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PANDEMIC AND THE CONSTITUTIONAL LAW IN THE CZECH REPUBLIC

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Вана А., Коуделка З. Пандемія і конституційне право в Чеській республіці.

Вказуєься, пандемія Covid або китайського грипу ввела низку країн у надзвичайний стан. Чи є цей стан явно надзвичайним станом, не має вирішального значення, оскільки різні правові системи використовують різні терміни, але вирішальним є те, що щодо своєї влади чеська держава використовує колективні та загальні заборони для регулювання осіб інакше, ніж за звичайних умов.

Стаття присвячена аналізу впливу пандемії Covid на правову систему, виявляючи прогалини в поточному законодавстві. Основна теза, розвинута в рамках цього дослідження, полягає в тому, що фундаментальним юридичним рішенням у випадках надзвичайних ситуацій повинно бути конституційне регулювання. У цьому контексті пропонується визначення сфер, які потребують внесення змін Конституційним Законом про Безпеку Чеської Республіки.

Однією з ключових рекомендацій дослідження є конституційне втілення механізмів надзвичайного законотворення виконавчою владою, а також впровадження системи контролю з боку Палати депутатів та обов'язкової експертної оцінки актів надзвичайного законодавства Конституційним Судом. Пропонується також вдосконалити форму законотворчості для уніфікованих заборон і розпоряджень, надаючи перевагу формі загального характеру порівняно зі спеціальним адміністративним рішенням.

Досвід пандемії Covid підтвердив, що правове вирішення кризи має випливати з конституційного законодавства. Регулярний акт не може бути підставою. Це конституційне законодавство в майбутньому може бути також конституційним актом про безпеку. Хоча доцільно внести до нього зміни в таких областях:

1. Запровадити можливість надзвичайного законодавства, виданого виконавчою владою.
2. Запровадити парламентський розгляд окремих актів законодавства про надзвичайні ситуації.
3. Запровадити обов'язковий перегляд Конституційним Судом актів надзвичайного законодавства.
4. У разі загальних заборон, виданих Міністерством охорони здоров'я, змінити їх положення із загального характеру на підзаконні.

Ключові слова: Covid, пандемія, надзвичайне законотворення, законодавство.

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The Covid or Chinese flu pandemic put a number of countries in a state of emergency. Whether this state is explicitly a state of emergency is not decisive, since various legal systems use various terms, but it is decisive that in respect of its power the Czech state uses collective and blanket bans to regulate persons differently than under normal conditions.

The article deals with the impact of the Covid pandemic on the legal system. It points out to the deficiencies in the current legislation. Its basic idea is that the fundamental legal solution to states of emergency must be represented by constitutional regulation. It determines areas in which the Constitutional Act on the Security of the Czech Republic should be amended. Constitutional embodiment of emergency lawmaking with executive power is suggested along with introducing controls by the Chamber of Deputies and with obligatory inspection of emergency legislation acts by the Constitutional Court. It is also suggested for a form of legislation to be thoroughly used for blanket bans and orders in preference to a form of a special administrative decision – measure of a general nature.

The experience with the Covid pandemic approved that the legal solution to a crisis must stem in the constitutional legislation. A regular act cannot represent the basis. This constitutional legislation may in the future also be the constitutional act on security. Although it is appropriate to amend it in the following areas:

1. Introduce the possibility of emergency legislation issued by the executive power.
2. Introduce parliamentary review of individual emergency legislation acts.
3. Introduce mandatory review of emergency legislation acts by the Constitutional Court.

4. In the case of general bans issued by the Ministry of Health amend their provisions from general nature to sublegal regulation.

Key words: Covid, pandemic, emergency lawmaking, legislation.

Introduction. The Covid or Chinese flu pandemic put a number of countries in a state of emergency. Whether this state is explicitly a state of emergency is not decisive, since various legal systems use various terms, but it is decisive that in respect of its power the Czech state uses collective and blanket bans to regulate persons differently than under normal conditions.

After the fall of totality in 1989 the changes in the legal system in Bohemia, Moravia and Silesia completed with the adoption of a new Constitution effective from 1993, the state of emergency was omitted. The criminal law cancelled the provision of martial law [1] and the Constitution, having known the state of emergency and the state of war, did not settle the conditions for operation of the State after the declaration thereof. So even the declaration of such states were not changed by the executive power. Non-war (civil) state of emergency was not even mentioned. As if the constitution dreamt a dream about November 1989 turning into a state of stable errorless operation.

It was waken up from that dream by great floods in Moravia in 1997, when the absence of the constitutional basis to solve the situation showed, and as a consequence of a natural disaster of a great extent the normal life of the people and operation of public institutions is affected or disabled. In some towns the town halls, offices, courts and firehouses, police stations and other service centers were flooded that had a great significance for the help to others.

Life showed that states of emergency on a constitutional level could not be disregarded. In reaction to the Moravian floods of 1997 the constitutional act on the security of the Czech Republic was adopted in the following year [2]. In many provisions it is regulated by the crisis management act [3]. Although the crisis management act is an ordinary act and the special legal regime in relation to the laying of duties to the people and the performance of the state power is established by the constitutional act on security itself. This constitutional act was used in a larger extent during the solving of floods in Bohemia in 2002. It was followed by no critical situation in the country requiring the blanket use of the constitutional act on security until March 2020, when Europe was affected by the Covid pandemic.

1. Application of the Constitutional Act on the Security of the Czech Republic

At the beginning of the pandemic in March 12 2020 a state of emergency was declared pursuant to the Constitutional Act on the Security of the Czech Republic allowing the government determining the duties and bans included of interference in the fundamental rights of persons. In the case of the actual declaration of the state of emergency the Constitutional Court decided that it was a special act of ruling not subject to the judicial review apart from exceptional cases. In the case of determination of bans and orders in the state of emergency laid by the government it was at first not apparent, how to assess the act used by the government to do so. Formally it was a governmental resolution (crisis management measure), materially though it included generally binding rules for the manners of persons enforceable by the state power, thus legal rules. This governmental resolution was materially evaluated as a legal regulation approved of by the Constitutional Court [4].

It is right that the governmental crisis management measures are evaluated materially. However a question arose regarding the legal power of this legal regulation in a material sense of the word. It is not an implementing provision such as the ordinary regulation of the government. Since the government can use it to restrict the rights of people stipulated by the law and to impose obligations to people, and owing to the fact that obligations can only be laid by the law [5] and the legal regulation is restricted or amended without such act explicitly remembering of their restrictions in the state of emergency (cancellation of obligation to keep electronic records of turnover), we come to the conclusion that the legal power of these legal regulations in the material sense of the word is on the level of law. This conclusion is confirmed by the fact that the fundamental rights and freedoms can be restricted, too, whereas the Charter itself allows determining boundaries of the fundamental rights and freedoms only to the law [5]. Materially it is a legal regulation with the power of the law, so the act of emergency (regulatory) legislation. The condition for this special emergency legislation, the name of which is not formal, but materially it is emergency legislation, is the existence of a state of emergency.

However the Constitutional Court accepted the conclusion that the legal power of the governmental resolution issued according to the emergency act on the security as the legal regulation is only sublegal. This way the Constitutional Court allowed that the relevant governmental resolutions could as sublegal regulations be evaluated as regards their lawfullness and constitutionality by other courts, too, especially the administrative courts, albeit only for the given proceedings (diffusional court review of the legal regulations). That could not happened in the cases of legal regulations on the level of the law. Since the court is bound by the law, it can only evaluate the compliance of a sublegal regulation with the law and the Constitution. The defectiveness

of the legal regulation may only be assessed by the Constitutional Court [4]. If the regulations are sublegal, a question arises why they miss the form of a governmental regulation, which is a standard sublegal regulation of the government and may be issued even without explicit legal authorization [4].

'The Constitutional Court commented on the fact that the governmental resolutions issued pursuant to the constitutional act on security have the legal nature of a sublegal regulation in judgment from February 9 2021 as a real fact, since its procedure in the review thereof [4] was amended without giving the grounds for it in the reasoning. It is an even more startling procedure since the judge correspondent Vojtěch Šimíček in the preceding decision of the Constitutional Court applied a different standpoint explicitly criticizing the Constitutional Court for not having settled the issue whether the governmental resolutions issued according to the constitutional act on the security have the legal power of an act or of a sublegal regulation stating: " *…The Constitutional Court explicitly refused to give its standpoint to the issue whether it is a reviewable legal regulation in the proceedings to cancel the acts or its individual provisions [Section 87(1)(a) of the Constitution], or to cancel other legal regulations or their individual provisions (Section 87(1)(b) of the Constitution] – however it expressly accepted that such fact may have significance from the viewpoint of the petitioner´s active legitimation* [6]*"*.

The part of the resolution of the Constitutional Court criticized by Šimíček included a dispute between the petitioner and the government as to whether the crisis management measure is a sublegal regulation, which has the nature of the law, which was claimed by the government. To this dispute the Constitutional Court stated: "*However this issue did not have to be definitively answered right now"* [6]. This way the Constitutional Court did not accept the opinion expressed earlier it its resolution that it is a sublegal provision stating: "*The challenged resolution of adoption of the crisis management provision has legal-normative contents defined by the general subject and class of entities (see point 40). That means that although the challenged act is not a regulation pursuant to Article 78 of the Constitution, it has the nature of a general normative legal act. Based on the stated conclusion regarding the generality of the subject and addressees of the resolution in question the Constitutional Court came to an end that the challenged crisis management measure of the government is materially of a nature of a different legal regulation pursuant to Article 87(1)(b) of the Constitution or to provision of Section 64(2) of Act on the Constitutional Court*» [4]. It should however be added that until the judgment of February 9 2021 the Constitutional Court decided only with resolutions that binding character of a judgment.

This way the Constitutional Court moved the sublegal regulations into a role that they had not belonged to until now. Sublegal regulations of a state were only implementing regulations, now the governmental resolutions factually become original legal regulations since they are not intended for the implementation of an act, but often lay duties and bans that are not explicitly amended in an act. Such conception of sublegal regulations significantly raises the position of the executive power in a state beyond the explicit constitutional provisions.

Also the constitutional judge Vladimíř Sládeček refused to consider the crisis management measure of the government to be a sublegal regulation and expressly stated that he could not imagine that: *"…a sublegal regulation could restrict the fundamental rights"*. Sládeček had reservations to the fact that the Constitutional Court accepted the crisis management measures as a legal regulation, but as it already had happened, he considers it as a legal regulation with the power of the law [7]. He also gave the same standpoint in his different standpoint from May 12 2020 to the resolution of the Constitutional Court Pl.ÚS 11/20 [8].

Similarly, constitutional judge Jan Filip demanded that the crisis management measures of the government were perceived as an act, which he stated in his different standpoint from May 12 2020 stating: *"I insist on the standpoint that owing to their seriousness (usually they are related with infringement in the fundamental rights and freedoms), crisis management measures must be approached as if they represented an act (in relation to Article 4(2) of the Charter), although they are not an act"* [9]. But he did not publish any different standpoint toward the resolution of the Constitutional Court from February 9 2021 prepared by the judge correspondent Vojtěch Šimíček treating the crisis management measure as a sublegal regulation.

Crisis management measures of the government possibly having the power of the law was stated in an extensive text about pandemic by Filip Křepelka from the Faculty of Law of the Masaryk University in Brno [10]. The opinion of crisis management measures having legitimate legal power was not unique; it was held by the representatives of legal science and some Constitutional Court judges, so the Constitutional Court should have given a clear standpoint to their legal power, which did not happen.

2. Act on the Protection of Public Health

Besides the regime of the constitutional act on the security the Ministry of Health vastly used the option of issuing measures of general nature banning or ordering a number of blanket bans. The Ministry leaned on Section 69(1)(i) of Act No. 258/2000, on the Protection of Public Health allowing to issue a ban or an order of certain effectiveness to liquidate the epidemic or the risk of its creation. It is an

indefinite general authorization, which is different in comparison to other authorizations, whereas the law explicitly allows banning or ordering the expressly stated activities to the stated addressees – medical facilities, theater performance organizers.

However there is a constitutional principle that no one can be forced to do what the law does not lay (Article 2(4) of the Constitution and Article 2(3) of the Charter of Fundamental Rights and Freedoms). If the Ministry of Health is by a free and indefinite authorization allowed to lay the duty that the law did not directly know, e.g. blanket wearing of masks in 2020, this constitutional principle was infringed, which was introduced in reaction to the totality period until 1989, when a number of obligations were laid only be sublegal regulations. This contentious and free legitimate authorization was used by the Ministry of Health extensively and in summer 2020 it was used to determine a number of bans and orders in the time, when the state of emergency [11; 12] was temporarily not in force. In spring 2020 legal academics Jakub Dienstbier, Viktor Derka and Filip Horák stated to the legislation of issuing of these regulations that: *"it is constitutionally very problematic to say the least"* [13]. Also Filip Křepelkta identified himself with their standpoint [10].

By using a measure of general nature the rapid abstract review by the Constitutional Court is out of question in the proceedings of the petition for the cancellation of the legal regulation which may be submitted also by a group of MPs and senators, so by opposition, too. A measure of general nature does not on the one hand completely exclude the review by the Constitutional Court, on the other hand it is bound to the termination of the procedures within the administrative courts, which may last for years.

3. Pandemic Act

In 2020 voices appeared that for the solution of the situation the existing legislation is not right and a special pandemic act should be adopted. Therefore the Ministry of Health prepared a governmental draft act on emergency measures during the epidemic of COVID-19 disease in 2020 (commonly termed as the Pandemic Act). On May 7 2020 [15] the government adopted the draft and on the same day passed it to the Chamber of Deputies. The government then lost interest in its hearing. That was in the situation, when for other acts used rapid hearings in the state of emergency legislation. In the end this draft was not adopted.

Only after discussions with opposition the government submitted another draft act of the same name on February 15 2021 [14]. It was passed in the same month in the state of emergency legislation. On February 26 2021 pandemic act was passed after amendments agreed with opposition [16]. The government and the opposition agreed since the pandemic act was expected to replace the state of emergency from March 2021. It actually did not happen. The state of emergency was maintained and the Ministry of Health further extensively used the elastic enabling legal regulations of the act for the protection of public health. The highly regarded pandemic act did not fulfill the expectations.

The system defect of the pandemic act is in its legal power. Provided that the state has for over a year dealt with an emergency situation solved by the government by extensive bans and orders, including the night curfew and restriction to free movement within a municipality or district, long-term closure of a number of stores and services as a blanket ban in the w hole country, it is such a principal infringement to the common life and rights of persons that it cannot have legal support on the level of a mere act. So regardless of the content, the pandemic act as a regular act is an insufficient basic source of law to solve the situation. It can only be an act implementing the constitutional provision to solve emergency situations.

Provided that in our legal system the pandemic act, or any other act, cannot be the basic source to solve a crisis, a question arises as to whether such sufficient constitutional source is the constitutional act on security, or whether another constitutional act should be adopted. The fact that to solve the situation the constitutional act on security has been used for over a year, without addressing its amendment, is an actual proof that it is a sufficient constitutional source to solve emergency situation. There is no need to adopt any new special constitutional pandemic act.

On the other hand there were areas which are worth a thorough consideration and possible amendment also on the level of a constitutional act. The suitability of amending the constitution act on security was also mentioned by the constitutional judge and the professor of administrative law Mr. Vladimíř Sládeček or Jiří Vaníček [17; 18]. The amendment of the constitutional provisions should also include the areas of

a) Emergency legislation,

b) Parliamentary supervision over emergency legislation,

c) Review of legal regulations of emergency legislation by the Constitutional Court,

d) Measures of general nature in cases replacing legal regulations.

4. Emergency Legislation

Emergency, i.e. implementing legislation applied on the basis on special enabling acts empowering the executive power to set forth cases otherwise reserved to law represented a significant part of the legal system in the past. It was used by both democratic and totalitarian countries.

Well-known is the German enabling act by which the legislative power of the parliament was passed to the government [19]. The Reichstag did not lose

its legislative power, but presented the government with this power for the period of 4 years. Only by this act Hitler gained dictatorial power and did not surrender it even after the 4 years, although the Reichstag was not dismissed and remained active during the war. Also the Reichspresident was cut out from the legislative force of the government, when the Reichskanzler proclaimed the government acts. In both the Czechoslovakian constitutional theory and practice the enabling acts were looked into by Jaroslav Krejčí, who in his first book *Moc nařizovací a její meze* (1923) [20] dealt with the issue of limits of the enabling power according to the new Czechoslovakian constitution. The issue was whether the government may in exceptional cases on the basis of a lawful empowering by the parliament issue orders amending the law (contra legem) or orders amending the areas not amended by law (praeter legem). A discussion was held about Act No. 337/1920 by which the government empowered the taking of measures to the amendment of exceptional relations caused by war, and to the judgment of the Constitutional Court from November 7 1922 on the measure of the Stable Committee from July 23 1920 № 450 on incorporating Vitorazska and Valčicka (Valticka) [21]. In its reasoning the Czechoslovakian Constitutional Court expressed a legal opinion that acts or measures of the Stable Committee empowering the government to issue orders where law was need are unconstitutional. This standpoint was challenged by the coauthor of the constitution prof. Jiří Hötzel in a reference to the French legal practices and partially in a reference to the previous Austrian situation. Jiří Hötzel understood the legislative power of the parliament as its subjective right which could be passed to another body apart from the case in which the Constitution explicitly prohibited so.

Jaroslav Krejčí supported the standpoint of the Constitutional Court in the reference of the French legal constitutionalist Adhémar Esmein and León Duguit and by pointing out to the failure of the governmental draft of the enabling act submitted to the French parliament by the Briand´s cabinet during the direct jeopardy of the state by war in 1916. He refused the former Austrian practice as monarchist, when the ruler as the holder of the entire state power was limited only, when the constitutional explicitly stated so. In a republic it is a different situation. To support his arguments he included the limitations of the enabling power by the constitution of the Austrian Republic [22].

Jaroslav Krejčí proceeded from the presumption that the people are the holders of all state power in the Czechoslovakian Republic[23]. The constitution further defines bodies to which the sovereign people pass a certain part of their power. This way he holds on to the Esmein´s standpoint according to which the parliament is not the owner of the legislative law, but it is only its function [24]. Without the approval by the people the parliament must not pass its right. Empowering of the government to interfere in the law-making area is unconstitutional, unless it is given by the constitution itself or by another constitutional act. In such cases it is not any more the delegation of the parliament, but directly of the holder of the sovereign power – the people. Using the wording of Section 55 of the Constitution Krejčí refused that the government used orders to amend the areas not amended by the law.

Krejčí only admitted the possibility of empowering the government to legislation in a constitutional act. That also happened in a constitutional act on ordering power from 1938м [23], in the implementation of which Krejčí participated as the then Minister of Justice and the chairman of the Constitutional Court. However in the case of this enabling act it was necessary to gain the approval from the president of the republic to adopt an order with the power of the law or the constitutional act, so the government was not the absolute master of the legislative and constitutional power. The theoretic defense of his approach Krejčí gave in the masterpiece *Zmocňovací zákon a ústavní soud* (1939) [25].

Ordering (emergency) legislation can also include decrees with the power of the law or of the constitution of president Edvard Beneš issued against the proposal of the government. He was not empowered to do so by the parliament, but he empowered himself in a decree on temporary power of legislation [26]. These decrees were additionally passed after the war by the National Assembly and the Constitutional Court accepted their lawfulness, since they aimed at the restoration of constitutionality in times, when the normal constitutional regime was abandoned for the reasons of German occupation of the state [27].

Even after the Second World War the ordering (emergency) legislation was not abandoned. Well-known is the governmental regulation with the power of law on the protected area of the Prague Castle from 1954 [28] expropriating real properties in the premises of the Prague Castle (to the Catholic Church). At the same time this regulation was issued pursuant to an act on the state plan to develop national economy for 1954. This regulation with the power of the law had to gain approval from the president of the republic and was additionally passed by the National Assembly.

Yet the ownership of real properties at the Prague Castle and the economic plan for 1954 have nothing in common. That is another issue of the enabling acts, which on the one hand stipulate, for what purpose the government is empowered to adopt legal acts with the power of the law, but on the other hand the government interprets this enabling purposes very freely and uses them where inappropriate.

After the restoration of democracy in 1989 the ordering (emergency) legislation was abandoned. The fundamental obstacles of the ordering legislation were constitutional rules:

a) Granting the legislative power only to the Parliament [4].

b) Granting only the implementing role to the sublegal regulations of the executive power, their existence is bound to the implemented act and they must be issued within its powers [4]. Sometimes there can be situations, when the lawful empowering is cancelled, but not immediately there are existing implementing regulations to it. Those represent independent legal normative acts and must be explicitly repealed, unless a new act is adopted with the same content, albeit formally new legal empowering. The implementing regulation without the legal empowering is defective, but as regards the presumption of correctness of the legal acts it is in force until its repealing.

c) Obligations can only be laid to persons by law [4; 5].

It is apparent that the state may appear in a situation, which must be solved by law, whereas the work of the Parliament is disabled or the situation is so urgent that neither the adoption of an act within emergency legislation is a sufficient fast solution. France deals with this by special powers for the president of the republic [29]. So in this situation it is possible to transfer the establishment of legal rules to the executive power. Although under the conditions stipulated by the constitutional act.

By its nature the executive power disposes of much better prerequisites to solve emergencies. In our country the executive power is represented by the president of the republic having a democratic mandate granted in direct elections, and by the government. Since the transfer of the legislative power to the executive power is an extraordinary measure infringing the principle of the distribution of power, it should only be applied in agreement of both these front bodies of the executive power.

The constitutional act on security should explicitly stipulate that the fundamental rights of the people and other obligations generally indirectly defined may be laid in a decree of the president with the power of law issued against a proposal of the government, or in a governmental regulation with the power of the law, the effect of which requires the approval of the president of the republic.

5. Parliamentary Review of Emergency Legislation

Since emergency legislation is an infringement to a principle otherwise in force that the legislative power appertains to the Parliament the review and the final dominion of the parliament over the legislation must be persisted. In our legislative power the Parliament has two chambers, but the Chamber of Deputies has a stronger position, which may overrule the Senate with certain exceptions. Therefore such acts should be excluded from the emergency legislation, the passing of which requires the approval of the Senate. For other acts the Chamber of Deputies could adopt a resolution of disagreement. In such a case the stated acts of emergency legislation would lose force ex nunc. Although if the former other acts were to be amended, the original version of the acts would be renewed, the amendment of which in form of emergency legislation would be refused by the Chamber of Deputies. That assures the avoidance of legislative void in the amendment of a certain area of legal relations.

So the Chamber of Deputies would not lose it legislative force. Emergency legislation of the executive power would only complete it. Its power of cancel emergency legislation does not only secure the review of legal defects of such act of e.g. unconstitutionality, but also for the reason of their case incorrectness or different political choice in the legal solution of a certain situation. In addition the Parliament could always pass its own act to amend a certain case, which by the principle of a younger act prevailing over the older act, would be able to amend an act of emergency legislation passed by the government. So the Parliament would not have to only repeal the act, but also to amend it according to its political discretion. It would keep the dominion over law-making.

An advantage of such review in comparison to the present is the selective approach. Today the Chamber of Deputies may refuse the approval of the prolongation of the state of emergency, but it cannot abrogate individual resolutions of the government, which have the character of a legal regulation. This way the Chamber of Deputies does not have the dilemma that on the one hand it acknowledges the rightfulness of the state of emergency, but on the other hand it disagrees with specific restricting crisis management measures of the government. Now it either accepts them, or has to terminate the state of emergency to abrogate them. Newly the Chamber of Deputies could repeal individual acts of emergency legislation of the government and would only repeal those, of whose unsuitability or defectiveness it would be persuaded, but still keep them in force.

Vladimír Sládeček mentions the option of repealing individual crisis management measures of the government as soon as today. He does not restrict the controlling force of the Chamber of Deputies only to the possibility of cancelling the declared state of emergency, but also the individual crisis management measures [17]. Such stated is desired, although not applied in practice by the Chamber of Deputies owing to the absence of an explicit lawful adaptation. The refore it is suitable to amend such force of the Chamber of Deputies in the constitutional law.

6. Review of Emergency Legislation by the Constitutional Court

The state of emergency revealed shortages in the judicial review. The initial helplessness of courts was apparent as well as their unwillingness to deal with governmental resolutions on the merits (with crisis management measures) determining various obligations and measures of the Ministry of Health. The Constitutional Court gave its standpoint stating that the Constitutional Court is aware that it cannot have the same demands for these legal acts issued during the state of emergency as it has for the legal regulations issued during the calm weather. The fact is that it only took into consideration that the stormy weather is only for the benefit of the government, not the for the benefit of petitioners. For them it had the same strict conditions as if the weather was calm and refused a number of petitions for procedural reasons. Its attitude was such that it was not competent to assess the correctness of issuing a measure of general nature by the Ministry of Health, but only the resolutions of the government, which have material nature of a legal regulation. Since the legitimation for the review of a legal regulation before the Constitutional Court is limited with enumeration, it refused a number of petitions submitted directly by persons who were apparently not legitimate to submit such petitions. The significance of a fast approach to the abstract review of constitutionality in this case was also confirmed by the problematic decisions of the Metropolitan Court in Prague. Within the administrative judicature it accepted the practice of the Ministry of Health, who repeated in short intervals cancelled its own measures and replaced them formally with new ones of the same content. Yet, the ministry asked the Metropolitan court to refuse the petition for the review of the already cancelled measures and not to accept any changes in the prosecution for the review of its "new" measures. The metropolitan court complied with the proposal of the ministry, although the Constitutional Court no more accepted such practice in the case of the price regulation for the rent.The Highest Administrative Court had to step in and stated that if a measure of general nature were to be replaced contextually with a similar measure of general nature in a time interval actually disabling the court review of the first measure, the court shall allow a change in the original petition for the cancellation of the first measure. If the court fails to do so, and contrariwise refuses the petition for the reasons of lack of conditions of the proceedings based on the nonexistence of the challenged first measure of general nature, it violates the right to a just trial and to an effective judicial protection.

The Metropolitan Court in Prague also originally refused to review the measures laying obligations stating that it is a legal regulation that cannot be cancelled. Yet, the Constitutional Court stated that these measures are not a legal regulation so the Constitutional Court cannot cancel them, but they are subject to a review in administrative judicature [4]. The affected people this way appeared to be in a circle, when no court wanted to decide about their petitions. Also here the Highest Administrative Court stepped in and ordered the Metropolitan Court in Prague to hear the case within the proceedings of a petition for reviewing a measure of a general nature [29].

If the constitutional law explicitly adopted the option of creating emergency legislation by the executive power, besides parliamentary review it is correct to introduce judicial review, too. Since it is a measure of executive power made in a state of emergency, such legislation is suitable which excludes doubts about the constitutionality of emergency legislation act by one final review.

In order to review the case rapidly, it is correct to concentrate such review directly at the Constitutional Court, whereas the review is preferentially performed before other procedures. To avoid disputes in the case of active legitimation, it is possible to adopt the provision that the Constitutional Court review acts of emergency legislation directly in the Constitution. So issuing an act of emergency legislation commences officially and by law the proceeding of reviewing constitutionality of such act.

It is not new in the history of our law. This was the method of reviewing the constitutionality of the Stable Committee of the National Assembly by the Czechoslovakian Constitutional Court between years 1920 and 39 [23]. It was a reaction of the constitutional authority to a situation, when the legislative power was passed from the parliament to its one stable working body. Although it was not passed to the executive power, the constitutional authority then considered it to be necessary that this special procedure during the adoption of legal standards was sanctified by the Constitutional Court.

7. Measures of General Nature or Legal Regulation

A measure of a general nature is a special type of an administrative decision that is neither individual nor normative legal act introduced by the Administrative Procedure Code in 2004 [30]. A textbook case, when a measure of general nature should be used is the decision to locate a traffic sign. Such a decision is not a legal regulation, only has a restricted local meaning, and is not addressed specifically to individually defined persons, but to all who will use the given local communication in the given place.

However a measure of general nature was also used in cases, when its purpose is identical with the purpose of the provisions of implementing legal regulations. It was not and is not the meaning of a measure of general nature to replace legal regulations.

An example of such measure of general nature being extensively used without reasoning is the ban and restriction issued according to the act on public health by the Ministry of Health. The content of such measures of all-state effect is to lay obligations to generally defined persons (operators of pubs or even to all people). So materially its content represents a legal regulation.

Measures of the Ministry of Health were not, unlike the crisis management governmental measures, published in the collection of acts, they were published on the official notice board and the web of the Ministry of Health. Although within the repeated changes it was sometimes difficult to search. Should it have a form of a legal regulation, its publishing in the collection of acts would be clear, as it nowadays also has an electronic form so there is no risk of default.

For the future the use of measures of general nature when defining the obligations for the benefit of a normative legal act should be limited – administrative legal implementing provision (regulation, order). So also the bans issued by the Ministry of Health as measures of general nature, either according to the act on the protection of public health or the pandemic act, the legislator should unequivocally determine that for their introduction a form of a legal regulation needs to be used. It will also have impact on the fast and concentrated review by the Constitutional Court, whereas until the Constitutional Court decides, general courts can in individual cases decide not to use such sublegal regulation [4].

8. Conclusion

The experience with the Covid pandemic approved that the legal solution to a crisis must stem in the constitutional legislation. A regular act cannot represent the basis. This constitutional legislation may in the future also be the constitutional act on security. Although it is appropriate to amend it in the following areas:

1. Introduce the possibility of emergency legislation issued by the executive power.
2. Introduce parliamentary review of individual emergency legislation acts.
3. Introduce mandatory review of emergency legislation acts by the Constitutional Court.
4. In the case of general bans issued by the Ministry of Health amend their provisions from general nature to sublegal regulation.

REFERENCES:

1. Criminal Code of the Czech Republic № 141/1961. URL: https://www.derechos.org/intlaw/doc/cze1.html (дата звернення 11.05.2023).
2. Constitutional Act № 110/1998, on the Security of the Czech Republic (hereinafter referred to as the Constitutional Act on Security). URL: https://www.psp.cz/en/docs/laws/1998/110.html (дата звернення 11.05.2023).
3. Crisis Management Act № 240/2000. URL: https://ec.europa.eu/echo/files/civil_protection/national_disaster_management_system/czech_republic/240_2000_crisis_management_act.pdf (дата звернення 11.05.2023).
4. Constitutional Court from April 22 2020, Pl.ÚS 8/20. URL: https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezy/2020/Pl._US_8_20_vcetne_disentu_na_web.pdf (дата звернення 12.05.2023).
5. Charter of Fundamental Rights and Freedoms. URL: https://www.psp.cz/en/docs/laws/listina.html (дата звернення 12.05.2023).
6. Constitutional Court from December 8 2020, Pl.ÚS 102/20. URL: https://www.usoud.cz/en/decisions/2021-02-09-pl-us-106-20-state-of-emergency-in-the-time-of-the-coronavirus-pandemic-restriction-of-retail-sales-and-services (дата звернення 12.05.2023).
7. Sládeček, V. Vláda a nouzový stav. *Správní právo* 5-6/2020, p. 266–281 (275-276).
8. Sládeček, V. Different standpoint of the constitutional judge to the resolution of the Constitutional Court from May 12 2020, Pl.ÚS 11/20, point 1.
9. Filip, J. Different standpoint of the constitutional judge to the resolution of the Constitutional Court from May 12 2020, Pl.ÚS 11/20, point 6.
10. Křepelka, F. Právo pandemie covidu-19: náčrt celkového obrazu. *Časopis zdravotnického práva a bioetiky* 2/2020, s. 1–70 (35).
11. Koudelka, Z. Nouzové zákonodárství a roušky. *Právník* 12/2020, p. 956–968. p.
12. Wintr, J. K ústavnosti a zákonnosti protiepidemických opatření na jaře 2020, *Správní právo* 5-6/2020, p. 282–297 (293-294).
13. Dienstbier, J., Derka, V., Horák, F. Ústavnost mimořádných opatření podle zákona o ochraně veřejného zdraví. *Právník* 5/2020, p. 417–432 (432).
14. The print of the Chamber of Deputies 859, 8th election period 2017-21.
15. Governmental resolution from May 7 2020 № 515. URL: https://www.randls.com/en/coronavirus/list-of-coronavirus-regulations/government-resolutions/ (дата звернення 12.05.2023).
16. Act № 94/2021, on special measures during the epidemic of the COVID-19 disease (hereinafter referred to as the pandemic act).
17. Sládeček, V. Vláda a nouzový stav. *Správní právo* 5-6/2020, p. 266–281 (278–281).

18. Vaníček, J. Ústavný zákon o bezpečnosti státu v čase vojny, vojnového stavu, výnimočného stavu a núdzového stavu a ústavní zákon o bezpečnosti ČR. In PAVLÍČEK, V. a kol. *Právo a bezpečnost státu*. Praha, Univerzita Karlova 2002, p. 18–62 (60–62).
19. Pavlíček, V. Bezpečnost České republiky a potřeba ústavních změn: sborník příspěvků z mezinárodní konference, Prague: Charles University, Faculty of law, 2004. ISBN 80-85889-57-9, p. 29–50.
20. Krejčí, J. Moc nařizovací a její meze. Parlament magazine publishing, Prague l923, 32 p.
21. Government Gazette of the Czechoslovakian Republic. № 284/1922.
22. Constitution of the Austrian Republic from October 1 1920. URL: https://constitutionnet.org/sites/default/files/Austria%20_FULL_%20Constitution.pdf (дата звернення 12.05.2023).
23. Constitution Czechoslovakia Republic introduced by Act № 121/1920. URL: http://czecon.law.muni.cz/dokumenty/31558 (дата звернення 12.05.2023).
24. Esmein, A. Éléments de droit constitutionnel. 6. édition, Paris 1914, p. 682n.
25. Krejčí, J. Zmocňovací zákon a ústavní soud. Vydavatelstvo časopisu Moderní stát, Prague 1939, p. 102.
26. Decree of the President of the Republic. *Czechoslovakian Official Journal*. № 2/1940.
27. Judgment of the Constitutional Court No. 55/1995.
28. Government Regulation № 55/1954, on the Protected Area of the Prague Castle.
29. Constitution of the French Republic from October 4 1958. URL: https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958 (дата звернення 12.05.2023).
30. Judgment of the Highest Administrative Court from October 13 2020, 4 As 258/2020 cancelling the resolution of the Metropolitan Court in Prague from August 7 2020, 3A 76/2020-104. URL: https://www.europarl.europa.eu/cmsdata/175155/20090113ATT46029EN.pdf (дата звернення 12.05.2023).