

Covid-19 pandemic in the Czech republic – Legal frame

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„Im Gegensatz zum Tier sagt dem Menschen kein Instinkt, was er muß, und im Gegensatz zum Menschen in früheren Zeiten sagt ihm keine Tradition mehr, was er soll, und nun scheint er nicht mehr recht zu wissen, was er eigentlich will.“ (Viktor Frankl)

„Wer ein WARUM zum Leben hat, erträgt fast jedes WIE.“ (Friedrich Nietzsche)

„I know that I know nothing.“ (Socrates)

I. Introduction

A lot of medical, social and political comments have been written in 2020 about the coronavirus which stands behind COVID-19 pandemic. This article is less descriptive from above mentioned perspectives. Instead, it aims at Czech legal frame.

The Czech republic and Italy are both unitary republics, but self-government in Italy, hopefully thanks to stronger federalism, is much more pronounced in its constitution, and is active while struggling with COVID-19 pandemic.

II. Positions of Czech stakeholders

- i. In case of life, health, property, inner order and security threatening, state of emergency is declared by government. First declaration is for up to 30 days, every other subsequent declarations beyond 30 days must be parliament approved first. Cancellation of state of

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emergency may be done by government or parliament at any time. In the Czech republic we have Security Constitutional Act¹ (Constitutional Act No. 110/1998 Coll.), which by article 5 and 6 together with Crisis Act¹ (Act No. 240/2000 Coll.) grants government crisis legislative power, when being in the state of emergency.

During declared state of emergency parliament continues in its legislative power partially by accelerated legislation process and public administration in its executive power, but government has the right to issue crisis acts, that restrict constitutional rights. It does not lose the right to issue other than crisis acts, as it normally does.

That is why there have been interventions of the parliament into private law commitments like e.g. postponing of tenant's payments or into public law relations like providing benefits to own-account workers taking care about their children while not attending the school despite they do not contribute to the fund from which benefits are paid. There have been also exceptions in some international sport events granted by public administration. These interventions and exceptions have been in accordance with governmental crisis acts.

- ii. After Austria-Hungary disintegration 1st Czechoslovak republic rised. This republic is still inspirational for the Czech republic, because what we solved one hundred years ago, we are solving also nowadays, not only in respect to COVID-19 pandemic. But our today's conclusions are in certain ways different from those previous ones. At that time it was the first democratic republic of Czechoslovak citizens (Czechs and Slovaks today). It dealt with the question, whether to delegate legislative power in exceptional circumstances to government (option the Czechs were familiar with from former Austrian period) or whether to create besides regular parliament substitutional permanent parliamentary committee overtaking parliament's legislative power. It chose the 2nd option². It granted parliamentary committee acts the power of law and it enabled Constitutional court to review the acts from constitutional perspective.

There is an iconic, besides all others also comparative book titled „Legislation without parliaments. Delegation and substitution of legislative power“, author prof. Jan Kysela from Department of Politology and Sociology, Faculty of Law, Charles University, Prague, which was reviewed by his nowadays department colleague prof. assoc. Jan Wintr in Journal of Jurisprudence and Legal Practice in 2007³, a year after the book was published. The title of the book is sometimes paraphrased and shortened as „Legislation of executive power“. There is said in the book: *„The legislative delegation cannot be rejected as such a priori... May be, perhaps a little paradoxically, a partial tool for revitalizing parliament, which will be given more time to discuss important decisions. In short, the choice between parliamentary and executive legislation does not seem to me to be a clash of white with black, but rather a choice of different shades of gray“* (p. 33). Jan Wintr adds the comment^{3,4} (Constitutional court File No. Pl. ÚS 52/03): *„...if the parliament has already authorized the executive power to implement the law in a specific case, the Constitutional court considers it inadmissible from the point of view of the division of powers to change such legislation itself, subject to change or withdrawal of the competence order and adoption of new legislation in the form of primary legislation“*. This Constitutional court decision may be seen as decision supporting strong position of delegated legislation, no matter what the power of executive acts is.

¹see after law number search in Collection of laws at: <https://aplikace.mvcr.cz/sbirka-zakonu/>

²Constitutional court of the Czechoslovak republic and its fortunes in years 1920-1948. Constitutional court of the Czech republic. Available at: <https://www.usoud.cz/en/constitutional-court-of-the-czechoslovak-republic-and-its-fortunes-in-years-1920-1948>

³WINTR, Jan. Kysela, Jan: Zákonodárství bez parlamentů. Delegation a substituce zákonodárné pravomoci [Legislation without parliaments. Delegation and substitution of legislative power]. Journal of Jurisprudence and Legal Practice. [Online]. 2007, No. 4, p. 388-390. Available at: <https://journals.muni.cz/cvpv/article/view/7148>

⁴see after file number search in the database of Constitutional court decisions at: <https://nalus.usoud.cz/Search/Search.aspx>

- iii. It is not possible to restrict constitutional rights by the activity of public administration, which proceeds according to Health Protection Act¹ (Act No. 258/2000 Coll.), as we know from very early administration court decision⁵ (Prague city court File No. 14 A 41/2020). This was regional administration court decision in the dispute between citizen - Czech lawyer and Ministry of Health.

But last word will be said by Supreme administration court, in the matter of Ministry of Health complaint about the above mentioned Prague city court decision⁵ (Supreme administrative court File No. 6 As 114/2020).

State of emergency declaration is under supervision of the parliament, not Constitutional court, as we know from its very early decision⁴ (Constitutional court File No. Pl. ÚS 8/20). Attached dissent statements say that besides being political act, state of emergency declaration is also legal act which triggers some sleeping legal norms and Constitutional court has competence to review it. Parliament may cancel declared state of emergency, what by other words means, that all governmental crisis acts turn being invalid from the day of state of emergency cancellation.

Constitutional court said, that within individual constitutional complaint it is not empowered to review governmental crisis acts, issued under Security Constitutional Act and Crisis Act, because complainants did not attack governmental crisis acts in respect to how directly they influenced their constitutional rights, but, instead, did attack governmental crisis acts as the whole. „Actio popularis“ is in general not allowed within individual constitutional complaint. But again some Constitutional court plenary judges added dissent statements to very early decisions⁴ (Constitutional court File No. Pl. ÚS 8/20 and Pl. ÚS 10/20) saying that governmental crisis acts influence individual's constitutional rights directly and therefore Constitutional court should have decided complaints on the merits. Because of Constitutional court inactivity this was sued to European Court of Human Rights, but its decision will be very probably issued in the period of years⁶.

Current Constitutional court's attitude therefore rises a huge question also in respect to some former Constitutional court's, let's say, „brave“ decisions⁴ (e.g. Constitutional court File No. Pl. ÚS 27/09), that were interpreted as balancing on the edge of its powers. In above mentioned decision Constitutional court cancelled constitutional act according to article 9(2) of Constitutional Act No. 1/1993 Coll. - Constitution, which says „*A change in the essentials of a democratic state governed by the rule of law is inadmissible.*“ There is also the fact here, that half of the Constitutional court's plenary added dissent statements related also to possible „denegatio iustitiae“ resulted from current Constitutional court's attitude. And last but not least there is also the fact, that Austrian Constitutional court had decided to review „similar“ acts that were not decided on the merits by Czech Constitutional court within „similar“ individual complaints and argued also by European Convention on Human Rights⁷.

In the absence of constitutional case-law, there is at least administrative case-law that allows for a broader judicial review.

Administrative courts seems to be bounded by governmental crisis acts¹ (article 95 of Constitutional Act No. 1/1993 Coll. - Constitution), what by other words means, that they must not omit them when assessing concrete cases; they must apply them. If they think, that acts are not constitution conformed, they must let Constitutional court assess them first. But this is valid only if governmental crisis acts have the power of law, not if they bear sub-law power. But the power of governmental crisis acts itself is not absolutely clear from Constitutional court's pre case-law.

⁵see after file number search in the database of administrative courts decisions at: <http://nssoud.cz/main0col.aspx?cls=JudikaturaSimpleSearch&SimpleSearch=1&pagesource=0>

⁶see in the database of European Court of Human Rights Czech decisions at: [https://hudoc.echr.coe.int/eng#{\"sort\":\"kupdate Descending\"},\"respondent\":\"CZE\"},\"documentcollectionid2\":\"GRANDCHAMBER\",\"CHAMBER\"}\]](https://hudoc.echr.coe.int/eng#{\)

⁷COVID-19-Gesetz ist verfassungskonform, Verordnungen über Betretungsverbote waren teilweise gesetzwidrig. Verfassungsgerichtshof Österreich. Available at: https://www.vfgh.gv.at/medien/Covid_Entschaedigungen_Betretungsverbot.de.php

- iv. Regions and municipalities have been granted the right of self-governmental legislative power. This is anchored in the constitution¹ (article 104(3) of Constitutional Act No. 1/1993 Coll. - Constitution). In the post-totalitarian period of nineties Constitutional court had rather restrictive attitude to self-government regulations, but later, repeatedly decided, that not regulated matters, may be solved by self-government acting within the boundaries of law. In the first years of new millennium Constitutional court formulated 4 steps test of its judiciary review in respect to self-governmental regulations⁴ (Constitutional court File No. Pl. ÚS 63/04). This test consists of powers', material competence, abuse of law and rationality review. The similar judiciary review is applied when testing regulations of regions and municipalities issued within by the state delegated competences⁴ (e.g. Constitutional Court File No. Pl. ÚS 57/13). Both types of sub-law legislation regulations are used in general, but in respect to COVID-19 pandemic, we have seen no territorial regulations. Only centralization and deconcentration within state institutions have been in-use.

III. How different Italy is comparing to the Czech republic?

We have found, that Italian territorial self-government is active in its own legislation in COVID-19 pandemic. At first sight this seems to be due to „administration federalism“ constitutional reform in 2001. The Italian constitutional reform consisted of dividing exclusive and common powers and competences among state and territories⁸. The reform brought a lot of similarities with constitutional arrangement of federal republic like Germany and Austria. But Italy still is, differently from Germany and Austria, unitary republic. We would not say, that the same does not work in the Czech republic, but, differently from Italy, it is not pronounced in detail in the constitution. In Italy, before „administration federalism“ constitutional reform, there were also possible to issue territorial self-governmental ordinances and ordinances issued within by the state delegated competences. We are talking about Local Authorities Act⁹ (article 50 and 54 of Act No. 267/2000 Coll.)¹⁰. None of these two articles has been cancelled by „administration federalism“ constitutional reform. Based on article 50, municipalities have been issuing self-governmental ordinances, containing COVID-19 pandemic precautions. Based on article 54, municipalities issue ordinances related to security within by the state delegated competences. One such Sutri municipality ordinance, issued during COVID-19 pandemic, has been publicly criticized¹¹, because it prevented and penalized wearing masks. It said, that only terrorists wear the masks and terrorism is against the law.

The situation, that actually occurred in Italy during the COVID-19 pandemic, was a considerable concentration of legislative power in the hands of the Prime Minister through the tool of DPCM (Decreto Presidente Consiglio Ministri). Part of the doctrine stressed that the most appropriate instrument was actually „decreto-legge“ - act of the government which must be converted into law by parliament - see

⁸VESE, Donato. (2020). Managing the Pandemic: The Italian Strategy for Fighting COVID-19 and the Challenge of Sharing Administrative Powers. Chapter 3. Rules governing powers and competences in the constitutional scenario. European Journal of Risk Regulation, 1-28. DOI: <https://doi.org/10.1017/err.2020.82>

⁹DECRETO LEGISLATIVO 18 agosto 2000, n. 267. GAZETTA UFFICIALE. Available at: <https://www.gazzettaufficiale.it/eli/id/2000/09/28/000G0304/sg>

¹⁰ Il potere di ordinanza sindacale alla luce della recente evoluzione normativa e giurisprudenziale (di Antonio De Vita). Il Merito. Available at: <https://www.ilmerito.org/8-nel-merito/363-il-potere-di-ordinanza-sindacale-alla-luce-della-recente-evoluzione-normativa-e-giurisprudenziale-di-antonio-de-vita>

¹¹Sgarbi sindaco senza freni: "A Sutri multe a chi indossa le mascherine senza necessità". la Repubblica. Available at: https://roma.repubblica.it/cronaca/2020/08/29/news/la_provocazione_di_sgarbi_sindaco_a_sutri_multe_a_chi_indossa_le_mascherine_senza_necessita_-265778461/

article 77 of the constitution^{12,13}. „Decreto legislativo“⁹ is on the other hand act of the government with law power, which is issued if prior parliament delegation exists – see article 76 of the constitution¹³.

IV. Conclusion

Writing this article, we are in the last quarter of 2020, in the 2nd lockdown this year, starting from 22nd October 2020, lasting beyond 3rd November 2020, the day very first 30 days period of declared emergency state expired. Government approved 3 restrictive crisis acts, that have impacted free movement, sale and services and public administration operation¹ (crisis acts No. 424-426/2020 Coll.). From my perspective these crisis acts are much more mature than former mainly spring ones, reflecting also, besides common sense wisdom, court suits and medical recommendations coming from recent knowledge.

Summarising, what was said about legal positions of Czech stakeholders in COVID-19 pandemic, we have to conclude, that among constitutional bodies the leader is the government controlled by the parliament with the courts having rather no say, among public administration Ministry of Health and its deconcentrated hygiene bodies, with self-government having no say. We may summarize, that during declared state of emergency in the Czech republic there is primarily state power in the action. Governmental crisis acts, no matter if they have law power or sub-law power, enjoy court immunity. We may discuss, whether government in the Czech republic is delegated by parliament or substitutes parliament in crisis situation, in respect to governmental crisis acts.

We may conclude, that, in general, local differences exist, resulting mainly from different attitudes and activity of stakeholders. State crisis management as in the Czech republic is only theoretically more effective than potentially dichotomous state and self-governmental managements as in Italy. It does not seem to be the public law being alone successful in tackling COVID-19 pandemic, but close and correct relationships among state and its citizens matter.

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¹² DELLA GIUSTINA, Camila. Le ordinanze extra ordinem durante l'emergenza Covid-19. Chapter 3.1. Un nuovo istituto giuridico: il DPCM urgente. Rivista Giuridica AmbienteDiritto.it - ISSN 1974 - 9562 - Anno XX - Fascicolo 2/2020. Available at: <https://www.ambientediritto.it/dottrina/le-ordinanze-extra-ordinem-durante-lemergenza-covid-19/>

¹³ COSTITUZIONE DELLA REPUBBLICA ITALIANA. GAZETTA UFFICIALE. Available at: <https://www.gazzettaufficiale.it/dettaglio/codici/costituzione>