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Rule of Law and Democratic Decline During States of Emergency – The Case of the Czech Republic[1]

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ABSTRACT

Purpose: This paper analyses the impact of the state of emergency declared during the Covid-19 pandemic on public administration, specifically focusing on the Czech Republic. It aims to understand the correlation between the rule of law, the legitimacy of measures taken during the pandemic, and the public's willingness to comply with these measures.

Design/Methodology/Approach: The paper employs a comparative study design, examining the consistency of pandemic measures with the core principles of the rule of law – legality, proportionality, and legitimate expectations. The study focuses on measures that restrict rights (e.g., right to education) and those that, conversely, grant rights (e.g., decisions on compensation bonuses). The methodology involves an analysis of the relevant case law, administrative practice, and data from several databases.

Findings: The study reveals frequent breaches of legality and proportionality, both in the restriction and granting of rights. Findings indicate that the public's willingness to comply with measures decreased when these were perceived as illegitimate. This was evident in the Czech Republic where, despite the persistence of most measures, the situation worsened during the autumn 2020 and spring 2021 waves of the pandemic.

Practical Implications: The findings of this study have significant implications for public administration and policymaking, especially during times of crisis and declared state of emergency. The results highlight the importance of maintaining the rule of law and ensuring the legitimacy of public compliance measures. The study suggests that disregard for these principles can lead to a decline in public trust and cooperation, exacerbating the crisis.

1 The paper was presented as a working paper at EGPA 2022 conference organized by the European Group for Public Administration in close cooperation with The Instituto Nacional de Administração (INA, Portugal) in Lisbon, September 2022 as "Rule of Law Principle and Other Principles Breaches during Covid Pandemics – the Case of the Czech Republic" and revisited later with further data available, notably the case law of administrative courts.

Originality/Value: This paper provides a unique perspective on the management of the Covid-19 pandemic, linking the rule of law with public compliance. It offers valuable insights for governments and policymakers on the importance of maintaining legality and proportionality in their measures, and the potential consequences of their disregard. What sets this study apart is its comprehensive analysis of both cases where rights were reduced (such as limitations of the right to education) and cases where rights were provided (such as the granting of compensation bonuses). This dual-focused approach offers a more holistic view of the impact of governmental measures during the pandemic. The study's findings contribute to the broader understanding of crisis management and the role of public administration. This comprehensive approach enhances the originality and value of the research, making it a significant contribution to the field.

Keywords: compensation bonus, democratic decline, state of emergency, proportionality, right to education, rule of law

JEL: K38, H12, H83

1 Introduction

During the COVID-19 pandemics governments and administrative bodies had to solve issues of unexpected dimensions. To protect public health, they applied measures with unpredictable results and restricted human rights in previously inconceivable ways. To prevent the epidemics from spreading governments used lockdowns and curfews. Thus, they limited freedom of movement, the right to carry out business, the right to education, the right to healthcare and many more. Part of the public viewed these interventions to be too intense and unnecessarily strict. Simultaneously, the states also introduced other measures to compensate people and legal entities for damage caused by these restrictions. These procedures were also questioned, mainly for being discriminatory and not equal.

It is understandable that to protect one value in imminent jeopardy (such as health and lives) other values must be restricted. Constitutions of democratic states together with international treaties on human rights protection usually foresee possibility for such limitations notably in the case of emergency, however they strictly set conditions which need to be abided so that the rule of law principle is adhered to. States of emergency usually trigger passing of more power to the executive which is more flexible than the legislative power and thus may react immediately. However, the executive might be tempted to concentrate more power and misuse it for purposes unrelated to the essence of the emergency state. Leaving the misuse of power alone, technocratic governance in the sense of leaving decision-making to health experts impacting fundamental human rights and freedoms also raises democratic concerns as they are not accountable in the same sense as elected politicians (Grogan, 2022, p.352). The discretion often rested on questionable legal basis. Chaotic and often contradictory measures with immediate effect explained to public

in press conferences meant a high level of legal uncertainty. On top of this lack of transparency behind the measures which were not sufficiently justified could not convince the public that they resulted from an evidence-based politics but were rather a product of wishful thinking. It may be summed up that the health crisis brought severe challenges to ensuring high level of adherence to the rule of law principles which resulted in a lack of public trust so crucial to effective public governance.

The approach to the pandemics was not coordinated by the EU much, the reaction to the crisis was an issue of individual states. Thus, "managing the COVID-19 crisis in Europe has been predominantly shaped by distinct country/specific approaches instead of (convergent) European action" (Bouckaert et. al., 2020, p. 766). Bouckaert et. al. (2020) show that differences in administrative setting between the Continental Napoleonic model with centralised administration and German federal model with strong Länder governments influenced the modes of crisis management in monitoring, learning, decision/making, coordinating, communicating, leading and recovering capacity. The administrative setting of the Czech Republic, a Central European country which is still not as developed as in the west democracies, has certainly influenced all these modes. Moreover, there was no recent experience with large scale epidemics. Klimovský et al. (2021b) explain that this type of governments is initially complacent and then shocked by the true nature of the crisis, they are "initially late and slow in reacting before having a strong yet panicky response." Besides, there is no robustness in policy design (Klimovský et al., 2021c, p. 1320). Consequently, all these modes of crisis management showed deficiencies, some of them larger, some smaller. However, this article will mainly concentrate on the decision-making and its legality.

The Czech Republic as many other European countries was poorly prepared for coping with the COVID-19 pandemics. There were not enough protective means available, the homes for elderly had no special protection, the hospitals lacked devices for artificial lung ventilation, etc. Still, ultimately with the first spring wave of 2020 the country was successful and belonged to the European countries with the least impact on human lives and health. This success was due to "fast and comprehensive anti-pandemic measures realized by the government and secondly, the citizen's compliance with the said measures" (Němec et al., 2021, p. 12.) As Koca posits trust and support of people to the government was one of the key success factors at that initial stage of the first wave in the Czech Republic. Still, the government has been criticised by public for not managing the process transparently. However, the support may change into protests within no time (Koca, 2022, p. 16). The continuation of the pandemic after the summer break emerged as a major issue. The spring measures were generally not perceived as proportionate but rather much too harsh, lacking transparency and being inadequately justified and explained. Thus, the exhausted public was not disciplined any more in autumn. The government instead of using the summertime for preparing robust policies followed the public opinion carefully and despite the numbers of infected growing fast already in August 2020 and to an extent predicting a disaster

already in September waited with restrictive measures till the end of regional representatives' elections in the beginning of October. Later the strategies were prepared, and measures were often declared without any consultations with stakeholders. "During the second phase it became fully evident that the top leaders were not able or maybe even unwilling to engage all the relevant stakeholders (especially experts) and listen to them" (Klimovský et al., 2021a, p. 98). Thus, the results were of the poorest with 29.704 deceased with COVID-19 in the period of October 1st, 2020, till May 31st, 2021.[2]

New regulatory regimes that had significant impact on lives of all individuals such as availability of public services including education and governmental financial support to only specific groups of entrepreneurs were introduced with minimum of public and parliamentary scrutiny. Thus, the judicial review of such governmental measures was crucial. This article seeks to analyse the role of administrative courts in the sense of institutions providing not only effective protection to individuals but rather as those institutions protecting values and principles such as legality, proportionality, transparency and further that are fundamental to the modern democratic states governed by rule of law. The pandemics and its impact on lives has been studied intensely, but there is still a need for the research of the administrative justice role. Sunkin and Marsons claim that "...the pace of change has meant that there has been no space for careful assessment of the broader and longer-term implications of the pandemic from an administrative justice perspective. This is something that will be necessary" (2022, p. 658). Vyhnánek et al. have studied the role of constitutional courts positing that during a very specific situation of pandemics courts may be faced with challenging issue of how broad their review should be (2024, p. 386). The same could apply to administrative courts. Ondřejek has studied the Czech Supreme Administrative Court's case law dealing with justification of extraordinary measures adopted pursuant the so-called Pandemic Act (Ondřejek, 2024). Compared to his valuable study (published in Czech, therefore available to a limited audience), this article covers a broader set of measures issued under different legislation. Moreover, different methods are used.

The paper utilizes a comparative study approach to assess how pandemic measures aligned with the fundamental principles of the rule of law, including legality, proportionality, and legitimate expectations. It examines both measures that restrict rights, such as the right to education, and those that confer rights, such as decisions on compensation bonuses, in order to see whether the breaches appeared in both situations or in case of restrictions only. The methodology involves reviewing relevant case law, administrative practices, and data from various databases.

Thus, the article explores the critical importance of adhering to the rule of law during times of crisis. Beqiraj and Moxham conclude that the trend of gradual rule of law decline in countries across the world has become particu-

2 The data provided by the Ministry of Healthcare at https://onemocneni-aktualne.mzcr.cz/covid-19. The total number of deceased with COVID-19 as of 16th August 2022 is 40 660.

larly concerning and apparent in the 2021 measures (2022, p. 162). Given that emergency situations, such as those experienced during the COVID-19 pandemic, may reoccur, it is crucial for public administration bodies to reflect on their actions and ensure they align with the core values of the rule of law. By doing so, they can guide the most effective responses to future emergencies. Adherence to the core value of rule of law can guide the most effective responses to emergency. The article advocates for preparing for future crises by building on the lessons learned from the COVID-19 pandemic, ensuring that responses are both lawful and effective.

2 Methods

The main research question is how the principle of rule of law together with proportionality, legal certainty and other intertwined principles were influenced by the measures taken by the government and other administrative bodies during the pandemic of COVID-19 in the Czech Republic. The research intends to find whether the legality and proportionality principles were breached both by measures restricting people's rights and in opposite situation when people were granted new rights – compensation bonuses. For the purposes of this qualitative research, several different methods were applied as relevant. First, a comprehensive overview of the principles of legality and proportionality and the impacts of emergency states on the aforementioned principles is carried out through literature review and using normative-analytical method. Second, through systematic approach, the author analyses relevant statutory laws dealing mainly with the empowerment to impose restrictions by legal rules adopted by the government or the Ministry of Health through measures of general nature. As the restrictions of human rights were numerous, the analysis of specific issued measures is restricted to one area. The measures of general nature closing schools were selected as the right to education was affected by these closures intensely in the Czech Republic. Compared to other European countries the distance-learning lasted for longer periods. Third, to demonstrate the impacts of the administrative bodies practice in providing compensation which is generally perceived positive due to granting new rights, the procedures of tax authorities are analysed. The case law of both the Czech Supreme Administrative Court and Constitutional Court interpreting these laws is analysed in the study where available. This case law is studied using analogy, comparative method, and inductive reasoning. In the conclusion the situations of rights restrictions and compensation grants are compared, and conclusions drawn to guide the most effective responses to future emergencies.

3 Literature Review

The rule of law principle is a fundamental and consensual element of Europe's constitutional heritage as a body of principles inherent both to national legal orders and EU and ECHR legal frameworks (Pech, 2022, p. 127). As an umbrella principle it comprises of several elements as legality, separation of powers,

protection of fundamental human rights and judicial review. It encompasses elimination of arbitrary authority, the misuse of power by the executive. The majority of the scholars agree that the underlying value is the idea of constraint (Janderová, 2019, p. 117). The role of administrative courts exercising the review of the administrative authorities' decisions and other acts thus consisting in preventing misuse of power by the executive, is of fundamental importance. Therefore, the *Rechtstaat* as the ideal of a fully democratic state respecting and protecting human rights is a value in itself worth of protection even during the emergency states.

The rule of law together with the principles of proportionality and legal certainty are core principles in limiting the administrative bodies' powers. The principle of legality requires that all administrative action has to have a legal ground and that administrative bodies act within the binding rules already enacted both in statutory laws and secondary regulations. "Even under a narrow definition, the rule of law clearly and necessarily implies that administrative implementation occurs within the framework established by legislation, that subordinate legislation may be made by the administrative branch only where there is an enabling power in primary… law …, and that such subordinate legislation must be within substantive limits and conform with procedural requirements of higher law." (Hofmann, 2013, p. 150) The principle of proportionality forms a protective shield from excessive administrative acts. "Proportionality is a method for determining whether the reasons advanced by the state for limiting a specific fundamental freedom outweigh the values which underlie the constitutional commitment to the protection of that freedom" (Addink, 2019, p. 78). Legal certainty "provides expression to an important assertion of the rule of las that those subject to the law must know what the law is so as to plan their action accordingly." (Hofmann, 2013, p. 173) Thus, the rules must be clear, understandable, and consistently applied. Legitimate expectations should be protected so that the subjects of law may rely on a reasonable assumption that the situation created by the rules and administrative practice will remain unchanged (Addink, 2019, p. 78). Furthermore the decisions, measures and in broader sense public policies should be transparent so that adherence to other values may be checked by public. It is evident that the problems resulting from inefficiencies inherent in public policies themselves and inefficiencies arising during their application can be eliminated to some extent by sufficient information support (Fuka, 2022, p. 2).

All these principles support one another. They are binding on the state institutions so that rights of individuals and legal persons may be protected. "Fundamental principles, such as the principles of legality, proportionality and equality, are the product of societal development over time and are inextricably linked to the promotion and protection of human rights" (Sever, 2015, p. 251). They serve well as ground of judicial review and when breached the courts may take appropriate corrective action such as quashing an administrative decision. However, the courts usually tolerate some level of disruption, and the breach must reach some level of intensity depending on the specific context of the individual case they discuss. Supposedly, the states of emer-

gency during a pandemic situation create a context which will find the courts more tolerable to minor breaches. Vyhnánek et al. explain that due to a greater degree of epistemological limits of courts in the context of pandemics a vigorous test of proportionality might not be a reasonable approach. Courts must appreciate and reflect the empirical uncertainty of public authorities. They are unable to determine whether the public authority had a "better alternative" (more effective and less human rights harming) at their disposal. Thus, courts have generally drifted towards a deferential review. However, they claim that courts may not refrain from reviews, there needs to be some level of judicial intervention granting review the existence and quality of empirical evidence used. A suitable approach may be seen in the "semiprocedural review" encompassing a shift in the structure and the focus of the review and a slight shift in the test of proportionality (2024, p. 395–397).

The principle of the rule of law remains applicable to public administration, even during a pandemic and despite any emergency measures that have been adopted (Horvat et al., 2021, p. 138). However important it is to take immediate and sufficient measures to cope with urgent situations of imminent danger to human health and lives, it is also important not to neglect the value of rule of law and democracy. To be more flexible, states adopt decisions declaring the states of emergency. These decisions typically involve transferring powers form the parliament to the government and allow for elimination of control mechanisms that. Under normal circumstances, safeguard the democratic nature of governance but, on the other hand, prolong processes. The emergency provisions entrust the executive with the power to make policy declarations that immediately become binding. Thus, the states of emergency should be used cautiously and scarcely only when it is necessary and for a limited duration, as short as possible. The governments may be tempted to misuse they newly acquired powers for unrelated purposes. This is more significant in countries that are facing a decline in democratic values. The process of autocratization that we face in at least some of the Central European countries is gradual, often unhurried, and thus difficult to discern for the public. Lührmann and Rooney (2020) show that "democracies are 75 percent more likely to erode under a state of emergency than without, marking a substantial increase in the probability of democratic decline". (p. 3) It was tempting also for the Czech Republic government to misuse the emergency state. "On its session agenda, the Government also included an item proposing the exclusion of trust funds from the implementation of an EU directive on the identification of beneficial owners (which may have been an attempt to assist the prime minister with his well-known conflicts of interest when obtaining money from European Structural and Investment Funds). A bill that would allow military intelligence to monitor internet activity was also debated. Further, the Government proposed amending the Act on the Rules of Budgetary Responsibility, allowing it to enact measures without approval from the National Fiscal Council" (Špaček, 2020, p. 265). Thus, although the rule of law standards may be adjusted during states of emergency, it is imperative that these adjustments are bounded by clear limitations to prevent potential misuse and to safeguard fundamental rights In its Rule of Law Checklist, the

Venice Commission detailed specific criteria for exceptions to the principle of legality during emergency situations. Above all, the derogation from certain rights have to be proportionate the possibilities for the executive to derogate from the normal division of powers in emergency circumstances also limited in duration, circumstance and scope. Judicial review of the existence and duration of an emergency situation, and the scope of any derogation must be available (Venice Comission, 2016, p. 13). Therefore, it is necessary to stress the role of the court review in protecting from autocratization.

Nevertheless, the mere declaration of the state of emergency need not erode democratic foundations of the state. Their use needs to be constraint to the actual threats, the measures need to be proportionate, and they must terminate as soon as the threats become less intensive or immediate and they may be coped with by usual legal means.

Let me analyse the legal instruments used to cope with the COVID-19 pandemics. The state of emergency was declared by Government Resolution No. 69/2020 Coll. for a period of 30 days from March 12th, 2020, for the whole territory of the Czech Republic "because of the threat to health in connection with the detection of the occurrence of the coronavirus (referred to as SARS CoV-2) on the territory of the Czech Republic". As to the formulation of rights which were limited, the government referred to a separate government resolution ("The government I. orders in the sense of Sec. 5 letter a) to e) and Sec. 6 of Act No. 240/2000 Coll., on crisis management...to solve the crisis situation that has arisen, crisis measures, the specific implementation thereof will be determined by a separate resolution of the government."). The state of emergency was extended twice with the consent of the Chamber of Deputies (the lower house of the Parliament) and lasted until May 17th, 2020.

During the state of emergency, the state used mainly the following three legal instruments to cope the risk of the pandemic and to deal with its consequences - a) statutory laws, b) crisis measures of the government and c) extraordinary measures of the Ministry of Healthcare. (Wintr, 2020, p. 282). The courts were asked for review of these extraordinary measures since the beginning of April and the first four of them were quashed by the decision of the Municipal court in Prague (administrative court of first instance) file No. 14 A 41/2020 of 23rd April 2020. The Constitutional Court rejected several complaints in May (decisions Pl. US 7/20, 8/20, 10/20, 12/20, 13/20, and 15/20).

The legality of individual measures (in fact their constitutionality) depends primarily on their compliance with the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the "Charter") which stipulates those fundamental rights must not be suspended even during a state of emergency. Although, they may be limited, but only under the conditions set by Article 4[3] of

3 Article 4 of the Charter reads: "(1) Duties may be imposed only on the basis, and within the bounds, of law, and only while respecting the fundamental rights and freedoms. (2) Limitations may be placed upon the fundamental rights and freedoms only by law and under the conditions prescribed in this Charter of Fundamental Rights and Freedoms (hereinafter "Charter"). (3) Any statutory limitation upon the fundamental rights and freedoms must apply in the same way to all cases which meet the specified conditions. (4) When employing the provisions

the Charter, enshrining the reservation of the law. The relationship between the state power and individuals is also governed the provisions of Article 2, paragraphs 2 and 3 of the Charter containing the reservation of statutory laws.[4] For the special situations during emergency states the Constitutional Act No. 110/1998 Coll., on Security of the Czech Republic, Article 6, paragraph 1 stipulates that the "State of emergency can be declared only for a certain period and for a certain territory, stating the reasons. At the same time with the declaration of a state of emergency, the government must define which rights set forth in the special act and to what extent are limited in accordance with the Charter of Fundamental Rights and Freedoms and which duties and to what extent are imposed. The details are set by a special statutory law."

Thus, it follows that standard means of imposing duties is a statutory law. However, during a crises other means are to be tolerated although the Constitutional Act No. 110/1998 Coll. is not absolutely clear about that. The laws that imposed restrictions were passed in the state of legislative emergency which allows for a much quicker procedure. However, this article will leave those aside and concentrate on the restrictions imposed by the government and the Ministry of Healthcare.

The special statutory law foreseen by the Constitutional Act No. 110/1998 Coll. is the Act No. 240/2000 Coll., on crisis management (hereinafter the "Crisis Act"). Under its Sec. 5 it lists the fundamental rights and freedoms the government may "for the necessary time and to the necessary extent" limit by the measures listed in Section 6 of the Crisis Act. Most of the government's crisis measures referred to in Sec. 6 par. 1 letter b) of the Crisis Act contain the prohibition of entry, residence, and movement of persons in defined places or territories.

The Constitutional Court in the resolution Pl. ÚS 8/20 dealt in detail with the legal nature of the government act declaring the state of emergency, as well as individual crises government measures. The court concluded that the very declaration of a state of emergency is not judicially reviewable. However, for the individual government crisis measures such conclusion would be unsustainable. Judicial review of measures that obviously interfere with fundamental rights and freedoms, may not be defied in a democratic state governed by the rule of law principle. According to Art. 36, par. 2 of the Charter the review of the decision relating to fundamental rights and freedoms under the Charter must not be excluded from the jurisdiction of the court. Thus, it was crucial to analyse the legal nature and legal force of the government's crisis measures to decide which judicial review is applicable (i.e., by administrative courts or by the Constitutional Court). Through judicial and academic discussions four possible variants crystallized: a) legal regulations with the force of

concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted."

4 Article 2, par. 2 and 3 of the Charter reads: "State authority may be asserted only in cases and within the bounds provided for by law and only in the manner prescribed by law. (3) Everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon her by law."

as statutory law, b) normative legal acts - secondary legal regulations, c) measures of general nature, and d) the legal nature of the act may be different according to specifics of the situation (Wintr, 2020, p. 287). The measures of general nature are acts combining the character of administrative decisions and by-laws. Differently from the by-laws (and similarly to the administrative decisions) they may be subject to a review of administrative courts initiated by affected individuals. They are specific in the case they regulate and general regarding the subjects to whom they apply. The municipal zoning plans can be mentioned as an example. They are used to regulate the type of buildings and infrastructure which may be erected on the municipality's territory and thus are specific in the case. The question with the government measures was whether the pandemic situation created such specific situation so that they could fall in the category of the measures of general nature. The Municipal Court in Prague held in its judgment file No. 10 A 35/2020 of May 7th, 2020, with references to jurisprudence and literature that the sign of specificity of measures of a general nature can be given by their relationship to "the specific event that is the COVID-19 disease pandemic", while (with reference to Constitutional Court decision Pl. ÚS 14/17) "when assessing the material features of the act of public administration in case of doubt, it is appropriate to lean towards a measure of a general nature, not to normative legal acts (by-laws)." Moreover, neither the Constitutional Act on Security of the Czech Republic nor the Crisis Act empower explicitly the government to issue normative legal acts. An argument in favour of measures of general nature could be also found in Sec. 94a of the Act No. 258/2000 Coll., on the Protection of Public Health (hereinafter the "Act on Protection of Public Health"), according to which the Healthcare minister's extraordinary measures which are quite similar in content are explicitly marked as measures of a general nature, with certain exceptions to their issuance procedure.

The only legal basis to restrict rights and impose duties in times when the emergency state, which allowed for the above-described government emergency measures, was not proclaimed were the epidemic emergency measures issued by the Ministry of Healthcare. They were issued as acts in the event of an epidemic or facing the risk of its occurrence pursuant to Sec. 69 par. 1 of the Act on the Protection of Public Health. In the first phase - the 2020 pandemics, probably most common and their legality was questioned. Later, in February 2021 the Act No. 94/2021 Coll., on Extraordinary Measures during the Epidemic of the COVID-19 Disease (hereinafter the "Pandemics Act") was enacted so that more appropriate measures could be taken in time when the emergency states were not declared by the Parliament. The explanatory note to the Pandemic Act explicitly admitted that the Act on the Protection of Public Health did not offer a sufficient range of tools for managing the COVID-19 pandemics within the framework of the extraordinary measures defined there. "At the same time, the regulation of the process of issuing these measures was also very laconic and given that these measures could have nationwide scope and therefore nationwide effects, their legitimacy could be questioned due to the way they were adopted, and the possibility of arbitrariness could be objected. They were issued by the Ministry of Health-

care as measures of a general nature without a procedure for the proposal of measures of a general nature." To demonstrate the difficulties to comply with the principle of legality the Ministry of Healthcare extraordinary measures issued pursuant to Sec. 69 par. 1 of the Act on the Protection the measures closing schools will be analysed below.

4 Results

4.1 Measures of General Nature Closing Schools During the Pandemic

To prevent the spread of the COVID-19 disease the Ministry of Healthcare decided to ban the personal presence of pupils and students at Czech elementary, secondary, higher vocational schools and universities and educational facilities from March 11th, 2020, until further notice by measure (No. MZDR 10676/2020-1/MIN/KAN) on March 10th, 2020. This measure did not originally apply to kindergartens and elementary art schools, but as of March 12th, 2020, it was replaced by Government Resolution No. 74/2020 Coll. on the adoption of a crisis measure. With effect from April 20th, 2020, the previous government resolution was repealed and replaced by an extraordinary measure of the Ministry of Healthcare (No. MZDR 16184/2020-1/MIN/KAN) dated April 15th, 2020. In response to the judgment of the Municipal Court in Prague, this extraordinary measure was also cancelled and replaced by Government Resolution No. 198/2020 Coll. with effect from April 24th, 2020, to April 27th, 2020, and Government Resolution No. 197/2020 Coll. effective as of April 27th, 2020. From April 20th, 2020, the measures began to be gradually relaxed, first for universities, 9th grade elementary school students and high school graduates, and then for the rest of the students. All the children could return to schools on May 25th, 2020. Their participation in face-to-face classes was voluntary. On October 12th, 2020, the government decided to reban the personal presence of students at universities, secondary and elementary schools, including first grade, with effect from October 14th, 2020. All the schools were not opened at the same time, some of the children could return in April, some in May 2021. Exceptions applied only to the children of medical personnel and other key civil servants such as firemen and police. Thus, the period when the schools were closed was one of the longest in European countries. The new government promised not to close all the schools generally and kept the promise in the school year starting in autumn 2021. It was up to regional hygienic authorities to decide on individual schools' closures depending on the pandemic situation these individual schools were facing.

These measures limited indisputably all the affected pupils and students in the exercise of their right to education, which is guaranteed by Article 33, par.1 of the Charter.[5] Limitation of the right to education consisted in the fact

5 Article 33 par. 1 of the Charter reads: "Everyone has the right to education. School attendance is compulsory for the period specified by law." According to the decision file No. Pl. ÚS 16/14 of the Constitutional Court of January 27th, 2015, also the kindergarten children enjoy this right.

that teaching was changed from face-to-face to distance form, i.e., to a less comprehensive form. The kindergarten children usually had no contact with the school, the lower classes of the elementary schools enjoyed one or two on-line hours per day, sometimes not even that much. The children from families that could not afford internet connection were not educated at all. Thus, the social differences deepened even more during the pandemics.

Several complaints were discussed by courts. They first had to decide who might file the action and concluded that it is the children (represented by their parents), the schools (it is not decisive that the schools are also in the position of administrative authorities when they decide on the pupils and students, in this situation their right of a legal entity to carry out the activities they were created for could have been infringed), and also the municipalities that establish schools and might be affected in their right to self-government.

However, the main question was whether the Ministry of Healthcare was empowered by the Act on the Protection of Public Health and/or the Pandemic Act to close the schools in the whole republic. The Supreme administrative court found in its decision file No. 10 Ao 2/2021 that, based on Sec. 69 par. 1 letter b)[6] of the Act on the Protection of Public Health, the Ministry could not close kindergartens and primary schools across the board or limit their operation. Most of the other letters of this provision (Art. 69) aim at narrowly defined orders or prohibitions (ban on the sale of suspect food, ban on the use of water, setting aside beds or directly objects for the isolation of people, carrying out disinfection), which are intended to contribute to a better management of specific outbreaks of the epidemic. However, letter b) is worded rather broadly. The court explained that: "It affects a large number of common areas of life and at the same time intensively affects the rights and freedoms of the addressees (including constitutionally guaranteed rights and freedoms, such as the right to education or freedom of movement). The wording of this provision is also different: the other letters bind orders and prohibitions to things, water sources or places - whereas letter b) is aimed directly at persons, i.e. specifically natural persons suspected of infection. The other letters have a relatively narrow material scope, but a relatively broad personal scope (the command or prohibition affects anyone who is in possession of those things, water sources, etc.), while letter b) has a broad material scope (restrictions on travel, cultural performances, sports events, gatherings in general; closure of medical and social facilities, schools, hotels and restaurants), but a narrow personal scope, as it only affects natural persons suspected of infection."

6 According to Sec. 69 par. 1 letter b) of the Act on the Protection of Public Health, emergency measures in the event of an epidemic or the risk of its occurrence are prohibition or restriction of contact between groups of natural persons suspected of infection with other natural persons, in particular restriction of travel from certain areas and restriction of transport between certain areas, prohibition or restriction of festivities, theatre and film performances, sports and other gatherings and markets, closure of medical facilities one-day or inpatient care, facilities for social services, schools, school facilities, recovery events, as well as accommodation establishments and food service establishments or restrictions on their operation.

Nevertheless, the Ministry of Healthcare did not state anything in the grounds of the extraordinary measure, from which it would follow that the focus of the infection is the entire Czech Republic. The Supreme administrative court rejected the idea that the ministry could issue blanket measures pursuant to Sec. 69 par. 1 letter b) of the Act on the Protection of Public Health for preventive reasons already in its judgment file No. 6 Ao 22/2021. In another judgement, file No. 8 Ao 16/2021-124, the court summed up that by its very nature, Sec. 69 par. 1 letter b) is intended rather for time- and place-limited anti-epidemic measures, which are conditioned by an increased suspicion of the occurrence of infection in a specific group of persons. Theoretically, the pandemic situation could be that bad that anyone in the whole republic might be suspected of infection. However, the grounds of the measure would have to provide facts for such conclusion. In fact, the Ministry of Healthcare grounds its measures very laconically, without further clarification, they spoke of high numbers of infected and hospitalized persons. Such grounds in itself would be difficult to accept. Therefore, the Supreme administrative court decided consistently that the Ministry of Healthcare acted beyond its competence when it issued the crisis measures closing the schools broadly in the whole republic without providing strong grounds.

The Ministry of Healthcare competences in the Pandemic Act regarding limitation of school operation are enshrined in Sec. 2 par. 2 letter f). However, this provision concerns only universities, neither kindergartens nor elementary and high schools are included. Thus, the only legal ground rests in the above-mentioned provision of the Act on Protection of Public Health, which is not intended for widespread measures.

4.2 Compensation Bonuses

The compensation bonus represented one of the key state supports addressed to individuals and legal entities affected by the Covid-19 pandemic in their business activities. At the same time, it meant a considerable increase in the tax authorities' activity. In view of the expected large number of applications for compensation bonus, the government thought it was key to entrust with payments an institution capable of handling this task from technical and personnel side. The choice of tax authorities for compensation bonus administration was influenced by the fact that they keep rather numerous staff and are equipped with robust material background. They also have access to the income of individuals to which the compensation bonus was linked. However, this resulted in choosing the procedural legislation used normally by tax authorities for tax proceedings (thus well known to the clerks), which is rather specific. The procedure of granting the compensation bonus was thus regulated by the Act. No. 280/2009 Coll., the Tax Procedure Code, a procedural regulation inherently unsuitable for the payment of monetary benefits to their addressees. This choice brought about an unusually high number of deficiencies or deviations from the classic tax procedure which should have been adhered to.

Unfortunately, due to inconsistent decision-making which appeared in a series of cases, the addressees of this support were affected in their legal certainty. It must be admitted that unauthorized, unjustified, or even fraudulent requests were filed often. Still, the tax authorities interfered with rights of addressees in many other situations. The administration of the compensatory bonus required three legal amendments over a period of two years and several interpretive turns by state institutions, often in response to expert stimuli, or due to case law of administrative courts.

This may be demonstrated on the case of payment of compensation bonus for the autumn period of 2020, this institute of the deadline restoration was applied purposefully with the intention of retroactively correcting the politically inappropriate wording of statutory law. Interpretation and application practice of the coronavirus bonus by all relevant public authorities of the 2020 autumn Act[7], was such that restrictive or prohibitive measures did not apply to the operation of a taxi service. Applications submitted by taxi operators for the payment of compensation bonus were assessed by the financial administration as not entitled to the payment of compensation bonus, because the restriction or prohibition of the taxi service was not the subject of the compensation bonus. Proceedings commenced by submitting these applications, they were for this reason ceased. This decision-making was criticized by taxi operators who tried to change the attitude of the public administration. It should be noted that in the above period in many places the taxi service worked. As a result of this pressure the government decided to reassess its position and grant the compensation bonus to the taxi drivers. By its the Resolution No. 53 issued on 18th January 2021 the government adopted a crisis measure, by which, with effect from 19th January 2021, explicitly confirmed that the operation taxi service vehicles or other individual contractual transport of people is not prohibited any more. In this way, the government, in conjunction with the interpretation opinion of the Ministry of Healthcare of the Czech Republic, tried to state retroactively that the operation of the taxi service was prohibited until 18th January 2021. The aim was to retroactively achieve the state that it was possible for the taxi services operators to apply for a compensation bonus payment by 18th January 2021.

The change in this government opinion was interpreted by the tax administration in such a way that if some taxi operators could not apply anymore because of the time lapse (originally the application was to be submitted within a period of 2 months after the end of the bonus period), these applicants could apply for restoration of the deadline. Thus, due to this retroactivity, some applications were not dealt with in accordance with the principle of legality.

Although there have been quite a lot of appeals against the tax authorities' decisions and some have been challenged in court, only a limited number of court cases have been decided so far. The judgment of the Regional Court in Pilsen No. 77 A 27/2021-199 as of 12th May 2021 may serve as an example.

7 Act No. 461/2020 Coll., on Compensation Bonus in Connection with the Ban or Restriction of Business Activity in Connection with the Occurrence of the SARS CoV-2.

Applicants objected to the practice of tax authorities when instead of an immediate compensation bonus payment sent to their accounts after the application was delivered to the tax authority, they first verified whether a number of substantive legal conditions for entitlement to it were fulfilled. Thus, they have asked for evidence to be provided by applicants. In the case which appeared before the Plzeň Regional Court (administrative court of first instance) the court found that in doing so, the tax authority unlawfully withheld the compensation bonus as according to the law the compensation bonus is considered to be assessed on the day of submission of the application. Therefore, if the application contained all formal requirements, the compensation bonus was assessed on the date of its submission and the tax administrator had no other option than to pay it out. Possible verification of fulfilment of the substantive legal conditions of the claim could lead to the compensation bonus return only after the payment of it, as a result of the "procedure to remove doubts", or a tax audit.

There were other incorrect applications of the law complained by the applicants. The most questionable practices of tax authorities in the course of compensation bonus procedure can be summed up as (1) guiding applicants to withdraw the application for compensation bonus, so that the tax authority does not have to file a negative decision, (2) wrongful application of restoring the deadline as if it did not lapse, (3) repeated decision-making in the case of an identical request originally rejected, (4) possibility of submitting a request for deadlines reversion submitted by e-mail without an electronic signature, (5) failure to send a decision on reversing the deadline, (6) suspension of the proceedings according to the erroneous provision of the Tax Procedure Code, or simply through informal communication with the applicant, (7) verification of the compensation bonus entitlement before the payment thereof when it was not foreseen by law, (8) termination of proceedings in the event of non-substantiation of the application by stating conditions for compensation bonus entitlement, (9) limited grounds for appeal against the decision to cease the proceedings (impossibility to appeal to the merits of the case), (10) tax assessment when compensation bonus or part thereof was returned without a reasonable assumption.

5 Discussion

The findings of this comparative study reveal significant breaches of fundamental rule of law principles, including legality, proportionality, lack of justification, and discrimination. These breaches were evident in both scenarios where rights were restricted and where rights were granted. For instance, the decision to close schools across the entire republic, rather than targeting specific regions most affected by the pandemic, demonstrated a lack of proportionality and justification. On the other hand, the allocation of compensation bonuses for business closures highlighted issues of unequal treatment and breaches of legality, particularly due to procedural arrangements that were more suited to tax collection than to providing support. This com-

parative analysis underscores the necessity for decisions to be justified with clear, evidence-based justification to uphold the principles of justice and fairness. The importance of sound justification is paramount not only to ensure that decisions are based on evidence rather than arbitrary reasons but also to maintain transparency and public trust. When the government's actions are transparent and well-justified, it reassures the public that these measures are sensible, effective, and worthy of adherence.

The principle of legality demands that the legislature adopt binding rules and the government adheres to them when taking any measures including by-laws, decisions, and other acts. The government must act in accordance with the effective statutory law and may not exercise power outside the limits set by these laws. The legislator is bound by the Constitution which also means that the values protected by it may not be trampled down. Human rights may be restricted only to certain limits and under conditions set by the Constitution. Generally, these limitations should be carried out only by statutory laws and not by measures taken by the executive. However, the emergency states foreseen for situations endangering human lives and health or similar values the society wishes to protect allow for immediate governmental actions. Nevertheless, it must be clear that the crisis government measures can only be an extraordinary and short-term response to a crisis. They may not become a permanent part of the legal order or aspire to it. Otherwise, it would lead to democratic decline and autocratization. Longer-term measures of a general nature, especially if they interfere with fundamental rights and freedoms can only be enshrined in a democratic legal state by law. Further, even the exceptional and short-term measures must respect at least some minimum standards. Even if the human lives and health are values of fundamental importance, there are other values which still need to be protected as well. The conflict between the protected values must be solved in accordance with the principle of proportionality. The measure should be transparent, the grounds must be explained to the public, so that they may be checked. The changes should not be chaotic and unreasonably unpredictable so that the people may enjoy at least some level of legal certainty, and thus plan their future lives. If these conditions are not met, it ends in disillusion and loss of public trust in their government as could be demonstrated by the changes of the people's willingness to adhere to pandemic rules in spring and later in autumn 2020 in the Czech Republic.

It should also be noted that rules with the same or similar content were adopted both as crisis measures of the government, and extraordinary measures of the Ministry of Healthcare. The government's crisis measures are subject to some extent to parliamentary control. In the Chamber of Deputies, in case of serious dissatisfaction with governmental actions, they may decide not to extend or even cease the state of emergency at any time, thereby ending the validity and effectiveness of all government crisis measures. The same did not apply to the measures of the Ministry of Healthcare as they were not connected with the state of emergency, because they were adopted in accordance with different statutory law (the governmental measures under the Crisis Act

and the ministerial measures under the Act on Protection of Public Health which is primarily not intended for a crisis of such extent). Also, the ministerial measures did not require the consent of the whole government which sometimes meant that the Ministry of Education, Youth and Sports responsible for schools was not even notified of the Ministry of Healthcare measures closing schools. In this light the possibility of court review so that the executive does not misuse its power and interfere with rights of individuals in an unlawful or unproportionate manner seems to be even more important.

To the *Rechtstaat*, the role of administrative courts contributing to checks and balances and preventing misuse of power by the executive and unlawful or unreasonable interference with rights, is of fundamental importance. This court review was crucial when it was obvious from the content of the governmental and ministerial crisis measures that they probably do not have sufficient legal basis and that they are not grounded enough to prove that fundamental rights and freedoms are limited only to the necessary extent. It was necessary to insist that they had to be judicially reviewable because they showed (sometimes manifested) possible interference with fundamental rights and freedoms. The conclusion on the nature of the government crisis measures was important so that the courts could exercise their power. Making clear that they are issued in the form of measures of general nature made the administrative courts' review possible.

Moreover, the Ministry of Healthcare systematically avoided judicial review of its measures by their constant cancellation and issuing of new measures in similar wording. The administrative courts sometimes reacted by not allowing the amendment of the proposal and rejecting it of the proposal. However, the Pandemic Act later in February 2021 solved even this ministerial misconduct. The measures of general nature issued by the Ministry of Healthcare may be passed only after the previous consent of the government, they may be reviewed by the Supreme administrative court and this review may take place even if such measure was cancelled by the ministry before the court could issue its decision. However, Ondřejek's study underscores the significant role of further administrative court reviews. As of October 24, 2023, the Supreme Administrative Court had adjudicated 157 cases involving extraordinary measures issued under the Pandemic Act. Of these, 36 cases were either quashed or declared illegal due to insufficient or lacking justification (2024, p. 10). The courts were first careful in their findings. The Constitutional Court decisions contained separate justification of individual judges who obviously had different perception of to what extent the government should be left room in their effort to cope with the pandemics. They explained carefully that it is important to protect people from the pandemics. The administrative courts rejected some actions on the grounds of not choosing the right type of action. However, as the time passed the courts showed less understanding for the executive power misconducts. As the expert evidence became more accessible to the government and the Ministry of Healthcare together with their limitations of human rights lasting for a long period a shift to a more active role of the courts became necessary. The turn can be well demonstrated

by one sentence of Constitutional Court case Pl. ÚS 106/20 of 9th February 2021: "In laconic terms, even practical uncertainty and a lack of perfect information do not mean that the government can do anything and rely only on instinct or political compromise." The administrative courts' reviews followed the same logic and revealed the measures were overly broad (thus the Ministry acted ultra vires) and often poorly grounded with no possibility to check their proportionality. These reviews revealed that the ministry either did not have the necessary data available or was not capable of drawing conclusions from them. The wording was usually very general stating there are high numbers of infected and hospitalized people. The justifications of measures often did not prove any relationship between those numbers and the schools being open. Despite the facts showing that in the beginning of the pandemics the children younger than 10 years carried only a low viral load if any, the schools were closed for those children as well. Obviously, the Ministry of Healthcare and the government were afraid of children infecting their parents and grandparents. Instead of closing the schools, they could have worked on a policy dealing with situation of several generations sharing the same home, which is not uncommon.

The analysis, using the example of compensation bonuses distribution - which did not restrict rights but rather granted them – illustrates that the breaches of the principle of legality were not confined to restrictive measures. Although the manifestation of the breaches was different, the original reason can be seen for both situations in the chaotic solutions, acting to please the public and neglect of the *Rechstaat* values which are still not inherent to the public administration. However, correcting the tax authorities' wrongdoing, or rather establishing the illegality of such a procedure, was only achieved through actions for protection against unlawful interference filed with the administrative courts.

Moreover, the strong shift between the approach of the government during the spring 2020 when the measures were strict and autumn 2020 rather benevolent as indicated above led to the overall scepticism that the government measures were evidence-based. The people who were rather disciplined during the first wave lost their confidence in the need to follow rules that were chaotic and unclear anyway. On top of that the public could see the inequalities in granting compensation bonuses. This proves that disregard for the rule of law principles including transparency, legality and proportionality can lead to a decline in public trust and cooperation, exacerbating the crisis.

6 Conclusions

States of emergency often result in the transfer of greater power to the executive branch, which is more agile than the legislative branch and can respond more swiftly. However, this concentration of power may tempt the executive to misuse it for purposes unrelated to the emergency. Beyond the potential for power misuse, technocratic governance—where decision-making is left to health experts—can impact fundamental human rights and freedoms, raising

democratic concerns since these experts are not accountable in the same way as elected officials. The study proved that if governmental measures under states of emergency can be misused and lead to autocratization, this risk is equally, if not more, applicable to ministerial measures, which do not require a state of emergency. Given their lack of parliamentary oversight and potential for unilateral implementation, ministerial measures require stringent judicial review to prevent the unlawful or disproportionate interference with individual rights. The use of ministerial measures was authorized by an Act designed for situations with significantly lower impact, both in duration and scope, than the COVID-19 pandemic, making them particularly dangerous and prone to leading to autocratization.

In light of the potential recurrence of emergency situations similar to the COVID-19 pandemic, it is essential for public administration bodies to reflect on their actions and ensure they adhere to the core values of the rule of law. This adherence will enable the most effective responses to future emergencies. The article emphasizes the importance of preparing for future crises by leveraging the lessons learned from the COVID-19 pandemic, ensuring that responses are both lawful and effective. It can be understood that during the first days of the emergency, the government improvised somewhat in the interests of swiftness and efficiency of the reaction to the inherent danger. The implementation of states of emergency, with their distinct decision-making frameworks, was justified by compelling reasons at the beginning. The existing legal frameworks often did not anticipate a crisis of this magnitude, necessitating the government to apply them in a rather creative manner. However, this ad-hoc approach persisted throughout the entire of the pandemic. Practical use of government crisis measures and emergency measures of the Ministry of Healthcare all limiting fundamental rights, revealed several issues in terms of their constitutionality and legality. Discrepancies occurred also in situations when the state was granting rights instead of banning them. The practice of tax authorities paying out compensation bonus using legislation intended for different procedures which are rather specific, highlighted the drawbacks of ad-libbing and poorly prepared legal rules. The effort of the government to comply with the pressures of specific business groups left the tax authorities in an unsolvable situation leading again to acts breaching the principle of equality and legality.

It is essential to emphasize the role of judicial review in safeguarding against autocratization, especially since states of emergency can exacerbate this process, as observed in some Central European countries. The initially restrained approach of the courts has gradually changed into an active review of compliance with the basic principles of administrative law. The administrative courts ultimately clarified the legal nature of the extraordinary measures, enabling them to conduct a review. Doing so, they found the measures imposing limitations often unclear, unreasonable, and poorly grounded with dubious legal basis. The insufficient justification of the measures taken was the most common deficiency later found by courts causing their annulment. The analysed cases show that the public authorities' respect for human rights and the

principles of the rule of law unfortunately, did not increase significantly over time. The positive is the courts' persistence in pointing out all the defects. The administrative authorities were facing a significant number of negative court decisions repeating constantly the same recommendations, maintaining the rule of law and ensuring the legitimacy of public compliance measures. While it is often assumed that states of emergency during a pandemic might lead courts to be more lenient towards minor breaches, this assumption does not necessarily hold true. Initially, courts may be less strict, but this can change if the duration of the emergency state is prolonged. This study has shown that the context created by such emergencies does not inherently result in sustained judicial leniency. This is even more relevant to ministerial measures based on an Act designed for addressing epidemic situations with significantly lower impact in terms of area and duration, which do not require official declaration of a state of emergency.

As the analysis showed, the disregard for these fundamental values and principles can lead to a decline in public trust and cooperation, exacerbating the crisis. This situation necessitates the government to develop policies that ensure the state is better equipped for any future crises, with a stronger focus on the *Rechtstaat* values. Specifically, the proportionality of measures restricting rights should be meticulously observed, ensuring that such measures are limited to the necessary areas and duration. For future situations, when compensation is granted, strict equality among the requesters should be maintained, and a set of procedural rules should be prepared in advance. The choice of procedural rules depending on the institution the government entrusts with the payments, rather than the type of administrative activity, proved inadequate in ensuring adherence to this crucial value.

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