building to protect a neighbourhood from rising waters.[27]

2. *Emergencies during the COVID-19 pandemic in general*

Before 2020, states of emergency were only used in response to natural disasters. The laws were well drafted to deal with natural disasters in general and floods in particular. Of the four emergencies before 2020, three were due to floods, and one was due to a hurricane that damaged much of the forest in the mountains, so the laws were smoothly applied. The Covid pandemic in 2020 was a game-changer and presented the government with completely new challenges.

On 12 March 2020, the government declared a state of emergency. However, unlike previous emergency declarations, the March 2020 declaration did not list any restrictions on rights or executive measures to deal with the crisis. Instead, the declaration referred to subsequent emergency measures to be adopted separately by the government.[28] These were measures typically employed to deal with the pandemic, such as lockdowns, closures of services, education, shops, etc. Those regulations were adopted by government resolution and published in the same way as ordinary legislation (i.e., in the official collection of laws).

The March 2020 declaration of the state of emergency raised two important questions. Both were soon answered because unhappy citizens challenged the declaration before the Constitutional Court. There was no possibility for citizens to challenge the law, so the Court had to dismiss these complaints. However, while doing so, the Court stated some important answers to the questions (technically, it was *obiter dictum*).

The first question was whether it was possible to declare a state of emergency without specifying the measures which would accompany the emergency. The text of the 1998 Constitutional Act on the Security of the Republic strongly indicated that this was not possible ("While declaring a state of emergency, the government must define which rights set out in the special law are restricted and to what extent, ... and which obligations are imposed and to what extent."). However, the Constitutional Court approved the declaration without providing any details, emphasizing the uncertainty associated with the novel situation of the global pandemic:

> In the resolution declaring the state of emergency, the government defined the rights to be restricted by reference to Sections 5(a) to (e) and 6 of the Crisis Act and other specific Government resolutions. Although such an implicit definition is general and vague, it cannot be regarded as an expansive violation or abuse of constitutional law.

[24] No. 121/2006 Coll.
[25] No. 140/2013 Coll.
[26] No. 11/2007 Coll.
[27] See the judgment of the Czech Supreme Court of 17 June 2009, No. 25 Cdo 1649/200.
[28] No. 69/2020 Coll.

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> [. . .] an overly strict assessment of the formalities would completely disregard the seriousness and exceptional nature of the situation that led to the declaration of the state of emergency.[29]

The second question concerned the legal nature of executive measures restricting citizens' rights and granting certain powers to the authorities to deal with the crisis. The text of the Constitution was rather unclear in this respect. As citizens challenged many of these measures before the Constitutional Court in the spring of 2020, the Court found an opportunity to explain their legal nature in its decisions dismissing these constitutional complaints for lack of standing. The Court explained that these executive crisis measures were not administrative decisions or measures of a general nature that are subject to direct judicial review by the administrative judiciary. Directly applying these measures to an individual would be required to enable bringing an action against that application. In explaining what these measures are, the Court found refuge in classifying them as "*sui generis* legal regulations."[30]

Although lawyers like labelling unknown concepts "*sui generis*," such a label does not help us to understand the legal nature of the executive measures created during the emergency. Such a classification does, however, raise another question. It is a fundamental principle of Czech constitutional law that rights can only be limited by the act of parliament (legislation), not by any other ("inferior") law. The Constitutional Court explained that the power to impose duties and limitations on fundamental rights according to an executive measure under the 1998 Constitutional Act is a special arrangement related to general constitutional principles (this special rule has primacy over a general rule). In the case of emergencies, therefore, the constitutional law allows "the basis of a certain obligation to be defined not in the legislation but only in a government decision, without limiting the possibility of setting the limits of this governmental authority by legislation."[31]

3. The first phase of fighting the pandemic: unlimited reign of the executive (March 2020–February 2021)

The COVID-19 pandemic proved to be persistent, with repeated declarations of a state of emergency in autumn 2020 and spring 2021. However, the separation of powers and parliamentary oversight worked due to the specific situation of the minority government (2018–2021), which had to find support in the House of Representatives for each extension of the state of emergency.

From a legal point of view, the COVID-19 pandemic regulation in the Czech Republic may be divided into two different phases. The initial stage covers the first twelve months of the pandemic, from March 2020 to the end of February 2021. During this period, the state of emergency was the decisive factor in dealing with the crisis, the executive and its measures were dominant, and the role of judicial review was very limited (see below).[32]

[29] The decision of the Czech Constitutional Court of 22 April 2020 No. Pl. ÚS 8/20, para 29.

[30] The decision of the Czech Constitutional Court of 5 May 2020 No. Pl. ÚS 10/20, paras 20–2; similarly, the decision of the Czech Constitutional Court of 5 May 2020, No. Pl. ÚS 13/20, para 23. However, it all depends on the form and content of the measure in question. The Court noted that if the measures do not fall under the category of general laws, they may also be decisions or other acts of the executive.

[31] The decision of the Czech Constitutional Court of 5 May 2020 No. Pl. ÚS 10/20, para 24; see also a very interesting dissenting opinion by Justice Filip on decision No. Pl. ÚS 8/20.

[32] For some doctrinal papers during the first period see Aleš Sova, "Přezkum opatření přijatých v době nouzového stavu" [Judicial Review of the Acts Enacted During the State of Emergency] (2020) 53 (5–6) Správní právo 298–312 and Jan Wintr, "K ústavnosti a zákonnosti protiepidemických opatření na jaře 2020" [On the Constitutionality and Lawfulness of the Anti-Epidemic Acts in Spring 2020] (2020) 53 (5–6) Správní právo 282–97.

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The second phase began in March 2021. During this period, the parliament introduced a completely new state of emergency called "a state of pandemic alert." Although the state of emergency continued until April 2021 (and then again briefly for thirty days in November and December 2021), the effect of the state of pandemic alert now predominated. The role of judicial review became the dominant feature of the second phase of the Covid crisis.

The first wave of Covid was covered by the state of emergency from 12 March to 17 May (67 days in total).[33] Politically, the state of emergency was uncontroversial during this period; the political scene was united in the face of a novel situation and an unknown pandemic. The situation changed in autumn 2020. By the summer of 2020, it was widely believed that the pandemic was over. The reintroduction of the state of emergency in the autumn was a cold shower for most of the population and, therefore, became much more politically contentious.[34] The state of emergency was declared on 5 October 2020 and lasted until 11 April 2021 (189 days in total, although technically, it was three successive states of emergency). Accordingly, the government's position was much more vulnerable. As I mentioned above, it was a minority government that lacked a majority of deputies in the House. Even though the government played its role skilfully, and repeatedly managed to win the support of the fragmented House of Representatives and obtained five consecutive extensions, the government was ultimately defeated in a vote in February 2021, and the House did not agree to the sixth extension.

At the same time, however, the situation was extremely critical, with the number of sick and hospitalized people soaring across the country. As a result, the governors of the fourteen regions took advantage of a provision in the 2000 Crisis Regulation Act and asked the government to declare a new state of emergency. This move was ironic because almost all these regions were controlled by opposition politicians in 2021. The government used this opportunity to declare a brand new state of emergency, politically blaming the opposition, which was divided between its parliamentary faction (which strongly opposed any further extension of the state of emergency) and the regional factions, which favoured the extension due to the unfolding disaster in the regions.[35] It should be stressed that the regional governors' request did not oblige the government to declare a new state of emergency. In addition, there was an intriguing constitutional question as to whether the government was bypassing the previous negative vote of the House of Representatives: if the House did not agree to the extension, would it be possible for the government to simply announce a new state of emergency and seemingly start from scratch?

The members of the House of Representatives did not initiate proceedings before the Constitutional Court because they soon reached a new agreement with the government (see below). However, some senators did challenge a new state of emergency before the Constitutional Court. As the state of emergency lasted only twelve days (because of a new agreement between the House and the government), the Court could not rule on the case and had to dismiss it (based on the referral by parliamentarians, the Court can only rule on valid laws, not laws which have in the meanwhile been abolished). However, in dicta, the Court stated that the new state of emergency was unconstitutional (an unconstitutionality that the Court could not supposedly review). In the Court's view, if the 1998 Constitutional Act on the Security of the Republic provides that the Government may declare a state of

[33] Declared by the government resolution No. 69/2020 Coll., prolonged by two government resolutions No. 156/2020 Coll. and No. 219/2020 Coll.

[34] See in a comparative perspective David Lacko, Filip Horak, Martina Klicperova-Baker et al., "Perceived Legitimacy of Antipandemic Measures: Findings from West and East Germany, the Czech Republic, and Slovakia at the Peak of the COVID-19 Crisis" (2023) 29 Psychology, Public Policy, and Law 549–62.

[35] A "new" state of emergency was declared by government resolution No. 59/2021 Coll.

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emergency for a maximum period of 30 days and that the said period may be extended only with the prior consent of the House of Representatives [. . .], no other procedure for extending the state of emergency is possible. Unless the facts based on which the state of emergency was declared have changed, a state of emergency cannot be 're-declared' by the Government from the moment the 'authorized' state of emergency has ended, and the House of Representatives has not agreed to its extension.[36]

Here, the Court seemed to have resolved the issue, even though it had no jurisdiction to do so (the state of emergency has since been abolished by the act of the House of Representatives). As a result, this part of the Court's reasoning became the target of five judges who wrote their own concurring opinions. The judges argued persuasively that if the Court did not have jurisdiction to review the constitutionality of the declaration of the state of emergency in this case, then logically, there was no place for such strong obiter dictum. Moreover, if the Court had already announced that it does not have the power to rule on the constitutionality of a proclamation of a state of emergency, then this part had no place in the Court's decision. Finally, some of the concurring judges stressed that a new consensus had been reached between the government and the majority of the House. Personally, I agree with the concurring judges who pointed out many flaws in the Court's brief reasoning, which was inconsistent, suffered from questionable methodology and contradicted previous case law. Above all, the opinion of the Court was so short that it failed to provide any meaningful legal reasoning. Further, it ignored the rapid political evolution that had taken place in the meantime and the new balance between the House of Representatives and the government.[37]

And indeed, political evolution did take place. In mid-February 2021, the COVID-19 crisis reached its peak in the Czech Republic, and the parliamentary opposition soon came under pressure from the regions controlled by the same parliamentary opposition. In a nutshell, all major parliamentary factions agreed that the continued state of emergency was necessary. Therefore, the parliament did not lift the state of emergency immediately, but the deputies postponed it until the adoption of a brand-new law that would cover some specifics of the legal regulation of pandemics.[38] In the same month, on 27 February 2021, the legislature passed a law dealing specifically with COVID-19 in an accelerated procedure within a few days[39] (see III.4. below).

Prior to March 2021, it was extremely difficult to subject most executive measures adopted during the state of emergency to judicial review. The Constitutional Court repeatedly emphasized in its case law that these measures were laws (albeit "*sui generis*"). Since judges in the Czech Republic are bound only by acts of Parliament (legislation), all other laws may be reviewed by any ordinary judge. If the judge finds that the law is in conflict with the constitution or legislation, they will set the law aside (the judge, therefore, cannot annul the law).[40] However, no one in the Czech Republic can file a lawsuit against a law that is directly applicable to his or her legal situation. In Czechia, there is no constitutional complaint that can be lodged against the law which directly violates rights, unlike in Germany and Hungary. Even if a law directly imposes obligations on individuals, a decision or other state action to apply the law (police intervention, seizure, arrest, etc.) is still required to initiate legal proceedings.

[36] The decision of the Czech Constitutional Court of 16 March 2021 No. Pl. ÚS 12/21, para 22.

[37] See especially the concurring opinion of Justice Filip.

[38] House resolution No 84/2021 Coll.: "The House of Representatives abolishes the state of emergency on the date of entry into force of the Act on Emergency Measures for the COVID-19 Disease Epidemic, but no later than 27 February 2021."

[39] Law no. 94/2021 Coll. on emergency measures in the event of an epidemic of disease COVID-19.

[40] The Czech Constitution, Art. 95. See in more detail Kosař and Vyhnánek (note 1), chapter 7.

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Most government measures in relation to COVID-19 were directly applicable and imposed immediate duties on individuals and corporations (e.g., bans on entry into some areas, face-mask mandates, work obligations of medical students, closures of schools, restaurants and other services, and the closure of state borders). Individuals and corporations could not challenge those rules but needed to wait for the public authority to make a decision or take some other action against them (or even provoke such a decision or action). This is why very few judicial cases were decided on the merits during this period. Most cases ended in vain, as the plaintiffs sued the state for enacting the law.[41] Some lower administrative courts tried to subsume these situations under lawsuits against unlawful interference by public authority. In this way, at least one lower court tried to create a special lawsuit against the direct effect of the law.[42] One chamber of the Supreme Administrative Court tried another approach: it simply assumed that the origin of the unlawful interference in the case of the prohibition on personal participation in teaching was the primary school – which is why the plaintiff could sue that school.[43]

The grand chamber of the Supreme Administrative Court rebuffed both ways of challenging the emergency laws. In the grand chamber's opinion, neither schools nor shops, etc., can be held liable for a law enacted by the government if this law prohibited attendance at classes or closed the shops. Moreover, the effects directly resulting from a legal provision cannot constitute unlawful interference that can be contested before administrative courts. If these crisis regulations could be directly challenged (without any decision or another action aimed at the plaintiff), any law with direct effects could be sued before the administrative courts. This would be clearly beyond the power of the administrative judiciary, concluded the grand chamber.[44]

As a result, the only way to challenge these measures directly before the Constitutional Court was through the few institutions that were empowered to challenge laws directly (so-called general norm control), usually involving a group of deputies or senators. The problem was that the Constitutional Court could only rule on these complaints while the law was still in force. If its validity expired or the law was repealed by the lawmaker, the Constitutional Court must dismiss the complaint. As the "lifespan" of these measures was extremely short, the Constitutional Court was not able to rule on any of the cases filed by parliamentarians. All these cases were dismissed. The only exception was in February 2021, also thanks to the fast-tracked work of the judge-rapporteur attached to the case (the case arrived at the Court at the end of November 2020, and the Court decided the case within two months; by the time the case was announced, the law was no longer in force). The Constitutional Court, in this uniquely speedy case, abolished the executive crisis measure prohibiting retail sales and the sale and provision of services in establishments because the law was too broad and disproportional.[45]

4. The second phase of fighting the pandemic: "The rule of judges" (March 2021–December 2021)

The lack of proper judicial oversight of crisis regulation was severely criticized at the end of 2020 and the beginning of 2021. The COVID-19 law enacted in February 2021 allowed

[41] For some examples, see the reasoning of the grand chamber quoted below, note 39.

[42] The judgment of the Municipal Court of Prague of 11 November 2020 No. 14 A 45/2020-141.

[43] The judgment of the Supreme Administrative Court of 19 November 2020 No. 8 As 34/2020-100.

[44] The judgment of the grand chamber of the Supreme Administrative Court of 30 June 2021 No. 9 As 264/2020-51 (for the sake of academic fairness, I must say that I was the judge-rapporteur of this grand chamber decision).

[45] The judgment of the Constitutional Court of 9 February 2021 No. Pl. ÚS 106/20 (based on the petition of the group of senators).

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for much easier judicial review, and as a result of its adoption, the parliamentary opposition also agreed to the extension of the state of emergency.[46] The adoption of the law marked the beginning of a new ("litigious") phase in the legal handling of COVID-19.[47]

The pandemic alert began on the day the law was published, 27 February 2021. The state of pandemic alert was combined with the state of emergency for most of its duration. The law created new powers for the Ministry of Health and regional sanitary authorities. The most important innovation of the law was a new right for citizens to sue the Ministry of Health or the sanitary authorities and to challenge the laws issued by these institutions during the state of pandemic alert. Regulations enacted by the Ministry were challenged before the Supreme Administrative Court, while those enacted by the regional sanitary agencies were challenged before lower administrative courts. The Czech Supreme Administrative Court was selected to do this job because of the executive nature of those laws (which made this court a more natural candidate for this task than the Constitutional Court).[48]

In order to make this new proceeding fit with the general competences of administrative courts, the COVID-19 Law labelled these emergency regulations "measures of general nature"[49] (which are within the powers of the administrative judiciary), even though the emergency regulations do not fit the doctrinal concept of "measures of general nature."[50]

If the regulation was no longer valid, the court had to rule on the case regardless[51] – an important novelty for the administrative courts, which otherwise never adjudicate on measures which have ceased to be valid.

A flood of cases followed (more than 300 cases were filed with the Supreme Administrative Court in 2021). Many regulations issued during the pandemic alert were annulled by the Supreme Administrative Court. There were two main reasons why so many regulations were annulled or declared unlawful by the Court. The first was the strict proportionality requirement in the Covid-19 law. The second was that the Covid-19 law was hastily drafted and did not provide many of the powers that the Ministry of Health believed it had. What happened in 2021 and 2022 might be called a sort of formalistic (textualist) judicial activism.

First, the Covid-19 law was quite strict with respect to many features of the regulations enacted during the pandemic alert. The authorities had to apply proportionality analysis while drafting the justification of the regulation. Because the Ministry of Health was unable to apply this requirement and largely ignored the application of the

[46] A new state of emergency was declared by the government on 26 February 2021, starting the next day (No. 96/2021 Coll.). The deputies wanted a new state of emergency to distance themselves from the previous one, which had been declared in a questionable way (see 2.3). The state of emergency was extended once (146/2021 Coll.) and ended on 11 April 2021.

[47] In Czech see Terezie Boková, "Jarní pandemická sezóna: pokus o shrnutí jarní judikatury NSS k přezkumu mimořádných opatření v režimu pandemického zákona" [Spring Pandemic Season: An Attempt to Summarize the Spring Case Law of the Supreme Administrative Court on the Review of Emergency Measures under the Pandemic Law] (2021) Soudní rozhledy 219–24. In English Šimon Chvojka and Michal Kovalčík, "Judicial Review of COVID-19 Restrictive Measures in the Czech Republic" (2022) 2 Institutiones Administrationis – Journal of Administrative Sciences 112–32.

[48] See the *travaux préparatoires* to the law no. 94/2021 Coll.

[49] In German law called *Allgemeinverfügung*, in Czech called *opatření obecné povahy*. See Peter Kukliš, "Constitutional Basis of Public Administration (Selected Problems)" (2019) 102 Právny Obzor 72–87, at 83.

[50] Czech administrative courts have the jurisdiction to review and annul individual decisions as well as the said measures of general nature. In addition, they may set aside laws enacted by the executive branch (but not legislature) in individual cases. See in more detail Kosař and Vyhnánek (note 1), chapter 7.

[51] The Covid-19 Law, Art 13.

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proportionality principle, the Supreme Administrative Court started to annul measures enacted by the Ministry.[52] Moreover, while making a new regulation, the authority had to review the previous regulation and assess its effectiveness. If it failed to do so, the new regulation would be unlawful.[53] The case law demanded that the authority justify and prove almost everything. This requirement found drafters of the regulations unprepared and unable to do so.[54] This, combined with the fact that the law provided for easy standing (virtually anyone could contest the regulations), caused so many annulments.

Second, the COVID-19 law was hastily drafted and suffered from many gaps and unclear rules. The Supreme Administrative Court refused to apply friendly reasoning in favour of the authorities and instead rigorously demanded that only proper statutory authorization could allow the Ministry and other authorities to produce crisis regulations. Accordingly, in May and June 2021, the Supreme Administrative Court found that many regulations did not have the proper statutory basis. Many bans, including closures of restaurants,[55] elementary schools and kindergartens[56] (ironically, only universities were under the powers of the Ministry of Health) and many other services[57] were found to be beyond the powers of the Ministry.

The lessons of the Spring 2021 case law forced the legislature to enact an amendment to the COVID-19 law. The February 2022 amendment fixed many flaws criticized by the Supreme Administrative Court.[58] However, this amendment was not tested in practice because the pandemic had begun to recede. Most of the provisions of the Covid-19 Law ceased to be effective on 1 December 2022, and the "pandemic alert" became a historical piece of the legislature. We may also say, however, that from a legal point of view, the legal system is again unprepared for any global pandemics that might occur.

5. States of emergency after COVID-19 (since 2022)

The last state of emergency related to COVID-19 was declared on 26 November 2021 and lasted just one month.[59] COVID-19 was over, at least for now. But the world did not return to the good old peaceful days. On 24 February 2022, the Russian war against Ukraine began, with a flood of refugees from Ukraine. Soon, hundreds of thousands of refugees were crossing the Czech borders, and the government was struggling to meet the needs of so many people (mostly women with children). The response was to declare a new state of emergency in early March 2022. This state of emergency lasted almost four months

[52] See the judgment of the Supreme Administrative Court of 14 April 2021, No. 8 Ao 1/2021-133, where the Court made it clear that it would demand that the Ministry of Health follow all the statutory requirements (including proportionality) while enacting the regulations. Similarly, the judgment of 20 May 2021, No. 8 Ao 4/2021-75.

[53] The judgment of the Supreme Administrative Court of 28 June 2021, No. 6 Ao 7/2021-126.

[54] Only a few judgments distanced themselves from these (quite often excessive) requirements. See the judgment of the Supreme Administrative Court of 30 July 2021, No. 5 Ao 25/2021-51 ("There is no need to prove facts commonly known, such as the danger of an ongoing pandemic of this disease, or the fact that in countries where it is out of control, this pandemic is causing overload on the health system, with the associated significant loss of life and damage to health, as well as extensive economic damage, on a scale quite incomparable to the consequences of seasonal epidemics of ordinary influenza. It is similarly notorious that respiratory protective equipment, such as respirators and other face masks, which are recognized and used worldwide, are generally effective in limiting the spread of this infectious disease.").

[55] See the judgment of the Supreme Administrative Court of 21 May 2021, No. 6 Ao 22/2021 – 44 and the subsequent case law.

[56] See, e.g., the judgment of the Supreme Administrative Court of 2 June 2021, No. 9 Ao 3/2021-41.

[57] The judgment of the Supreme Administrative Court of 22 June 2021, No. 8 Ao 6/2021-91.

[58] No. 39/2022 Coll.

[59] No. 434/2021 Coll.

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(119 days) until the end of June 2022.[60] The purpose of this was to simplify some legal procedures and generally provide the government with exemptions from the duty to follow some strict legal rules in public procurement, etc.

Unlike the COVID-19 states of emergency, the "Ukrainian" state of emergency was much less controversial, also because it did not impose any duties on citizens. Accordingly, there were no judicial disputes relating directly to this state of emergency. However, one interesting feature of this state of emergency has already been discussed above, in part I.2 (where I explained the problems of checks and balances relating to the declaration and extension of states of emergency).

6. The state of danger in practice

In part I.1., I already explained that the 2000 Crisis Regulation Act created a so-called state of danger, the least invasive state of emergency, which is not regulated by the 1998 Constitutional Act on the Security of the Czech Republic. A state of danger is declared if lives, health, property, or the environment are threatened, if the intensity of the threat does not reach a significant extent and if it is not possible to avert the threat through the normal activities of administrative authorities. If the emergency exceeds the powers or capabilities of the region, the governor should request that the government declare a state of emergency.

The governor of the region (or, in Prague, the mayor) may declare a state of danger applicable to part of the region's territory or the entire region. A typical example of when the state of danger is declared is for less serious natural disasters, such as small-scale floods, landslides, and tornadoes, but also technical accidents (failure of a waterworks, leakage of a dangerous pollutant, etc.).[61] In practice, states of danger are not controversial, and I am aware of no litigation related to them.

IV. Conclusions

The first decades of this century showed that Czech emergency law worked well for short-term natural disasters. However, the real problem came in 2020, with the emergence of the COVID-19 pandemic and the need for a long-term state of emergency. It soon became clear that the rules that worked for floods and other disasters did not work for long-term global pandemics. The rules do not provide for effective judicial review of emergency measures (one cannot challenge these measures as such but must wait until an individual decision is made that is addressed to the future plaintiff) and thus shift the balance of power disproportionately towards the executive.

The solution to this dilemma – a special law applicable to the COVID-19 pandemic – proved to be both short-lived (the law was in force for less than two years) and too narrow (it applied only to COVID-19 and not to any other pandemic). In addition, the poor drafting of the law meant that the executive could only make regulations in a few areas (for example, universities could be closed, but not other schools). In any case, the law expired at the end of 2022, and the situation returned to how it had been before 2021.

Memories of COVID-19 are fading fast, and there are no plans to reform the relevant legislation. Of course, a global pandemic of any sort could strike again at any time, and the legal system is not prepared to deal with it. While politicians may be well aware of this ticking bomb, no serious politician will risk their reputation by proposing any similar legal

[60] No. 43/2022 Coll. (the Government's decision to declare a state of emergency in order to address the migration wave), extended by No. 77/2022 Coll.

[61] For some examples in Czech, see https://www.hzscr.cz/clanek/web-krizove-rizeni-a-cnp-krizove-stavy-krizove-stavy.aspx?q=Y2hudW09Mg%3D%3D (the website of Czech firefighters, accessed 29 July 2024).

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reform. Dealing with the pandemic became yet another example of an issue that deeply polarised the population. Such unpopular legislation would certainly bring back the unhappy memories of COVID-19 and all the haphazard actions taken to counter the pandemic. With this in mind, any legal reform (no matter how useful) would be a suicide mission for any politician.

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