



# Judicial Review of COVID-19 Restrictive Measures in the Czech Republic

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## Abstract

The courts ought to be active players during the pandemic crisis to prevent the abuse of power, enhance the quality of the measures taken and their communication and contribute to increasing their legitimacy. The paper focuses on the Czech Constitutional Court and the Supreme Administrative Court (together with regional administrative courts) and assesses whether they lived up to this role. We found that the Constitutional Court was a passive player, which resulted from insufficient procedural legal norms and a formalistic approach by the court itself. On the other hand, the Supreme Administrative Court was – mainly due to a special procedural framework – an active player. Its case law has a real impact and prevents the executive power from making some faults, such as an obvious lack of legal basis or clearly insufficient reasoning.

## Keywords

judicial review, COVID-19, restrictive measures, Constitutional Court, Supreme Administrative Court, Czech Republic.

## Introduction

The COVID-19 pandemic has been a challenge for many state institutions. Even though the executive has stood in the spotlight, the courts have not stayed out. This paper focuses on the judicial branch in the Czech Republic and its activities from the beginning of the pandemic until the end of 2021. The task laid on judicial shoulders was not easy. Relevant legal regulation either lacks any provision at all for judicial oversight or it provides them in a sub-optimal matter. Based on the analysis of the legal framework, case law, and normative ideals, this article answers the question of how the judiciary in the Czech Republic lived up to its role.

The article is divided into four main parts. The first provides a brief overview of applicable legal regulations in the Czech Republic for imposing restrictions. The second part is more theoretical and discusses the ideal approach of courts in times of pandemic. We argue that courts should not stand behind the scenes but should play an active role.

The following two parts focus on two courts, which played a key role at some stage of the pandemic in the Czech Republic – the Constitutional Court (hereinafter: CC) and the Supreme Administrative Court (hereinafter: SAC) together with the lower administrative courts. We describe their actual stand and actions stemming from their judgments and, consequently, com-

pare them with the ideal theoretical approach presented in second part. Finally, we conclude that the CC has been a passive player, which results from insufficient procedural legal norms and a formalistic approach by the court itself. On the other hand, we deem the SAC – mainly due to special procedural framework and its pro-active interpretation – to be an active player.

## 1 The Czech legal regulation of the pandemic management

The legal regulation on which the restrictions can be based is divisible into three categories. The first one is a framework triggered by a declaration of a “general” state of emergency and authorising the government (and some other authorities) to issue crisis measures pursuant to the Crisis Management Act.<sup>1</sup> The second is a common legal framework (regardless of a state of emergency), enabling the Ministry of Health to adopt measures to combat an epidemic. Finally, the third is a state of pandemic alert, which is governed by a special act and was adopted specifically because of the COVID-19 pandemic. We now introduce these regimes in greater detail.

From the beginning of the pandemic until February 2021, the government could rely only on the state of emergency regulated by the Security Act,<sup>2</sup> Crisis Management Act, and on the general legal framework represented by the Public Health Act.<sup>3</sup>

The state of emergency can be declared “if the Czech Republic’s sovereignty, territorial integrity or democratic foundations are directly threatened, or if its internal order and security, lives, health or property are to a significant extent directly threatened, or if such is necessary to meet its international obligations on collective self-defence”<sup>4</sup> for a maximum of 30 days. A possible extension is subject to prior approval by the Chamber of Deputies. The Chamber may also annul the declaration. While in the state of emergency, the government may, upon its resolution (a crisis measure), for the necessary time and to the strictly required extent, restrict fundamental rights and freedoms specified in Article 5 of the Crisis Management Act. These include freedom of movement, the right to assemble and the right to strike.

Together with these crisis measures, or while not in a state of emergency, the Ministry of Health may issue, according to the Sec. 69 of the Public Health Act, an emergency measure. That enables the ministry to, for instance, prohibit or restrict contact between individuals suspected of being infected and other individuals, cultural or sports events, and hotels and restaurants. It also grants a power to “prohibit or order certain other activities to eradicate an epidemic or the risk of an epidemic.”

In February 2021, the Pandemic Act<sup>5</sup> was passed. The main reason for the adoption of the specific act for the pandemic was political pressure from the opposition to abandon the state of emergency and to provide the government with sufficient legal basis for the necessary restrictions outside of the state of emergency. This act empowers the Ministry of Health to issue emergency measures with prohibitions and orders specified in § 2 (2) therein. That specifically includes restricting public transport or businesses, the prohibition of organising public or private events, restriction of universities, ordering the use of protective gear, etc. The Pandemic

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<sup>1</sup> Zákon č. 240/2000 Sb., krizový zákon. English version is available at <https://bit.ly/33G2vIE>.

<sup>2</sup> Ústavní zákon č. 110/1998 Sb., o bezpečnosti České republiky. English version is available at <https://bit.ly/3fxby17>.

<sup>3</sup> Zákon č. 258/2000 Sb., o ochraně veřejného zdraví.

<sup>4</sup> Article 2 (1) of the Security Act.

<sup>5</sup> Zákon č. 94/2021 Sb., o mimořádných opatřeních při epidemii onemocnění COVID-19. This act was amended by zákon č. 39/2022 Sb. In this paper, we refer to the unamended version, unless stated otherwise.

Act also provides for judicial oversight by administrative courts, which will be described in detail further on in this paper. These authorisations should have been valid until February 2022; however, they were extended until November 2022.<sup>6</sup>

## 2 The role of courts during the pandemic from a theoretical perspective

States exist to advance the well-being of their members; it is their main purpose (N. Barber, 2012, 56). To specify this aim regarding the pandemic situation, the well-being of all citizens in this case can be materialised as stopping the spread of a contagious disease while having the least possible impact on the economy as well as on fundamental rights. A modern democratic state with the rule of law is thus expected to fulfil its negative and positive obligations to individuals. It must refrain from infringing their fundamental rights and shall also conduct itself actively in such a way that these rights (particularly the right to protection of life and health) are not endangered by someone or some other event or phenomenon and that these rights can be fulfilled as much as possible. In other words, the state must pay attention not only to “freedom from” but also to “freedom to” (Berlin, 1969, 130–135). Therefore, the view asserting the ideal of state action during the pandemic as the non-issuance of any restrictive measures goes very against these principles of a modern democratic state. If the state did not issue any restrictive measures, it would fulfil its negative obligations but would completely fail in the area of positive obligations (Eichler & Sonkar, 2021).

If state power is exercised through the bodies of the legislative, executive and judicial branches, the well-being of all citizens must be the common aim of all of them, and these obligations must be fulfilled together by all three powers. The purpose of the division of power is not only to protect negative freedom – to protect against the concentration of power in the hands of one tyrant – but also to increase the effectiveness of governance in the broadest sense, by dividing individual competencies according to which branch seems most appropriate to exercise such competence (N. W. Barber, 2018, 56; see also Waldron, 2012, 24). While the legislature provides space for the input of amateurs (in the sense of opposition to experts) with a wide variety of opinions and it sets the direction of individual policies (N. W. Barber, 2018, 59), executive bodies have a wide range of expertise in specific policy areas and are expected to take concrete steps based on the direction set by the legislature, including the identification of various techniques. The executive is the only one with the power to enforce the outputs of legislation and the judiciary. The judiciary complements the entire triad – it exists to resolve legal disputes between the two parties and to interpret the law (N. W. Barber, 2018, 60; Shapiro, 1986, Chapter 1). Its main advantage over other branches is the impartiality and independence required by their social function (Shapiro, 1986, Chapter 1). In short, from Parliament, we expect an amateur discussion in conflicts of interest, expertise and managerial skills from the executive, and legal skills based on legal knowledge, methodology and argumentation from the courts.

We argue that, during the pandemic, the courts should grasp their role in managing it and be active players in the system of the separation of powers. The court’s active approach means, generally speaking, that they employ their powers as much as they are able to do so according to the respective legal framework. Either an active or passive approach manifests itself especially in the interpretation of vague, indefinite legal terms as will be described in the following

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<sup>6</sup> Point 49 of the zákon č. 39/2022 Sb.

chapters. The active court does not look for an opportunity to dismiss the case, but on the contrary, seeks ways in which it can live up to its constitutional role in the system of the separation of powers. The active court does not avoid answering questions and solving legal (i.e. neither medical, nor epidemiological, nor sociological) problems. Where there is a legal way, there must be a will.

That being said, we argue that courts should be active but not too activist. They must take into account the specifics of the exceptional situation, and the adequacy of individual measures should be assessed according to what the competent authorities could and should have known at the time the measure was adopted (Ondřejek, 2020, 624). Federico Fabbrini presented the concept of a *dynamic model* of the role of courts in emergencies based on empirical examples (Fabbrini, 2010). The onset of a crisis is usually characterised by a lack of information and very short interferences with rights, hence courts should be more reluctant to review the status quo. If the crisis lasts longer, there will be more information, including scientific knowledge and encroachment of fundamental rights is likely to become more serious as a result of lengthening time. With this, the role of the courts is gradually changing, from a more restrained one to being an active actor (Fabbrini, 2010, 693–696). We consider this model to be applicable to the role of courts in the COVID-19 pandemic.

Too activist approach – that disregards the specifics of a pandemic and interfere with the expertise of the other branches – exceeds the role of courts in the separation of powers. Courts do not have the expertise in the field of pandemics to review the suitability or necessity of declaring a state of emergency – and it can also bring unintended side effects. Jenkins observes, based on the decisions of the US and Canadian Supreme Courts and the British House of Lords, that overly activist pro-human rights judgments have provoked other branches of power and led to an extension of executive powers or reduced the impact of court decisions (Jenkins, 2014, 91). The road to hell is paved with good intentions.

Accordingly, courts should employ their instruments to fulfil their role in the system of the separation of powers and try to resolve very and only legal questions – not medical, epidemiological, sociological or similar issues. Three principal grounds lead us to this claim. The active approach is able to (1) prevent the abuse of power; (2) enhance the quality of the measures and their communication; and (3) contribute to increasing the legitimacy of measures. Now we elaborate on these three reasons in more detail.

(1) *Prevention of power abuse*. Justice Jackson, in his famous dissenting opinion on the US Supreme Court ruling in the Korematsu case against the United States, approving the internment of Americans of Japanese descent during World War II, stated – regarding the crisis legal framework – it was “a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need”.<sup>7</sup> A pandemic crisis has become (not only) such a loaded weapon for populist governments acting as an excellent pretext for them to consolidate power and, according to some authors, potentially leading to massive violations and redrafting of the local and global political order (Eichler & Sonkar, 2021). It is an opportunity through technocratic tools (transfer of responsibility to politically unaccountable experts – virologists or epidemiologists), populist tools (polarising and national rhetoric, neglecting minorities) and anti-democratic (weakening the role of parliaments, strengthening the executive, silencing the opposition and civil society) to misuse their power (Guasti, 2020, 48). Maerz et al. empirically show these inclinations in their research into 143 countries – democratic standards have fallen

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<sup>7</sup> Dissenting Opinion of Justice Jackson, *Korematsu v. United States*, 323 U.S. 214 (1944).

in 83 of them during the pandemic (Maerz et al., 2020). In this regard, courts ought to use their power to ensure that governments do not use the often vague wording of crisis laws and do not rule with their decrees – in the words of the European Court of Human Rights (hereinafter: ECtHR) – “beyond the extent strictly required by the exigencies of the crisis”.<sup>8</sup> If this is not the case, arbitrary rule, which threatens not only democracy but – maybe more importantly – the individual rights of citizens, will emerge. Although there is a new government in the Czech Republic which is not deemed populist as was the previous (see e. g. Havlík, 2019), that changed nothing regarding the necessity of an active courts’ approach. Therefore, the courts should prevent such a government from receiving a *carte blanche*, leading in the worst case scenario to a long-term violation of fundamental rights.

(2) *Enhancing the quality of the measures and their communication.* The unprecedented pandemic forced governments to react quickly. Individual steps are usually taken not only within time constraints but also under pressure from various interests. It is therefore not surprising that, euphemistically speaking, they are not usually legislatively and technically perfect, nor adequate in their justification. The measure is often the result of a debate between epidemiologists or virologists, not legislative experts. Here, however, comes the role for courts with skills and expertise in the legal field. Judges are not experts on epidemiological issues, but they are experts on legal issues. Legality represents their daily bread. The judicial role in a pandemic thus lies in helping the government to improve these measures so that they will respect the principles of the rule of law and cannot violate fundamental rights. Courts can also help to interpret disputed measures, fill in their gaps and so on. They can contribute to a “clearer situation”.

Although court rulings are by their nature related to a case from the past, the effects and implications of these verdicts are primarily aimed at the future (N. W. Barber, 2018, 62). The case law can be beneficial for the government to set future measures – if it recognises that some measures will not pass due to specific shortcomings, it will naturally help the government to define the limits of future measures (Wiley & Vladeck, 2020, 195), and not only the limits but also the way in which government actions communicate. As Wiley and Vladeck observe, the judiciary would force the government to “do its homework” – that is, to communicate not only the purposes of its regulations but also how exactly these regulations relate to those purposes (Wiley & Vladeck, 2020, 195). In other words, it is not only about noble goals but also noble (or at least justifiable) means to achieve them. This is all the more true in the Czech Republic, where the justification of the measures and the way they have been communicated are among the largest deficits in our pandemic management (see Vikarská, 2020; Vikarská, 2021; Wintr, 2020, 295).

(3) *Increasing the legitimacy of measures.* The legitimacy of government actions is closely related to their justification and legislative-technical measures. Trust in government and in its actions embodies an essential determinant of citizens’ compliance with the measures (Bargain & Aminjonov, 2020, 12).<sup>9</sup> This is crucial given the nature of this crisis situation. Maerz et al. point to the lack of the oft-cited correlation between “firm hand rule” and pandemic management (Maerz et al., 2020). Bargain and Aminjonov, on the other hand, find this correlation among governments with greater public confidence (Bargain & Aminjonov, 2020, 13). The role of the courts in respect of the legitimacy of measures lies in improving their quality and justification, as explained in the previous point, but also in their specific societal role as independent and

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<sup>8</sup> Ireland v. United Kingdom, app. no. 5310/71, § 207; Sakik and others v. Turkey, app. no. 23878-23883/94, § 44.

<sup>9</sup> See also judgment of the CC from 9. 2. 2021, no. Pl. ÚS 106/20, para. 94. All judgment of the CC are available in Czech from [www.nalus.usoud.cz](http://www.nalus.usoud.cz).

impartial arbitrators (Shapiro, 1986, Chapter 1). If a particular disputed measure is reviewed by independent and impartial arbitrators – moreover enjoying the greatest public trust in the Czech Republic in the long term within the political system<sup>10</sup> – such a measure will naturally gain greater legitimacy in the event of positive court approval (Petrov, 2020, 80). Overcoming any other institutional obstacle can only increase the legitimacy of certain acts (Petrov, 2020, 80).

To sum up, only the joint action of all three powers for a common goal – which we define as stopping the spread of a contagious disease with the smallest possible impact on the economy as well as on fundamental human rights – can lead to the most effective measures in a democratic state under the rule of law. Courts should not stand behind the scenes but should play an active role. In the next parts, we assess whether the Czech courts have been met these requirements. The next chapter starts with the CC.

### 3 The Constitutional Court

According to the Article 83 of the Constitution, the CC is “the judicial body responsible for the protection of constitutionality”. Apart from an abstract review of laws, every person may submit a constitutional complaint to the court. The complaint is an extraordinary remedy and can be filed “against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms”.<sup>11</sup>

Decisions of the CC were crucial during the first year of the pandemic, as the Czech Republic was in a state of emergency for most of it. Their importance stemmed from the vagueness of the applicable norms, the absence of norms for judicial oversight and the exceptional nature of the situation. It was the first time that a nationwide state of emergency had been declared in the Czech Republic. Previously, such state had involved only some regions for a short period of time as a response to natural catastrophes. As a result of this, those affected did not seek judicial protection directly against the measures. However, the pandemic is an entirely different scenario. As a response, some people demanded a review of the constitutionality of the declaration of the state of emergency and of the adopted crisis measures affecting their human rights.

There were two significant issues that needed to be clarified at the level of constitutional law, since the applicable laws did not provide any answer: (1) whether the courts (and if so, which) had the jurisdiction to review the constitutionality of the state of emergency declaration; and (2) whether the courts (and if so, which) had the jurisdiction to review the crisis measures.

The CC concluded that both are reviewable by the courts. However, the CC’s approach was not consistent with our definition of the court’s role in the pandemic.

#### 3.1 Declaration of the state of emergency

As far as the declaration of the state of emergency is concerned, the CC exhibited great self-restraint and called it an “act of governance”, which is not reviewable in abstract by courts in general.<sup>12</sup> The main supervision is provided by the Chamber of Deputies, which may – at any time – annul the declaration according to the Article 5 (4) of the Safety Act.

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<sup>10</sup> Among all state’s principal institutions (i.e., apart from municipalities and regions), only army and police are holding greater public trust (CVVM, 2020; CVVM 2021a; CVVM 2021b; CVVM 2021c).

<sup>11</sup> Article 87 (1) (d) of the Constitution.

<sup>12</sup> CC, dated 22 April 2020, ref. no. Pl. ÚS 8/20, para. 26.

The CC ruled that it is not competent to hear such a motion, because it lacks jurisdiction. That is because the declaration is an “act of governance”, staying out of judicial review (but within parliamentary control), and the Constitution does not foresee any procedure for such an act.<sup>13</sup> Nevertheless, the judgment concurrently mentions that the absence of competence is not absolute, and the CC could intervene if the declaration “was contrary to the fundamental principles of the democratic rule of law and would entail a change in the essential elements of the democratic rule of law.”<sup>14</sup> In other words, the CC generally lacks jurisdiction except in cases of a flagrant breach of the rule of law or the state’s international commitments. The majority opinion does not list any examples of such situations. According to dissenting judges, the CC should review the declaration if the state of emergency was declared for different reasons than the laws allow,<sup>15</sup> if it was declared arbitrarily or if it was just an excuse for seeking other goals (removal of the obligation of public procurement law, intimidation of opposition etc.).<sup>16</sup>

One of the dissenting judges, Milada Tomková, noted that only a competent court can hear cases and by stating its lack of jurisdiction, the CC surrendered its competence altogether in all cases.<sup>17</sup> We agree with her critique, as this approach is inconsistent and also brings some practical problems (e. g. the necessity to assess the legality of the state of emergency as a preliminary question by the ordinary courts when hearing cases about the legality of following measures) (for more detail see Kovalčík, 2021, 654; Vikarská, 2020). Some authors, however, commend this approach (Horák et al., 2021).

It could be concluded that the CC did grant the executive (and legislative) power considerably large space in this issue. As one of the concurring opinions aptly notes: “it is not a task of the judicial power in this situation to assess the relevance of infected persons, possibilities of spread of the virus, the impact on lives, health, property, etc.”<sup>18</sup> However, according to us, this space is too large and does not go hand in hand with its role in the system of the separation of powers. The CC should have retained the power to review the procedural aspects of the declaration (regardless of the manifest breach of the rule of law during the process) as well as a gross misuse of discretion during the declaration (amounting to the breach of the rule of law) – of the dissents hint.

The proposed approach could be equated to the ECtHR while scrutinising derogations under Article 15 of the ECHR. The ECtHR reviews not only the procedural part of derogation, but also the existence of “war or other public emergency threatening the life of the nation” (Jovičić, 2021). However, as the court itself states, the assessment of whether such a situation has arisen is a matter for the national authorities, and states enjoy a wide margin of appreciation (Schabas, 2015, 596).

The possibility to review the procedural aspects became crucial during the spring of 2021. The Chamber of Deputies did not approve the government’s proposal to prolong the state of

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<sup>13</sup> Ibid., para. 32; the same conclusion is also in subsequent decisions, see e. g. CC, dated 12 May 2020, ref. no. Pl. ÚS 11/20, para. 21.

<sup>14</sup> CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 27.

<sup>15</sup> Dissenting opinion of Radovan Suchánek to CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 6.

<sup>16</sup> Dissenting opinion of Kateřina Šimáčková, Vojtěch Šimíček and David Uhlíř to CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 6.

<sup>17</sup> Dissenting opinion of Milada Tomková to CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 9.

<sup>18</sup> Dissenting opinion of Kateřina Šimáčková, Vojtěch Šimíček and David Uhlíř to CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 2.

emergency, which should have therefore ended on 14<sup>th</sup> February 2021. The government however decided to declare a “new” state of emergency, which directly followed the previous one. It argued that the county governors asked it to do so, and that establishes the new legal reason for the declaration.

A group of senators challenged this declaration in front of the CC. In its judgment, the court declined to review the declaration following its previous jurisprudence. In its opinion, it did not fulfil the necessary threshold for review,<sup>19</sup> and therefore it dismissed the application as one over which it had no jurisdiction. But on the other hand, as *obiter dictum*, the CC concluded that the government’s approach was in fact unconstitutional. It specifically noted that “unless the facts under which the state of emergency was declared have changed, it cannot be ‘redeclared’ by the government from the moment the ‘authorised’ state of emergency has ended, and the Chamber of Deputies has not agreed to its extension”.<sup>20</sup> In other words, even though the CC, in the reasoning found the merit unconstitutional, it dismissed the case because its unconstitutionality was not enough.

### 3.2 Crisis measures

The restrictions of basic rights themselves during the state of emergency were imposed via crisis measures (for details, see chapter II). Even though the declaration itself should include restricted rights and their scope,<sup>21</sup> the CC held that they could be set out in subsequent crisis measures.<sup>22</sup>

As far as the legal nature of the crisis measure is concerned, the CC found that it is not a “statute”, but it has the nature of “some other enactment”.<sup>23</sup> This conclusion has far-reaching consequences – it can only be annulled with *erga omnes* effect by the CC in special proceedings, which only privileged applicants may initiate. As a result, that entailed the *de facto* impossibility of abstract judicial review by the CC due to the cumulative effect of the following:

- (1) the crisis measures were frequently updated (the average validity of crisis measure adopted from 30<sup>th</sup> November 2020 until 13<sup>th</sup> February 2021 was 25.7 days) (Chvojka, 2021, 20);
- (2) the process set out by the CC Act<sup>24</sup> for abstract legal review is not constructed for quick intervention by the CC [it has to give the government 30 days to reply<sup>25</sup> and the crisis measure must be valid at the time of application (or the application is inadmissible<sup>26</sup>)];

<sup>19</sup> CC, dated 16 March 2021, ref. no. Pl. ÚS 12/21, para. 20.

<sup>20</sup> *Ibid.*, para. 22.

<sup>21</sup> See Article 6 (1) of the Security Act, which stipulates that “*Concurrently with its declaration of the state of emergency, the government must specify which rights [...] shall [...] be restricted*”.

<sup>22</sup> CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 28 and 29.

<sup>23</sup> Article 87 (1) of the Constitution. CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 45. Newest case law considers this conclusion as stemming from “settled case law” – see CC, dated 11 May 2021, ref. no. Pl. ÚS 23/21, para. 10. However, it is necessary to assess the nature of crisis measures in each case. Some measures were found to be “an act of a purely internal nature” – see CC, dated 26 January 2021, ref. no. Pl. ÚS 113/20, para. 9.

<sup>24</sup> Zákon č. 182/1993 Sb., o Ústavním soudě [Constitutional Court Act]. English version is available at <https://bit.ly/3XSfxUV>

<sup>25</sup> § 69 (1) of the CC Act.

<sup>26</sup> § 66 (1) of the CC Act.

(3) the CC Act does not provide for a possibility to declare the crisis measure unconstitutional without annulment in case it was abolished during CC's proceedings (in such case, the proceedings are dismissed<sup>27</sup>) as does Pandemic Act (see below);

(4) there is a limited number of applicants who may apply for a review of legal norms (the application can be submitted by the government, group of 25 deputies or 10 senators, the CC itself while deciding a constitutional complaint, the Ombudsman, or by an individual together with a constitutional complaint).<sup>28</sup>

As a result, many applications were dismissed since ineligible applicants applied for review. Other proceedings initiated by senators were dismissed because the reviewed crisis measure was replaced by a new one.<sup>29</sup> From spring 2020 until the time of submission of the paper, only one crisis measure was actually reviewed by the CC.

In that case, the senators submitted for review a crisis measure restricting retail shops. The CC found that the government acted arbitrarily, as the crisis measure generally forbid all retail shops from providing their services, and then it provided for 36 exemptions without any reasoning for doing so.<sup>30</sup> In this respect, it should be noted that this (and all other crisis measures issued) lacked any official reasoning.

This shows that abstract judicial review of adopted crisis measures during the state of emergency is virtually impossible. The fundamental issue is the applicable procedural legislation, which never counted on such a situation as the current one. However, the subsequent formalistic and restricting interpretation of the procedural rules by the CC led further into a dead end. That was mainly reflected in the refusal to continue the proceedings after the amendment or repeal of a reviewed measure where it had been initiated by privileged applicants.

### 3.3 Emergency measures issued according to the Public Health Act

From time to time, especially at the beginning of the pandemic, the government also issued measures according to the rather general provisions of the Public Health Act. Some citizens also petitioned the CC, demanding review. The CC affirmed that these measures are “specific measures of a general nature”<sup>31</sup> (*opatření obecné povahy*) which are reviewable by administrative courts in special proceedings. Therefore, applicants have to use this procedure before applying to the CC. However, the court shall not reject the complaint if “the significance of the complaint extends substantially beyond the personal interest of the complainant”.<sup>32</sup> This is the case if the issue at stake concerns hundreds or thousands of cases and its resolution would eliminate more litigation, if there is an urge to figure out the constitutionality of the particular interpretation, or if it concerns the basic principles of democratic rule of law (Filip et al., 2007, 280–281). These must be argued and adequately proved by the applicants.

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<sup>27</sup> § 67 (1) of the CC Act.

<sup>28</sup> § 64 (2) of the CC Act.

<sup>29</sup> CC, dated 16 June 2020, ref. no. Pl. ÚS 20/20; and CC, dated 8 December 2020, ref. no. Pl. ÚS 102/20.

<sup>30</sup> CC, dated 9 February 2021, ref. no. Pl. ÚS 106/20, para. 70.

<sup>31</sup> E.g., CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 54; or more recently CC, dated 27 April 2021, ref. no. Pl. ÚS 19/21, para. 9.

<sup>32</sup> § 75 (1) and § 75 (2) (a) of the CC Act.

Even though the CC itself has the power to annul a specific measure of general nature,<sup>33</sup> the court did not satisfy any complaint. In all relevant cases, their dismissal was justified in the eyes of the CC by not extending the personal interest of the complainant. The “mere subjective feeling by the applicant” that the issue at stake concerns more people was not enough.<sup>34</sup>

But when else will this provision be fulfilled, if not in case of such widespread measures, which affect the fundamental rights of all the inhabitants of the state?<sup>35</sup> We cannot think of a better situation in which the complainant’s interest is shared than this one, but apparently the CC can. On the other hand, the self-limitation is understandable since remedy before the administrative courts was available.

We do not consider the role of the CC in relation to emergency measures issued according to the Pandemic Act, since they are primarily reviewed by the SAC and the case law does not deal with their direct review by the CC. However, the CC widened the possibility to lodge an action. Under previous case law, the applicant had to be directly affected by the measure.<sup>36</sup> However, the CC held that such a restriction is unconstitutional.<sup>37</sup> We elaborate on this decision’s impact in part IV.3 below.

### 3.4 The Constitutional Court as a passive player

In the light of the theoretical outlet accounted for in the previous chapter, we deem the CC’s role during the pandemic as that of a passive player. It means that the CC is neither a “passive bystander” nor an active player. Generally speaking, the CC has failed to play its part. While the substantial self-restraint regarding the declaration is consistent with the separation of powers during an emergency, it is the only thing on the good practice list.

First, to be an active player and to live up to its role, the CC should retain the power to scrutinise procedural aspects of the declaration of the state of emergency as well as “ordinary” (i.e. not only flagrant) misuse of the declaration. The declaration of the state of emergency as such (solely) is able to interfere with individual rights (for more detail see Kovalčík, 2021, 667). That is why judicial review is necessary.

Given that the government is legitimised through the confidence of the Chamber of Deputies and the interconnectedness is thus obvious, the control by the Chamber cannot be considered sufficiently effective. Therefore, the government does not have the problem – in the normal circumstances – of ensuring that the state of emergency will not be cancelled. In addition, the government can in fact declare the state of emergency in spite of the reluctance of the Chamber of Deputies, as it also happened during spring 2021, although it will probably be an unconstitutional procedure.

Also, in respect of scrutinising particular measures, the consequences of the active approach could be far-reaching. The requirement to state reasons in the crisis measure should have been established earlier than a year after the first state of emergency. The conclusion of the CC puts into question the constitutionality of all adopted measures, which could have a serious impact,

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<sup>33</sup> CC, dated 5 May 2020, ref. no. Pl. ÚS 12/20, para. 20.

<sup>34</sup> CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 62; CC, dated 5 May 2020, ref. no. Pl. ÚS 13/20, para. 28; CC, dated 9 June 2020, ref. no. Pl. ÚS 19/20, para. 39.

<sup>35</sup> See dissenting opinion of Kateřina Šimáčková, Vojtěch Šimíček and David Uhlíř to CC, dated 22 April, ref. no. Pl. ÚS 8/20.

<sup>36</sup> For greater detail see part IV.3 of this paper.

<sup>37</sup> CC, dated 19 July 2022, ref. no. IV. ÚS 2431/21, paras. 25–27.

among other things, on a state liability for damages. Nevertheless, it was good that at least some playground for the government was drafted.

The actual approach to review presented in February 2021 was regrettable, as the CC did not invalidate the unconstitutional state of emergency declaration. This was followed by the impossibility of reviewing the crisis measures, caused both by insufficient legal norms and a formalistic approach by the CC. As dissenting opinions, as well as scholars pointed out,<sup>38</sup> other – pro-review – interpretations were also possible. Where there is a will, there is a way.

The picture of the CC as a passive player is exemplified by its reluctance to review the emergency measures issued according to the Public Health Act, although the applicable law allows for such review and conditions for not exhausting the available remedies before submitting the constitutional complaint.

The situation in which the abstract judicial review of the declaration and the crisis measures is impossible had not been solved to this today. The public and academic focus shifted with the adoption of the Pandemic Act. However, the reality remains, that in any following state of emergency (as the one declared in November 2021 and lasting until Boxing Day), we will be back in this unsolvable situation. The only rational solution, in our opinion, is to provide for special proceedings, either before the CC or the SAC, in which abstract judicial review would be possible. If the legislator is unable to pass the corresponding acts, the courts will have no other choice than to amend their current findings and allow the review themselves.

It should be noted that this part focused solely on abstract judicial review in front of the CC. *In concreto* review of the declaration and crisis measures by administrative courts was and is still possible in some cases. However, the only possible way for citizens and others to obtain review was and is to violate some restrictions first and to be fined. In such a case, the administrative courts could review the constitutionality of the declaration or measure (regardless of its abolition). The approach by the SAC and lower administrative courts will be presented in the following chapter.

#### **4 The Supreme Administrative Court and lower administrative courts**

The second important player in the field of the judicial review of adopted measures is the SAC. This court is the highest judicial body within the administrative judiciary. Lower courts are the regional courts and they usually act as courts of the first instance. A cassation complaint to the SAC is permitted against their decision. By its decision, the SAC ensures the unity and legality of administrative courts' case law. In addition, the SAC is the first instance court for review of the emergency measures adopted under the Pandemic Act.

This court has had a much harder position during the pandemic and especially after the Pandemic Act was adopted. Unlike the CC, which got rid of applications on the basis of procedural reasons, the SAC had to make substantive review of a majority of applications. This chapter therefore investigates how much the SAC fulfilled its role as a court during a pandemic – together with the regional courts.

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<sup>38</sup> See Chvojka (2021); Horák et al. (2021); Kovalčík (2021); Vikarská (2021); and also dissenting opinion of Kateřina Šimáčková, Vojtěch Šimíček and David Uhlíř to CC, dated 22 April, ref. no. Pl. ÚS 8/20, para. 6.

#### 4.1 Declaration of the state of the emergency and crisis measures

The SAC case law followed the opinions of the CC regarding the nature of the state of emergency declaration and crisis measures.<sup>39</sup> Therefore, the administrative courts cannot provide for an abstract review as well.

As far as incidental review is concerned, there are a few relevant cases available. One of the most notable cases is from the Municipal Court in Prague. The applicant filed a motion demanding a declaration of unlawful intervention into her rights by a crisis measure (i.e. she wanted to declare the effects of normative act unconstitutional), which prevented her from going to her workplace abroad. The court, with the help of the ECtHR case law, stated that there is a close connection between the crisis measure and the applicant, and therefore dismissing the notion would be a denial of justice and violation of the right to an effective remedy. It then went on and concluded that the interference with the applicant's right was proportionate, and the motion was unfounded.<sup>40</sup> The possibility of a sort of "concrete review" was subsequently refused by the SAC's enlarged senate<sup>41</sup> and even the CC, which labelled the decision as excessive and stated that the Municipal Court's "approach probably stemmed from excessive inspiration from the [ECtHR]. However, the [ECtHR] is an international body whose powers are enshrined in an international treaty and do not directly affect the powers of the national courts of the contracting parties."<sup>42</sup> According to both, it is not possible to seek a declaration of the unlawfulness of effect stemming from the generally applicable act.

Another case concerns a review of the declaration of the state of emergency from February 2021, which we described above. The Municipal Court in Prague stated that the declaration was unconstitutional and, therefore, schools must resume teaching since there was no legal basis for their suspension.<sup>43</sup> The same court also reviewed the legality of crisis measures restricting retail stores when assessing the legality of banning people from the store by police and concluded that the crisis measure was unconstitutional.<sup>44</sup> The last one concerns the right to assemble. The police denied the applicant access to a square where the protest was taking place since too many people were already there. The Municipal Court in Prague reviewed the legality of the declaration of the state of emergency and concluded that material and procedural requirements were fulfilled and hence it was not unlawful or unconstitutional.<sup>45</sup>

To summarise, the activity in review by the administrative courts was precluded by the opinions of the CC on the nature of the declaration and crisis measures. In contrast to this, it

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<sup>39</sup> In regard of the declaration see e.g., SAC, dated 21 May 2020, ref. no. 5 As 138/2020 - 80, paras. 37 and 39. As far as the crisis measures are concerned, see para. 42 of the cited judgment. All judgments of the administrative courts are available in Czech at [www.nssoud.cz](http://www.nssoud.cz).

<sup>40</sup> Municipal Court in Prague, dated 11 November 2020, ref. no. 14 A 45/2020 - 141, mainly paras. 15, 33, 34–39, 51, and 107.

<sup>41</sup> Enlarged senate of the SAC, dated 30 June 2021, ref. no. 9 As 264/2020 - 51, para 72.

<sup>42</sup> CC, dated 4 January 2022, ref. no. Pl. ÚS 34/21, para. 30.

<sup>43</sup> Municipal Court in Prague, dated 23 February 2021, ref. no. 17 A 126/2020 - 84, para. 38. This judgment was annulled, and the action dismissed by the SAC, dated 20 July 2021, ref. no. 6 As 73/2021 - 67, but for different reasons than that the courts cannot review the declaration in incidental review.

<sup>44</sup> Municipal Court in Prague, dated 31 May 2021, ref. no. 6 A 141/2020 - 90, para. 66. The SAC approved the decision by SAC, dated 14. October 2021, ref. no. 7 As 205/2021 - 45.

<sup>45</sup> Municipal Court in Prague, dated 21 September 2021, ref. no. 8 A 26/2021 - 42, para. 56.

seems that the administrative courts are counting on incidental review. However, that means that citizens must first expose themselves to some kind of sanction for breaching the measures and only then argue its unlawfulness in front of the administrative court.

#### 4.2 Emergency measures under the Public Health Act

At the beginning of the pandemic, the Ministry of Health used the emergency measures issued according to the Sec. 69 of the Public Health Act to supplement the crisis measures. The content of the measures included, among others, the obligation to wear a mask, the prohibition and restriction of social events, mandatory antigen testing in healthcare facilities, or restriction of retail stores and freedom of movement in public places.

As we mentioned earlier, these measures are reviewable in abstract as “specific measures of general nature” by the administrative courts in special proceedings. Nevertheless, their reviewability has run up against some limits of the legislation – stemming particularly from its short validity (a feature shared with crisis measures). That led to a similar problem, because the previous case law mandated the dismissal of action for missing subject matter if the challenged specific measure of a general nature was abolished while proceedings took place.<sup>46</sup> However, the SAC concluded that when the emergency measure is quickly replaced by one with similar content, the court should allow an amendment of action to reflect this change instead of dismissing it and even instruct the applicant to do so.<sup>47</sup>

Another important addition of the SAC was the “restriction” of the Ministry’s powers. The Sec. 69 (1) (i) of the Public Health Act allows the Ministry to “prohibit or order certain other activities to eradicate an epidemic or the risk of an epidemic”. The Ministry used this provision to impose numerous different obligations as mentioned above. The SAC rejected the endlessness of such power, arguing that an *eiusdem generis* interpretation is essential.<sup>48</sup> Therefore, the Ministry cannot use this power to, for instance, shut down restaurants and casinos because this does not relate to other powers in the enumeration at all.<sup>49</sup> Furthermore, the measures according to the Public Health Act can only target “persons suspected of being infected”. As such, this act does not allow the behaviour of all persons on the territory to be regulated unless the entire country is declared “the focus of infection” and everybody can be suspected as being infected.<sup>50</sup>

The courts also repeatedly reproached the Ministry of Health for insufficient reasoning of its emergency measures. The Municipal Court in Prague even stated that it “repeats a number of deficiencies previously criticised by the court, despite the instructions given to the [Ministry] in earlier decisions of the court, or rather it cumulates and further deepens these deficiencies.”<sup>51</sup>

It is obvious that the SAC, and subsequently the regional courts, cared about effective judicial protection and tried to avoid denial of justice. The effectiveness of the review stems from the limitation of the Ministry’s powers extended in an arbitrary and unlawful way and in requiring adequate reasons for the measures to be imposed. The only reproachable issue can be seen

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<sup>46</sup> See cited case law in SAC, dated 26 February 2021, ref. no. 6 As 114/2020 - 63, para. 85.

<sup>47</sup> Ibid., paras. 97 and 106; or SAC, dated 16 March 2021, ref. no. 5 As 160/2020 - 66, paras. 18 and 20.

<sup>48</sup> SAC, dated 26 February 2021, ref. no. 6 As 114/2020 - 63, para. 143.

<sup>49</sup> SAC, dated 21 May 2021, ref. no. 6 Ao 22/2021 - 44, paras. 47 and 49.

<sup>50</sup> Enlarged senate of the SAC, dated 11 November 2021, ref. no. 4 Ao 3/2021 - 117, para. 54.

<sup>51</sup> Municipal Court in Prague, dated 13 November 2020, ref. no. 18 A 59/2020 - 226, para. 144.

in the length of the SAC's proceeding with regard to one of the leading decisions. It took almost nine months, but the conclusions there were crucial for further actions.

### 4.3 Emergency measures under the Pandemic Act

The Pandemic Act contains specific provisions for judicial review, aiming to overcome obstacles noted above in relation to the review of crisis measures by the CC and emergency measures issued under the Public Health Act. The most important change in this regard is the possibility to review even abolished measures and eventually declare them invalid.<sup>52</sup> The second important step was affirming the emergency measures as “specific measures of general nature” for which the general procedural rules apply.

This legal framework enabled the SAC to force the executive power to adhere to the basic democratic and rule of law standards, such as that interference with the rights of citizens and imposing obligations is only possible when it is in accordance with the law and has a proper justification. This is surely a welcome change after the first period with almost no judicial review. On the other hand, the current version of the Pandemic Act puts a heavy burden on the already swamped SAC. Since the pandemic apparently will not end in the nearest future, changes should be introduced.

The motion to invalidate an emergency measure can be submitted by “one who claims to have been deprived of his rights by a measure of a general nature issued by an administrative authority.”<sup>53</sup> The previous case law then requires the applicant to claim the possibility of his or her legal sphere being affected consistently and conceivably by the measure.<sup>54</sup> As a result, only the person to whom the measure was addressed could lodge an action. Therefore, there was difference if the wording was, for example, “the restaurants shall be closed” or “customers may not enter restaurants' premises”. This was changed by the above-mentioned decision of the CC and, under current interpretation, both sides (restaurants and guests) may lodge an action, regardless of the wording.

This could have a grave impact on number of motions and workload of the SAC. From February 2021 until the end of the state of pandemic readiness in spring 2022, the SAC obtained 317 motions. 60 of which were found at least in part justified, and therefore the court either annulled the emergency measure (or its part) or declared it unlawful. 30 motions were rejected as unfounded. 189 were dismissed for various procedural reasons [the lack of legal standing (also linked to previous narrow interpretation of legitimation to lodge action), late motion, unpaid court fee or motion's withdrawal, etc.] or because they were manifestly unfounded.<sup>55</sup> There were 22 pending cases at the time of submission of the paper.<sup>56</sup> The high number of dismissals is mainly due to previously restrictively applied legal standing. Therefore, in the potential upcoming COVID-19 autumn/winter wave, the SAC could face high number of motions, which it would have to deal with on the merits instead of dismissal for procedural reasons.

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<sup>52</sup> § 13 (4) of the Pandemic Act stipulates that “*If the emergency measure was abolished during proceedings, it does not prevent further proceedings*”.

<sup>53</sup> § 101a (1) zákona č. 150/2002 Sb., soudního řádu správního.

<sup>54</sup> SAC, dated 22 December 2021, ref. no. 8 Ao 28/2021 - 83, para. 14.

<sup>55</sup> § 13 (3) of the Pandemic Act allowed this simpler way.

<sup>56</sup> Data were obtained from the SAC.

The approach of the SAC to review has developed over time. The SAC was stricter and more prompt at the beginning. The measures were annulled as a whole (not only specific provisions) with a slight postponement so a new one could be issued and in relatively quick proceedings.<sup>57</sup> For instance, in June 2021, the SAC struck down the measures of the Ministry of Health allowing entrance to cultural and similar indoor events only to people with a vaccination, negative test or recovery certificate. According to this judgment, the Ministry had not put forward justifiable reasons for not including antibody tests among the entry conditions.<sup>58</sup>

One of the most serious issues was measures restricting and prohibiting restaurants and bars. The problem is that the Pandemic Act does not allow the Ministry of Health to restrict or forbid the operation of restaurants or bars. This led to the annulment of the measure by the SAC; however, the Ministry of Health issued new measures with the same content ignoring the previous legal opinion of the SAC in the annulling decision. In the decision reviewing the same restriction in a subsequent measure, the SAC pointed this out and stated that the Ministry of Health must “be aware that it is issuing measures that are manifestly unlawful and are likely to cause harm and prejudice to the fundamental rights of its addressees,” and that “the possibilities of judicial protection provided by the [SAC] have already reached its limits” since the proceedings only took four days.<sup>59</sup>

Apart from the lack of legal basis, another grave issue was the reasoning of the measures, which was often found insufficient. As the SAC pointed out, the Ministry of Health “(despite the fact that it has gradually tightened the obligations) still mechanically copies the justifications for the more stringent measures and does not adapt them in any way, not only to these new obligations but also to the requirements of the legislation.”<sup>60</sup> This led to an annulment or declaration of unlawfulness in many cases.<sup>61</sup> In cases of justification of measures requiring respirators to be worn, the SAC reproached the ministry for not taking into account the findings of the court made in the review and annulment of similar previous measures and made the same mistakes. While reviewing the third measure in this respect, the SAC noted that it “cannot stand idly by while its decisions are systematically ignored by the [Ministry of Health] and must therefore do its utmost to prevent the consequences of such a practice by the respondent”.<sup>62</sup>

Now fast forward in time after the “first wave” of judgments, where the SAC adopted a different approach. The court started annulling or declaring unlawful only specific articles of the emergency measures and dismissing the rest of the motions.<sup>63</sup> Moreover, some proceedings are taking much longer since some judges no longer consider the review of emergency measures a priority over the normal cassation agenda.<sup>64</sup>

<sup>57</sup> See e. g. SAC, dated 14 April 2021, ref. no. 8 Ao 1/2021 - 133; SAC, dated 22 April 2021, ref. no. 6 Ao 11/2021 - 48; or SAC, dated 11 May 2021, ref. no. 3 Ao 3/2021 - 27.

<sup>58</sup> SAC, dated 30 June 2021, ref. no. 6 Ao 21/2021 - 23, para. 21.

<sup>59</sup> SAC, dated 21 May 2021, ref. no. 6 Ao 22/2021 - 44, paras. 65 to 67.

<sup>60</sup> SAC, dated 27 May 2021, ref. no. 7 Ao 6/2021 - 112, para. 78.

<sup>61</sup> See e. g. SAC, dated 14 April 2021, ref. no. 8 Ao 1/2021 - 133, paras. 105 to 107; SAC dated 11 May 2021, ref. no. 3 Ao 3/2021 - 27, paras. 38 and 40; SAC, dated 9 June 2021, ref. no. 8 Ao 15/2021 - 65, paras. 59, 60 and 63; or SAC, dated 16 June 2021, ref. no. 9 Ao 7/2021 - 27, para. 27.

<sup>62</sup> SAC, dated 27 July 2021, ref. no. 8 Ao 17/2021 - 63, para. 43.

<sup>63</sup> See e. g. SAC, dated 28 July 2021, ref. no. 6 Ao 6/2021 - 91; SAC, dated 29 June 2021, ref. no. 8 Ao 7/2021 - 44; or SAC, dated 18 November 2021, ref. no. 9 Ao 21/2021 - 111.

<sup>64</sup> SAC, dated 23 November 2021, ref. no. Aprn 4/2021 - 107, para. 3. This ruling and the de-prioritizing of some

This takes us to the last important note. Having the SAC review the emergency measures as the court of first (and only) instance<sup>65</sup> had an impact on other proceedings as well, due to the complexity and difficulty of the review. It was one of causes of the proceedings taking longer – the median of a length of cassation proceedings, which are resolved on the merits, rose from 240 days in 2020 to 296 days in 2021.<sup>66</sup> Other causes, such as a growing backlog<sup>67</sup> and elections to the Chamber of Deputies in autumn 2021,<sup>68</sup> are not related to COVID-19.

#### 4.4 The Supreme Administrative Court as an active player

As the onset of the pandemic in the Czech Republic was (unsurprisingly) confusing and even highly emotive, the administrative judicial review, to some extent, mirrored this chaos. In the beginning, we could observe both – activist courts and those with the “passive bystander approach”.

As we elaborated on above, the dynamic situation of the new contagious disease required a more restrained approach by the courts. They should focus on procedural review and manifest unlawfulness, whilst, in respect of the suitability and proportionality of the particular measures, courts should be more reluctant to intervene. However, that was not always the case at the SAC. Although the community of scientists does not have a clear, strong and almost unanimous opinion on the usability of antibody tests for COVID-19, the SAC abolished measures because of the absence of reasoning for antibody tests not qualifying as the fourth option allowing entry to cultural events.<sup>69</sup> This judgment was even bolder in the light of the EU Covid Passports, which brought an agreement between the EU member states on three “safety options” – vaccination, negative test and recovery certificate.

Nevertheless, one swallow does not make a summer – several early “Pandemic Act judgments” by administrative courts, which could be deemed activist, were exceptional, and the case law has stabilised over time. The SAC has neither conclusively stood behind the scenes nor played a consistently active role, but put a stop to extreme activist proposals such as “creation of a sort of concrete review competence” without any legal basis, at the right time.<sup>70</sup> In short, the SAC grasped its role in the system for managing the pandemic and delineated a quite unambiguous playground for executive actions. The grounds of this lie, among other factors, in the clearer procedural framework for reviewing pandemic measures provided by the Pandemic Act, designed specifically for this situation.

This active – but not activist – approach by the SAC has a real impact. Plenty of judgments induced political pressure from the opposition in the Parliament as well, as from Czech

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emergency measures was approved by the CC – see CC, dated 4 January 2022, ref. no. I. ÚS 3265/21. Subsequently, this was included in § 13 (5) of the amended Pandemic Act.

<sup>65</sup> § 13 (6) of the Pandemic Act forbids cassation complaint, only constitutional complaint to the CC is permissible.

<sup>66</sup> Source data were obtained from SAC. The number of days was calculated as median of length of proceedings from date of complaint’s arrival at the SAC until the day of judgment on merits.

<sup>67</sup> Precise statistics can be found on the website of the SAC at <http://nssoud.cz/main2Col.aspx?cls=Statistika&menu=190>.

<sup>68</sup> The SAC had to deal with largest number of election complaints in history (most of them were however dismissed on procedural reasons). See Final information on election complaints. Online: <https://bit.ly/3OZC51U>

<sup>69</sup> SAC, dated 30 June 2021, ref. no. 6 Ao 21/2021.

<sup>70</sup> Enlarged senate of the SAC, dated 30 June 2021, ref. no. 9 As 264/2020 - 51, described in more detail above.

society as a whole, since the SAC's pandemic judgments were given significant space in the media. That leads to Ministry of Health and the government caring more about the wording of measures as well as their proper justification. However, the regulation of pandemic measures is still far from the ideal, but what is ideal? To summarize, it looks like that the judicial body has helped other branches of the state power to – at least – improve the measures.

The last reflection of this approach by the administrative courts is the novelisation of the Pandemic Act. It mostly reacts to the case law finding a lack of effective measures and therefore it now allows the Ministry to restrict any businesses where two persons directly meet and provides for a detailed list of places (specifically including zoos, rehabilitation centres, planetariums and discos), the operation of which can be restricted. The validity of the Act has been extended until 30 November 2022. At the time of submission of the paper, the Chamber of Deputies also cancelled the state's pandemic readiness, thereby terminating the Ministry of Health's power to issue emergency measures.<sup>71</sup> Also, there is no legislative proposal to prolongate the validity of the Pandemic Act.

## Conclusion

This paper rendered an overview of the judicial review of pandemic measures in the Czech Republic and addressed some of the problems, mostly from the perspective of the CC and the SAC. In the theoretical part, we argued that only joint action by all three state powers for a common goal – stopping the spread of a contagious disease with the smallest possible impact on the economy as well as to fundamental human rights – can lead to the most effective measures in a democratic state under the rule of law. This “joint action” also needs courts as active players in managing the pandemic. An active approach by the judiciary is able to prevent the abuse of power; enhance the quality of the measures and their communication and contribute to increasing the legitimacy of measures. Following up on this ideal approach, we assessed whether the courts in the Czech Republic live up to this role.

The findings are diverse. Firstly, the CC did not fulfil its role during the pandemic. The main obstacle was the insufficient legal framework for review of the declaration of the state of emergency and crisis measures adopted within it. However, the CC, by its interpretation, prevented its review even in the rest of the cases. That resulted in almost a year in which the CC was precluded from any abstract review. Accordingly, current crisis legislation cannot avoid amendments. The new Czech government stated has promised to revive the legal framework for crisis management. However, its programme statement does not contain anything on courts in this regard (Government Programme Statement, 2022).

On the other hand, we commend the SAC as an active player. The SAC and lower administrative courts managed to overcome the procedural obstacles in their abstract reviews of emergency measures, which led to the annulment of many of them. That revealed the necessity of effective judicial protection in such exceptional circumstances, since the SAC had to annul measures for basic errors by the executive power, such as an obvious lack of legal basis or clearly insufficient reasoning.

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<sup>71</sup> Resolution of the Chamber of Deputies from 4 May 2022, ref. no. 113/2022 Coll.

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# **BOOK REVIEW**