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The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks?

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ABSTRACT

Extraordinary limitation of certain fundamental rights seems necessary in fighting the COVID-19 pandemic. Many countries have declared a state of emergency for that purpose. Yet, there is also a risk of misusing the emergency for power grabbing, especially in the current era of executive aggrandizement, democratic decay and abusive populist constitutionalism. In this setting the legislative and judicial checks on the executive create a dilemma. Their standard operation in the state of emergency could control the executive, but might also impair its capacity to fight the pandemic effectively. This article therefore focuses on the desired role of the legislature and the judiciary in COVID-19 emergencies. Although many constitutions address emergencies, they are often vague and leave considerable room for the involved actors themselves to adjust their behaviour. This article asks how parliaments and courts should use this de facto room. I argue that they should show some deference to the executive, its level depending on the stage and severity of the crisis, but should not clear the field for governments. They must modify their activities but not suspend them. My main argument is that the deliberative and scrutiny functions of the legislature and the dispute-resolution function of courts are crucial not only for preventing the abuse of emergency measures, but also for increasing the effectiveness of emergency measures by improving conditions necessary for compliance. The legislature and courts can contribute to the higher feasibility and legitimacy of the emergency measures and thereby increase voluntary compliance, which is crucial for tackling the spread of the new coronavirus. The article illustrates these issues by way of the case study of the Czech Republic – a country experiencing its first nationwide state of emergency amid tendencies towards democratic decay and managerial populism.

KEYWORDS COVID-19; coronavirus; state of emergency; democratic decay; democratic backsliding; separation of powers; checks and balances; parliaments; judicial review; Czech Republic

1. Introduction

The COVID-19 pandemic has hit the world hard and has interfered in numerous areas of our lives. The million-dollar question is how to fight the

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pandemic effectively and stop the spread of the new coronavirus. Extraordinary measures including the cancelling of public events, travel restrictions, individual and mass quarantine, the closure of schools and businesses, and limitations of trade have been adopted in many countries.[1] These measures require significant curtailments of fundamental rights. Numerous countries have declared a state of emergency for that purpose.[2]

Yet, there is a risk of misusing the emergency to consolidate political power. This is particularly important in the current era of executive aggrandizement,[3] abusive populist constitutionalism and democratic decay when political leaders use the instruments of law to get rid of limitations on their power.[4] In fact, Hungarian Prime Minister Orbán has pushed the Enabling Act that gives him the power to govern by executive decree for an indefinite period. Critics argue that the new law transforms Hungary into a 'koronadiktatúra' (corona dictatorship).[5] In Israel, there were attempts to use the COVID-19 pandemic to limit the operability of courts and shut down the Knesset.[6] This trend is not limited to Hungary and Israel; several other countries seem to be following this path.[7]

In this setting, the operation of the legislature and the judiciary, the most traditional checks on the executive, creates a dilemma. Employing their standard approaches in a state of emergency could control the executive and prevent abuse, but might impair the governments' capacities to fight the pandemic effectively. This article therefore focuses on the desirable role of the legislature and the judiciary in the COVID-19 emergency. Although many constitutions address emergencies, they are often vague and leave considerable room for the involved actors themselves to adjust their behaviour. This article asks how the legislature and judiciary should use this de facto room.

[1]Cornelius Hirsch, 'Europe's coronavirus lockdown measures compared' (*POLITICO*, 31 March 2020), <https://www.politico.eu/article/europes-coronavirus-lockdown-measures-compared/>. All online sources were checked on 9 April 2020.

[2]See e.g. COVID-19 Civic Freedom Tracker, <https://www.icnl.org/covid19tracker/>.

[3]Executive aggrandizement occurs 'when elected executives weaken checks on executive power one by one, undertaking a series of institutional changes that hamper the power of opposition forces to challenge executive preferences'. Nancy Bermeo, 'On Democratic Backsliding' (2016) 27 *Journal of Democracy* 5, 10; Tarunabh Khaitan, 'Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism' (2019) 17 *ICON* 342.

[4]Tom Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 *Hague Journal on the Rule of Law* 9; Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545; Tom Ginsburg and Aziz Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018); David Landau, 'Populist Constitutions' (2018) 85 *University of Chicago Law Review* 521.

[5]'Will the Law Just Enacted Bring "Koronadiktatúra" to Hungary?' (*Hungarian Spectrum*, 30 March 2020) <https://hungarianspectrum.org/2020/03/30/will-the-law-just-enacted-bring-koronadiktatura-to-hungary/>.

[6]Nadiv Mordechay and Yaniv Roznai, 'Constitutional Crisis in Israel: Coronavirus, Interbranch Conflict, and Dynamic Judicial Review' (*Verfassungsblog*, 8 April 2020) <https://verfassungsblog.de/constitutional-crisis-in-israel-coronavirus-interbranch-conflict-and-dynamic-judicial-review/>.

[7]See Nate Schenkkan, 'Unpacking Authoritarian Propaganda on the Coronavirus' (*Freedom House*, 20 April 2020) <https://freedomhouse.org/newsletter/keeping-democracy-healthy/unpacking-authoritarian-propaganda-coronavirus-issue-4>.

It focuses mostly on decaying democracies experiencing 'incremental degradation of the structures and substance of liberal constitutional democracy'.[8] More specifically, the article concentrates on those polities which show tendencies to decay and are raising concerns about the effects of the emergency on the quality of democracy, but which are still displaying reasonable levels of judicial independence, trust in the courts and freedom of political speech in the legislature.

I argue that in such polities, parliaments and courts must modify their actions. They should show some deference to the executive, its level depending on the stage and severity of the crisis, but should not suspend their operation and clear the field for the executive. Building on theories of positive constitutionalism and efficiency-driven models of separation of powers, I introduce the effectiveness-enhancing theory of legislative and judicial checks in the COVID-19 emergency. My main argument is that the deliberative function of the legislature and the dispute-resolution function of the courts is crucial not only for preventing the abuse of emergency measures, but also for improving the effectiveness of emergency policies by supporting their legitimacy and feasibility. The legislature has unique institutional features that allow it to serve as a deliberative forum for scrutinising emergency policies and providing feedback to the executive. The judiciary is well equipped to resolve individual emergency-related disputes and to clarify the uncertainties in-built in the emergency measures. Accordingly, the legislature and courts can provide the emergency policies with additional legitimacy if the people know that their representatives have checked and discussed them, although in a limited manner, and that there is a venue where redress and clarification can be sought. Thereby, legislative and judicial checks can contribute to higher feasibility of the emergency measures and greater legitimacy of the emergency governance. These are important conditions supporting voluntary public compliance, which in turn is crucial for tackling the spread of the new coronavirus.

This theoretical argument is then illustrated by the case study of the Czech Republic, a country experiencing its first nationwide state of emergency amid tendencies towards democratic decay and managerial populism. The goal is to identify both good and bad practices and specify additional requirements necessary to maximise the legislature's and courts' contribution to improving the COVID-19 emergency governance. The key is to modify their operation in a way that strikes the right balance between respecting the executive's emergency mission, checking the executive and preventing the spread of the disease within the Parliament and courts.

The rest of this article proceeds as follows. Part 2 introduces the effectiveness-enhancing theory of legislative and judicial checks in the COVID-19

[8]Daly (n 4) 17.

emergency. Part 3 analyses the practice of the Czech Parliament and judiciary in the state of emergency through the prism of the effectiveness-enhancing theory. Part 4 concludes.

2. The effectiveness-enhancing theory of legislative and judicial checks in the COVID-19 emergency

2.1. The dilemma of legislative and judicial checks in the state of emergency

A traditional question of constitutional theory is whether a state of emergency occurs within the legal order at all.[9] The history of legal and political thought provides two major lines of answers. John Locke and Carl Schmitt represent the sceptical one. Although a major proponent of limited and divided government, Locke argued that '[m]any events may occur in which a strict and rigid adherence to the laws may do harm'.[10] In emergencies, the executive should use its prerogative powers to 'act according to discretion, for the public good, without the support of the law and sometimes even against it'.[11] In the twentieth century, Carl Schmitt radicalised Locke's idea and famously argued that '[s]overeign is he who decides on the state of exception'.[12] Schmitt attacked the sustainability of liberal constitutionalism, claiming that in exceptional times the sovereign is not constrained by law. Moreover, the sovereign himself decides when such times have come.[13] The Schmittian approach to emergencies was largely discredited in constitutional practice. It is said to have contributed to the collapse of the Weimar regime and facilitated the rise of the Third Reich.[14] The second tradition favours legal regulation of emergencies. Machiavelli claimed that a state 'will never be perfect unless it has provided for everything with its laws and has established a remedy for every accident and given the mode to govern it'.[15] In other words, Machiavelli pleaded for *ex ante* legal provisions regulating the exercise of public authority in emergencies.

Many modern constitutions regulate emergencies in the way recommended by Machiavelli.[16] Constitutional emergency provisions regularly define emergencies, specify who has the authority to declare the state of

[9]David Dyzenhaus, 'Schmitt V. Dicey: Are States of Emergency Inside or Outside the Legal Order?' (2006) 27 *Cardozo Law Review* 2005.
[10]John Locke, *Second Treatise on Government* (Early Modern Texts 2017) 53.
[11]ibid.
[12]Carl Schmitt, *Political Theology* (University of Chicago Press 2005) 5.
[13]David Dyzenhaus, 'States of Emergency' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 444.
[14]Kim Lane Scheppele, 'Law in a Time of Emergency' (2003) 6 *University of Pennsylvania Journal of Constitutional Law* 1001.
[15]Niccolo Machiavelli, *Discourses on Livy* (University of Chicago Press 1996) 74.
[16]Ferejohn and Pasquino coin this as the constitutional model of emergencies. John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 *ICON* 210, 217.

emergency under what conditions, and list their effects.[17] A common result of declaring a state of emergency is the concentration of extra powers in the hands of the executive.[18] This is a logical step since it is the executive, from among the three branches, which has what responding to an emergency needs: hierarchical structure with a clear division of ranks and responsibilities, access to expertise, and qualities that allow for swift and decisive action for protecting the nation.

For the very same reasons, however, the executive's emergency powers give rise to several risks. The executive can panic and adopt measures which excessively restrict liberty (panic theory). It can also design the emergency measures in ways that benefit the majority at the expense of minorities (democratic failure theory). Another risk is that the executive may fail to readjust the legal order once the reasons for emergency are gone (ratchet theory).[19] More generally, there is a danger that the executive will abuse the emergency powers for the sake of power grabbing and/or promoting self-interest rather than the common good. This is particularly threatening in the current context of executive aggrandizement and democratic decay often driven by authoritarian populism. Using the means of law and the cloak of popular sovereignty, populist leaders tend to get rid of checks and limitations on their power and attack courts, oppositional parliamentarians, media and civil society.[20] Adding emergency executive powers to this scenario creates an obvious danger.

The traditional way to control the executive and prevent abuse of power is the doctrine of separation of powers, specifically its checks and balances element.[21] Carolan, however, aptly stated that the 'doctrine seems hopelessly indeterminate'.[22] One might add that the indeterminacy is even greater in a state of emergency. In fact, the immanent feature of exceptional states is uncertainty since emergencies are inherently chaotic.[23] As a result, constitutional emergency provisions are vague by definition and leave considerable room for the involved actors themselves to adjust their behaviour. The question of how the legislature and courts should use this room and operate in emergencies, however, creates a dilemma. Checks on the executive which are too strict might impair its strengths in managing emergencies, i.e. decisiveness, swiftness, capacity for action. Too lenient an approach, on the other hand, could make the abusive and power-grabbing scenario more likely.

[17]Oren Gross, 'Constitutions and Emergency Regimes', in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 336–40.
[18]Christian Bjørnskov and Stefan Voigt, 'The Architecture of Emergency Constitutions' (2018) 16 *ICON* 101, 125.
[19]Eric Posner and Adrian Vermeule, *Terror in Balance: Security, Liberty, and the Courts* (OUP 2007) 12–14.
[20]See n 4.
[21]On the elements of separation of powers see Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 433, 438.
[22]Eoin Carolan, *The New Separation of Powers* (OUP 2009) 254.
[23]Stefan Olsson, 'Defending the Rule of Law in Emergencies through Checks and Balances' (2009) 5 *Democracy and Security*, 103, 103.

The following part focuses on this dilemma in the specific context of the COVID-19 pandemic.

2.2. The dilemma in the COVID-19 emergency

The existing scholarship on states of emergency is usually centred on wartime and counter-terrorism. Despite the metaphors about the war against coronavirus, this emergency has several distinctive features. It is a public health emergency on a global scale with virtually every individual potentially affected. There is no clearly defined external enemy or evil-doer who must be stopped, but an invisible virus spreading through interpersonal contact, respiratory droplets and contaminated surfaces. Consequently, the legislature and the judiciary are particularly vulnerable to the spread of the disease – as large collective bodies (parliaments) or bodies where human interaction is usually required by law (court hearings). How should parliaments and courts react? Should they let the executive deal with the issue and suspend their activities to prevent them from infecting themselves?

The intuitive claim can be that responding to the COVID-19 emergency requires fast, decisive action unified by strong leadership. Within this view, involvement of the legislature and courts impairs the effectiveness of the government's emergency measures by slowing down decision-making and opening the door for party politics. Yet, I will argue, perhaps counterintuitively, that the continued operation of the legislature and the judiciary can improve the effectiveness of emergency governance by increasing the feasibility[24] and legitimacy[25] of the emergency measures and thereby supporting voluntary compliance, which is crucial for defeating the new coronavirus. Therefore, parliaments and courts should remain functional, although in a modified and limited manner required by the emergency, and adjust the intensity of their oversight to the stage and severity of the pandemic. Their operation not only is important from the negative point of view, i.e. to prevent power grabbing, but can also positively contribute to the effectiveness of COVID-19 emergency governance.

To be clear, this is not an empirical article testing the relationship between the operation of checks and balances and the effectiveness of emergency measures. I am rather trying to develop a principled theoretical argument based on the following assumptions: (i) higher feasibility of emergency measures supports voluntary compliance;[26] (ii) greater legitimacy of

[24]I use feasibility as a summary term for qualities that allow the people to adjust their behaviour to the emergency measures, such as accessibility, visibility, clarity, consistency and constancy.

[25]I understand legitimacy as a 'quality possessed by an authority, a law, or an institution that leads others to feel obligated to obey its decisions and directions'. Tom Tyler, 'Legitimacy and Criminal Justice: The Benefits of Self-Regulation' (2009) 7 *Ohio State Journal of Criminal Law* 307, 313–14.

[26]Fuller argued that the internal morality of law (which largely overlaps with what I summarily call feasibility) is a necessary condition of the very effectiveness of law. Lon Fuller, *The Morality of Law* (Yale

emergency measures supports voluntary compliance;[27] (iii) the involvement of one's politically accountable representatives in the legislature in the decision-making supports the legitimacy of the emergency governance; (iv) having a realistic chance of having the emergency measures reviewed by an independent umpire supports the legitimacy of the emergency governance.[28] I consider these assumptions plausible, at least in democracies where freedom of political speech in the legislature exists and if there is a reasonable level of judicial independence and public trust in the courts.

The starting point of my argument is that COVID-19 is a highly contagious disease. Defeating it requires coordinated and effective measures reducing its exponential spread. They include self-isolation of the infected and preventive social distancing of the rest of the population. The necessary condition for the effectiveness of such strategies is a very high level of compliance. Yet, complete top-down enforcement and policing seem impossible in democracies during the pandemic. Consequently, many of the measures necessary for fighting the pandemic are not enforceable in the standard top-down way of law enforcement, definitely not on the scale required. Even digital surveillance is no panacea.[29]

If achieving high compliance through policing is unlikely, the key is voluntary compliance with emergency measures. Voluntary compliance, however, cannot be taken for granted, at least not during the entire period necessary for overcoming the pandemic. In the first days of the COVID-19 emergency, 'the rallying around the flag effect' effect was visible – people tended to unite and follow the national leadership. Yet, recent research shows that this sentiment is usually short-lived as the trend of 'fleeing the flag' develops. Accordingly, the trust of that part of society that does not support the governing parties can fade away quickly.[30] This is especially relevant in the era of crisis of liberal constitutionalism where even traditional democracies experience erosion of the rule-of-law culture, executive aggrandizement, and stark polarisation.[31] Such trends are highly problematic for voluntary compliance.

University Press, 1969) 155. Waldron argued that these qualities also increase fidelity to law. Jeremy Waldron, 'Why Law – Efficacy, Freedom, or Fidelity?' (1994) 13 *Law and Philosophy* 259, 277.

[27]Tom Tyler, *Why People Obey the Law* (Princeton University Press 2006). In the COVID-19 context, see Yuval Noah Harari, 'The World after Coronavirus' (*Financial Times*, 20 March 2020) <https://www.ft.com/content/19d90308-6858-11ea-a3c9-1fe6fedcca75?segmentid=acee4131-99c2-09d3-a635-873e61754ec6>.

[28]See Tyler (n 25) 307 (arguing more generally that fair procedure increases legitimacy and public compliance).

[29]For further discussion see Barrie Sander and Luca Belli, 'COVID-19 Symposium: COVID-19, Cyber Surveillance Normalisation and Human Rights Law' (*OpinioJuris*, 1 April 2020) <http://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-cyber-surveillance-normalisation-and-human-rights-law/>.

[30]Matthew Flinders, 'Democracy and the Politics of Coronavirus: Trust, Blame and Understanding' (2020) *University of Sheffield Working Paper* 4–5.

[31]See n 4 and Mark Graber, Sanford Levinson and Mark Tushnet, *Constitutional Democracy in Crisis?* (OUP 2018); Jack Balkin, 'Constitutional Crisis and Constitutional Rot' (2017) 77 *Maryland Law Review* 147; Mark Tushnet, 'Constitutional Hardball' (2003) 37 *John Marshall Law Review* 523.

If (a part of) the public views the executive's emergency measures as mere power-grabbing instruments and/or means of self-enrichment, that may impair the legitimacy of emergency governance and compliance levels, which is detrimental for tackling the pandemic. Another obstacle to high compliance can be the formal deficiencies of emergency measures. Made in a rush and under pressure, the emergency measures are likely to include gaps, inconsistencies, under-defined terms and lack of stability due to the necessity of reacting to the developments in the pandemic. These imperfections reduce the feasibility of the emergency measures, which can also be problematic for compliance.

The legislature and the judiciary, however, can enrich the executive's emergency measures with additional legitimacy and increase the public trust if the people know that their representatives have checked and discussed them and that there is a venue where redress and clarification can be sought. They can also improve the feasibility of emergency measures by identifying and/or rectifying eventual legal deficiencies, inconsistencies and contradictions.

The point of separation of powers is not only the protection of liberty by making tyranny more difficult. It is also a device for increasing the efficiency of governance if competences are assigned to those authorities that are best suited to carrying them out.[32] Each branch of power has its integrity and distinctive character.[33] The executive is unique by virtue of its ability 'to get things done'.[34] Indeed, it has historically been characterised as the embodiment of force. Yet, with the rise and professionalisation of the administrative state, the executive is also distinctive by reason of its access to expertise and technical capacities. Thus, the executive's increased law-making powers in a state of emergency seem justified, particularly in the COVID-19 emergency where detailed epidemiologic, medical, socio-economic and other expertise is highly needed. In sum, besides enforcement, modern executives are endowed with managerial skills and expertise in the area they engage with.[35] The other branches are significantly weaker in these respects. Nevertheless, they have other strengths that can balance the executive's vices.

The legislature stands out as the representative branch, an intermediary through which the citizens can affect the policy direction the state takes. At the same time, parliaments are important deliberative fora where different political ideas can be heard and discussed.[36] As Barber put it, 'The legislature is a good forum for enabling representatives of the population to test expert opinion. […] One of the most important functions of a legislature is the discussion, and challenge, of proposed legislation, and the scrutiny of the

[32]Nick Barber, *The Principles of Constitutionalism* (OUP 2018) 56.
[33]Waldron (n 21) 466.
[34]Barber (n 32) 67.
[35]ibid 65–66.
[36]Jeremy Waldron, 'Representative Lawmaking' (2009) 89 *Boston University Law Review* 335.

executive'.[37] The non-expert 'amateur' nature of the parliament can be crucial in the COVID-19 emergency. Rather than providing alternative epidemiologic expertise, the parliamentarians can voice the views and concerns of their constituents affected by the emergency measures. Thanks to that, the legislature can express alternative opinions, provide feedback to the executive, identify potentially problematic measures and point to gaps, inconsistencies and other deficiencies, and the executive should respond. To quote Barber one more time, 'The executive, fortified by technocrats, is forced to justify and explain its actions to the amateur chamber'.[38]

It can be argued, though, that legislatures cannot effectively work this way for two main reasons. First, the government and the parliamentary majority are usually fused in parliamentary democracies, which precludes effective countering of the executive.[39] Second, in the COVID-19 emergency, parliaments have few opportunities to review the emergency measures due to the emergency law-making competences of the executive, and few opportunities to discuss them due to accelerated procedures,[40] which limit plenary deliberation. Admittedly, the emergency situation prevents parliamentary business as usual. Nevertheless, the parliamentarians have several options to express their opinions even in the state of emergency. The consent of the parliament is often necessary for declaring and extending a state of emergency.[41] These occasions can be used to demand information, assess emergency measures and provide feedback to the government. Moreover, some emergency measures might require legislative changes – e.g. those concerning changes to socio-economic relief or those granting new competences to some actors. Finally, members of the parliament (MPs) can constitute a parliamentary commission or issue political declarations reacting to the executive's steps. New Zealand, for instance, even established an opposition-led parliamentary committee to monitor government responses to COVID-19.[42] As regards deliberation, the parliamentary meetings seem to be the best alternative available to provide at least some political process that allows for the checking and discussion of the emergency policies. Given their visibility and media coverage, parliamentary meetings provide an important opportunity for the

[37] Barber (n 32) 58.
[38] ibid 58–59.
[39] Walter Bagehot, *The English Constitution* (Watts & Co, 1964).
[40] See Ittai Bar-Simon-Tov, 'Parliamentary Activity and Legislative Oversight during the Coronavirus Pandemic: A Comparative Overview' (2020) <https://www.researchgate.net/publication/340091555_Parliamentary_Activity_and_Legislative_Oversight_during_the_Coronavirus_Pandemic_-A_Comparative_Overview>.
[41] See Tom Ginsburg and Mila Versteeg, 'States of Emergencies: Part II' (*Harvard Law Review Blog*, 20 April 2020) <https://blog.harvardlawreview.org/states-of-emergencies-part-ii/>.
[42] Andrew Ladley, '*New Zealand and COVID-19: Parliamentary Accountability in Time of Emergencies*' (ConstitutionNet, 7 April 2020) <http://constitutionnet.org/news/new-zealand-and-covid-19-parliamentary-accountability-time-emergencies>.

opposition to confront the executive's emergency measures and make the people's concerns heard.

The judiciary can also contribute to the effectiveness of emergency governance. Essentially, courts are fora for the authoritative resolution of disputes, including disputes between the state and the individual. While performing this task, they interpret the existing law, which sometimes unavoidably results in fine-tuning laws or even judicial lawmaking. In a state of emergency, I will argue, the judiciary fulfils three main functions: it resolves individual disputes over emergency policies, checks the executive, and clarifies the likely imperfect emergency policies.

Many emergency measures restrict the rights of their addressees. Some people may feel that their rights are restricted disproportionally. Emergency measures are thus likely to generate disputes. This is particularly relevant for COVID-19-related measures that touch upon many basic rights and have far-reaching economic repercussions. The very fact that courts can resolve these disputes is an important contribution to the effectiveness of emergency measures.[43] The judicial process manages conflicts in an orderly way by structuring and regulating them according to pre-existing rules. Thereby, courts absorb conflicts that may otherwise threaten public order and reduce compliance.[44] In addition, courts individualise conflicts and prevent them from growing into larger social protests,[45] which are undesirable in (public health) emergencies.

Furthermore, the judiciary can also refine and clarify the emergency measures, and thereby improve their feasibility. Often made in a rush, emergency measures are likely to be imperfect,[46] include vague underdefined terms, gaps or even conflicting provisions. Interpreting legal norms and overcoming imperfections in law are judges' day-to-day job. Thus, they are well placed to address and rectify some legal deficiencies of the emergency measures, which would otherwise be detrimental for social coordination and might reduce compliance.

Finally, the social function of courts requires them to act independently and impartially.[47] People's knowledge that there is an impartial venue where they can be heard and granted protection is crucial for the legitimacy of emergency governance. South Africa, for instance, created the function of the COVID-19 Designate Judge to monitor surveillance

[43]Daniel Stier et al., 'The Courts, Public Health, and Legal Preparedness' (2007) 97 *American Journal of Public Health* S69.
[44]See, *mutatis mutandis*, Adam Przeworski, *Crises of Democracy* (CUP 2019) 7.
[45]ibid 153.
[46]For an example from the UK see Ronan Cormacain, 'Coronavirus Amendment Regulations: The Government's Dubious Response to the "Out Out" Defence' (*BIICL*, 27 April 2020) <https://www.biicl.org/newsitems/16412/coronavirus-amendment-regulations-the-governments-dubious-response-to-the-out-out-defence>.
[47]Martin Shapiro, *Courts* (University of Chicago Press 1981).

measures.[48] Yet, the truth is that courts are usually deferential to the government when called upon to review emergency measures.[49] As suggested above, there are sound reasons for that – judges lack public health expertise and are politically unaccountable. Furthermore, too intensive judicial interventions in the emergency policies may overly tie the executive's hands. Greater deference, however, does not mean that courts cannot counter evidently wrong, unjust and outright discriminatory measures and power-grabbing attempts. The court's role in emergencies also changes dynamically; the judicial scrutiny tends to become stricter with the passage of time.[50] In addition, the significance of judicial review of emergency measures does not rest merely in the power to quash emergency measures. The judicial process also changes the discourse and forces the government to justify its emergency policies in legal principled terms.[51] Writing about the Israeli Supreme Court, Dotan reported that 'in the course of litigation the government was called on to provide detailed explanations for its decisions, and governmental policies were often reshaped and refined'.[52]

In sum, 'the joint enterprise of governing'[53] of all the three branches, rather than an unconstrained executive, can maximise the effectiveness of emergency measures. As Waldron stated, we 'want these three things, each in its distinctive integrity, to be slotted into a common scheme of government […]'.[54] On the other hand, the extraordinary nature of emergencies and the executive's qualities for tackling them justify a certain level of deference on the part of the legislature and the courts. It is difficult to set the level of deference *in abstracto*. In general, however, the intensity of legislative and judicial oversight should be driven by its eventual contribution to the effectiveness of the emergency governance, which is largely determined by the stage of the crisis and its severity. In the initial phase of the pandemic,[55] when the stakes are high, the information lacking and fast actions required, excessive judicial or legislative oversight could damage the effectiveness of emergency measures. Courts and legislators should thus focus on critical flaws that would significantly impair the legitimacy or feasibility of the emergency measures, especially their evidently abusive, discriminatory or extremely

[48]See a media statement at <https://www.justice.gov.za/m_statements/2020/20200403-Covid19-JusticeORegan.pdf>.
[49]Gross (n 17) 347.
[50]Federico Fabbrini, 'The Role of the Judiciary in Times of Emergency' (2009) 28 *Yearbook of European Law* 664, 693–94.
[51]Shai Dothan, *International Judicial Review* (CUP 2020) 70.
[52]Yoav Dotan, 'Continuous Judicial Review in Coronavirus Times' (*Regulatory Review*, 11 May 2020) <https://www.theregreview.org/2020/05/11/dotan-continuous-judicial-review-coronavirus-times/>.
[53]Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 235.
[54]Waldron (n 21) 466.
[55]Intensive waves of the disease, however, may reoccur also later.

disproportionate nature. As the crisis unfolds and the executive has more information and resources available, more intensive review may be justifiable. Regarding the judiciary, Fabbrini showed that courts have actually reacted in this way during counter-terrorism emergencies as they dynamically intensified their review.[56] Can we realistically expect a similarly constructive approach from the parliamentarians? The abovementioned polarisation does not suggest that legislators would be likely to suspend party politics. Yet, the parliamentary opposition has incentives to direct its attention to improving emergency governance. It is rational for the opposition to propose functional alternatives and improvements since the constituents' interest is to overcome the pandemic effectively, not to destroy the executive's efforts. Historical experiences of national unity governments and similar joint activities in crises show that this is possible.

How far does the effectiveness-enhancement theory reach? It is most relevant for democracies where substantiated worries exist that the state of emergency may be misused and impair the quality of democracy, but where oppositional parliamentarians enjoy freedom of political speech and courts enjoy reasonable independence and public trust. However, even consolidated democracies can benefit from the advantages of legislative and judicial involvement in emergency governance. Some might say that highly consolidated democracies enjoy great legitimacy anyway and do not need any enhancement. That is only half-right. Several traditional democracies have recently experienced stark polarisation and ruptures in the rule-of-law culture amounting to constitutional hardball and rot.[57] Moreover, authoritarian populism may serve as a platform making backsliding possible even in well-consolidated democracies.[58] On the other side of the spectrum, in authoritarianisms the governing actors usually control the judiciary and manage to silence parliamentary opposition. In such cases, an intervention by a captured court or by the regime-controlled parliament is unlikely to improve emergency governance. The effectiveness-enhancing theory is thus most relevant for the countries in between – democracies that are decaying but still enjoy reasonable levels of judicial independence and the ability of oppositional parliamentarians to speak freely. Part 3 zeroes in on such a country, the Czech Republic, in order to analyse particular institutional settings and identify both good and bad practices in the state of emergency.

[56]Fabbrini (n 50).
[57]See n 31.
[58]Steven Levitsky and Lucan Way, 'The New Competitive Authoritarianism' (2020) 31 *Journal of Democracy* 51, 59–60.

3. Legislative and judicial checks during the COVID-19 pandemic in the Czech Republic

3.1. Overview of the emergency measures and their political context

The Czech Republic started adopting pandemic-related measures quite early on, prior to the first death caused by COVID-19 in Czechia.[59] First, in early March, the Ministry of Health used its powers under the Public Health Protection Act (2000) and adopted measures for the prevention of epidemic. The Ministry imposed a ban on exporting respirators and hand disinfectant, ordered quarantine to individuals returning from critically affected countries, and introduced screening for COVID-19 symptoms at border controls. The Ministry also banned large public events and shut down schools.[60]

On 12 March 2020, the government declared a nationwide state of emergency.[61] The Czech constitution regulates states of exceptions by way of a separate Constitutional Act on the Security of the Czech Republic. It distinguishes three exceptional states: state of emergency, condition of threat to the State and state of war. A state of emergency can be declared in cases of natural catastrophe, ecological or industrial accident, or other danger significantly threatening life, health, property, order or security. The government has a duty to inform the Chamber of Deputies, which may annul the state of emergency. A state of emergency may be declared for a maximum period of 30 days, which may be extended with the prior consent of the Chamber of Deputies.[62] On the statutory level, the Crisis Management Act (2000) regulates further details. It authorises the government to limit certain fundamental rights, restrict movement, impose a duty to work, deploy the army to implement emergency measures, and introduce various economic measures.[63]

Using these powers, the government has adopted dozens of resolutions introducing restrictive measures.[64] These included the closure of non-essential shops, closing down the borders, a ban on non-essential movement and the obligatory wearing of facemasks in public. In the next phase, the government approved a number of resolutions aimed at socio-economic relief, some

[59]Hirsch (n 1). I use Czechia and Czech Republic interchangeably.
[60]The overview of all emergency measures is available (in Czech) at <https://www.zakonyprolidi.cz/koronavirus/monitor>. Selected emergency measures in English can be accessed at <https://www.vlada.cz/en/media-centrum/aktualne/measures-adopted-by-the-czech-government-against-coronavirus-180545/>.
[61]Resolution of the Czech Government no. 69/2020 Coll.
[62]Articles 5 and 6 of the Constitutional Act on the Security of the Czech Republic (no. 110/1998 Coll.).
[63]Section 4–6 of the Crisis Management Act (no. 240/2000 Coll.).
[64]The legal nature of governmental emergency resolutions has not been totally clear. The Czech Constitutional Court, however, sees them as general normative acts adopted by the government, i.e. a form of derived legislation. In the vocabulary of the Czech Constitution, these acts are titled 'other legal enactments' (*jiné právní předpisy*). See decision of the Constitutional Court of 22 April 2020 no. Pl. ÚS 8/20, § 45.

of which required legislative amendments.[65] By the end of March the government had changed its legal strategy. It repealed many of the emergency resolutions issued in accordance with the Crisis Management Act and replaced them with decrees of the Ministry of Health of nearly identical content, but issued in accordance with the Public Health Protection Act.[66] Several representatives of the executive admitted that one of the reasons was fear of litigation seeking compensation for restriction of economic activity.[67] The point is that compared to the Crisis Management Act, the Public Health Protection Act limits the state's liability for damages.

Admittedly, the government adopted a number of important measures that facilitated the control of the spread of COVID-19. The abovementioned change of legal basis for the emergency measures, however, was one of several controversial aspects of the COVID-19 emergency governance, which problematised its legitimacy and feasibility. As regards feasibility, accessing the up-to-date content of the emergency measures was not easy. The government issued dozens of emergency measures, some of which were amended multiple times, some replaced by Ministry of Health decrees. Some important rules were highly unstable. For instance, the government determined time slots when shops were opened exclusively for the elderly. However, the time slots were changed three times in five days, which caused significant confusion among senior citizens. The clarity of some of the emergency measures was also impaired by poorly coordinated communication by the executive representatives with the public, which several times amounted to contradictory information. Finally, the very legal basis of some of the measures was questioned. Several constitutional lawyers contested the government's competence to ban Czech citizens from travelling anywhere outside Czechia and the measure postponing Senate by-elections merely by executive action rather than by statutory means.[68]

Some of the emergency measures were problematic due to a specific political context in Czechia. The current Prime Minister, Andrej Babiš, is a billionaire who established a 'business-firm' political party ANO in 2011.[69] His

[65]See n 60.

[66]As to the legal nature of these ministerial decrees, they take the form of hybrid measures (*opatření obecné povahy*) combining elements of legislation (general scope of application) and administrative decisions (focus on a specific issue). These are reviewable by administrative courts. See decision of the Constitutional Court of 22 April 2020 no. Pl. ÚS 8/20, § 54.

[67]Petr Dimun, 'Vláda svým postupem chce zamezit sporům o odškodnění, potvrdila ministryně financí Schillerová' (*Česká justice*, 26 March 2020) <https://www.ceska-justice.cz/2020/03/vlada-svym-postupem-chce-zamezit-sporum-odskodneni-potvrdila-ministryne-financi-schillerova/>.

[68]E.g. Jan Wintr, 'Rozbor ústavnosti a zákonnosti krizových opatření vlády z 15. března 2020' (*Beck-online*, March 2020) <https://www.beck-online.cz/bo/document-view.seam?documentId=nrptembsgbpxm6lcmvzf6mq>.

[69]Lubomír Kopeček, 'I'm Paying, So I Decide: Czech ANO as an Extreme Form of a Business-Firm Party' (2016) 30 *East European Politics and Societies* 725.

political style is described as managerial or technocratic populism as he claims to 'run the state like a business company'.[70] Babiš previously expressed unease with checks on the executive and advocated a strongly majoritarian centralised system.[71] Because of his past business activities, he faces criminal prosecution for fraud and the European Commission's audit investigating his conflict of interests.[72] The patterns of Babiš's concentration of power have so far been different from those identifiable in Hungary and Poland. He concentrates power within the executive, the economic sector and the media, especially by personal and managerial politics – a quieter but consequential politics of backsliding.[73] The state of emergency thus represented a certain danger that the decaying tendencies would deepen. Czech constitutional scholar Jan Kysela put it bluntly,

> I would be calmer if the emergency government was headed by someone who did not regard his criminal prosecution and conflict of interest investigation as a "purpose-built plot", did not label critics as corrupted traitors, and had a somewhat more exemplary relationship to the Constitution and the Parliament.[74]

Such a setting threatened the legitimacy of emergency governance. Several governmental steps gave rise to doubts whether they pursued the common good; they were labelled as tailored to the interests of Babiš's business empire.[75] During the state of emergency, the government also aimed to discuss draft legislation establishing evidence of real owners of business companies that contained a controversial exemption for trust funds, including the Prime Minister's own.[76] Another controversy was sparked by the Minister of Defence's proposal to strengthen the government's emergency powers at the

[70]Vlastimil Havlík, 'Technocratic Populism and Political Illiberalism in Central Europe' (2019) 66 *Problems of Post-Communism* 369.

[71]Andrej Babiš, *O čem sním, když náhodou spím* (2017) 128–31.

[72]James Shotter, 'Czech Prosecutor Reopens Andrej Babis Fraud Probe' (*Financial Times*, 4 December 2019) <https://www.ft.com/content/ffe1cfd0-16a3-11ea-9ee4-11f260415385>; 'EU Audit Finds Czech Prime Minister Babis in Conflict of Interest' (*Reuters*, 1 December 2019) <https://www.reuters.com/article/us-czech-eu-babis/eu-audit-finds-czech-prime-minister-babis-in-conflict-of-interest-report-idUSKBN1Y51CO>.

[73]Seán Hanley and Milada Vachudová, 'Understanding the Illiberal Turn: Democratic Backsliding in the Czech Republic' (2018) 34 *East European Politics* 276, 283; Jiří Pehe, 'Explaining Eastern Europe: Czech Democracy under Pressure' (2018) 29 *Journal of Democracy* 65, 70.

[74]Ondřej Kundra, 'Rozhovor s Janem Kyselou: Dějiny učí, že po zpřísnění se nemusí konat návrat k normálu' (*Respekt*, 30 March 2020) <https://www.respekt.cz/respekt-pravo/dejiny-uci-ze-se-po-zprisneni-se-navrat-k-normalu-konat-nemusi>.

[75]David Klimeš, 'Vláda nabízí skvělou pomoc pro Agrofert. Teď ještě něco pro nás ostatní' (*Aktuálně.cz*, 1 April 2020) <https://nazory.aktualne.cz/vlada-nabizi-skvelou-pomoc-pro-agrofert-ted-jeste-neco-pro-n/r~78a332b273fe11ea9d470cc47ab5f122/>.

[76]Vláda stáhla z programu jednání zákon o evidenci skutečných majitelů. Vypustí z návrhu podezřelou výjimku? (*Rekonstrukce státu*, 16 March 2020) <https://www.rekonstrukcestatu.cz/cs/archiv-novinek/vlada-stahla-z-programu-jednani-zakon-o-evidenci-skutecnych-majitelu-vypusti-z-navrhu-podezrelou-vyjimku>.

expense of the legislature.[77] After pressure from the civil society, both bills were withdrawn from the government's agenda.

In these circumstances, the effectiveness-enhancing capacity of the legislature and the judiciary in Czechia is of crucial importance. The following sections analyse their operation in the early weeks of the state of emergency and their reactions to selected controversies. This account is up-to-date as of 24 April 2020 unless stated otherwise.

3.2. Operation of the Parliament in the state of emergency

Both chambers of the Czech Parliament have remained in session during the state of emergency, but have modified their way of working. The Chamber of Deputies' initial approach was problematic from the viewpoint of the effectiveness-enhancing theory though. The Chamber's last meeting before the state of emergency took place on 11 March. It was terminated prematurely and the next meeting was scheduled only for 14 April. That would effectively have meant that during the critical pandemic period the Chamber of Deputies would not have fulfilled its core function. Subsequently, a press release was issued: '[s]hould the impact of the new coronavirus spread be greater than expected, the Chamber is ready to meet and quickly approve the necessary legislation related to the epidemic'.[78] That was not comforting either. The point of the legislature's involvement in shaping emergency policies is to check, discuss and eventually improve the emergency measures, not to function as an uncritical approval machine.

As the situation developed, however, the Parliament managed to provide some checks and feedback to governmental measures. Both chambers have met several times. The governmental policies were debated and critically scrutinised by the opposition. First, on 17 March, the presidency of the Chamber of Deputies and political parties' chairmen met in a crisis setting and discussed the current situation with the government's representatives via video-conferencing.[79] The next day, a plenary meeting of the Senate took place in a restricted format. The opposition-led Senate adopted a political resolution reacting to the state of emergency. The senators acknowledged the public health risks, but criticised the executive's crisis communication and called on the government to proceed strictly according to the Crisis Management Act, to provide full and true information to the public, swiftly to secure protective equipment, and to coordinate its activities with the EU.[80]

[77] Lukáš Valášek and Ondřej Kundra, 'Ministr obrany navrhuje v krizi posílení pravomocí premiéra na úkor parlamentu' (*Aktuálně.cz*, 30 March 2020) <https://zpravy.aktualne.cz/domaci/ministerstvo-obrany-navrhuje-aby-v-krizi-mohl-premier-ridit/r~d54ace9872bf11ea8b230cc47ab5f122/>.
[78] Available at <https://www.psp.cz/sqw/cms.sqw?z=13746>.
[79] Press release available at <https://www.psp.cz/sqw/cms.sqw?z=13794>.
[80] The resolution is available at <https://senat.cz/xqw/webdav/pssenat/original/94251/79056>.

A week later, a plenary meeting of the Chamber of Deputies took place. Discussing the COVID-19-related legislation, the Chamber of Deputies declared a state of legislative emergency,[81] which allowed for significantly accelerated procedures. Based on an agreement, the number of MPs present was limited to 102 (out of 200) to allow sufficient distancing. In addition, parliamentarians agreed to limit the number and length of speeches.[82] Given the general order to wear facemasks in public, all the MPs wore them. The Senate met the next day and approved accelerated procedures as well. Moreover, only 42 (out of 81) senators were present. Rather than speaking from the lectern, the senators were recommended to speak from their places for hygienic reasons.[83] All senators wore facemasks too. A limited number of committee meetings also took place in both chambers.

A major opportunity for the legislature's checking function came on 7 April as the government sought an extension of the state of emergency until 11 May. Since the consent of the Chamber of Deputies was necessary for the extension,[84] a plenary meeting was held. The opposition criticised the government's uncoordinated communication of the emergency strategy and demanded more detailed information and explanation. The opposition MPs wanted to retain control:

> [w]e are asking whether the state of emergency must be extended indefinitely. […] We are ready to meet every ten or fourteen days and hear the government's report about how the situation develops […]. We need this information and we need to see that decisions are made according to clear criteria.[85]

In the end, the Chamber of Deputies extended the state of emergency only until 30 April. Such scrutiny showed to be an important check on the government. It probably contributed to the fact that a week later the government introduced a two-month plan of further emergency measures and their easing.[86] However, the effectiveness-enhancing potential of the parliamentary meeting was reduced by the government's behaviour. When the opposition MPs asked questions and demanded further information, many ministers (including the Prime Minister) were often absent and, accordingly, little dialogue took place. The government's attitude seems to be a missed opportunity

[81] Which allows the relaxing of the ordinary legislative procedure. It is not to be mistaken for the constitutional state of emergency, which had been declared earlier by the government.

[82] Stenographic protocol from the Chamber of Deputies meeting, 24. 3. 2020, available at <https://www.psp.cz/eknih/2017ps/stenprot/042schuz/s042001.htm#r1>.

[83] Stenographic protocol from the Senate meeting, 25. 3. 2020, available at <https://www.senat.cz/xqw/xervlet/pssenat/htmlhled?action=doc&value=94367>.

[84] Article 6 (2) of the Constitutional Act on the Security of the Czech Republic.

[85] MP Vít Rakušan, stenographic protocol from the Chamber of Deputies meeting, 7. 4. 2020, available at <https://www.psp.cz/eknih/2017ps/stenprot/043schuz/s043005.htm>.

[86] The schedule is available at <https://www.vlada.cz/cz/epidemie-koronaviru/dulezite-informace/harmonogram-uvolnovani-opatreni-ve-skolach-a-skolskych-zarizenich--podnikatelskych-a-dalsich-cinnosti-180969/>.

and a failure to appreciate the parliamentary debates' significance for the emergency governance.

From the standpoint of the effectiveness-enhancing theory, the Czech Parliament's operation performance during the pandemic can be seen as a way of incremental 'soul searching'. Initially, the Chamber of Deputies seemed to have retreated as no meeting was called for the crucial phase of the pandemic. Subsequently, however, parliamentary meetings were convened and both chambers found ways to operate meaningfully while minimising the spread of COVID-19. Discussing legislative bills and the government's requests for extending the state of emergency allowed parliamentarians to scrutinise some of the emergency policies, provide feedback and point to issues and groups of citizens overlooked by the government. The Chamber of Deputies put pressure on transparent planning of emergency policies and their lifting by the government. Opposition MPs also voiced the concerns of social groups not addressed by the governmental socio-economic relief measures, e.g. employees working on short-term contracts.[87] The Senate also provided feedback to the executive[88] and pushed it towards greater transparency and public reason-giving.[89] Unfortunately, the legislature's effectiveness-enhancing potential was not fully met due to the government's lack of interest in a dialogue on parliamentary soil.

3.3. Operation of the judiciary in the state of emergency

Courts are not as heavily populated bodies as parliaments. Still, their operation in the COVID-19 pandemic creates several challenges. As regards protecting the health of judges and non-judicial personnel, the Czech authorities reacted quite swiftly. The Ministry of Justice recommended courts to postpone non-urgent hearings.[90] Judicial self-governance actors at individual courts, especially court presidents, then introduced preventive measures including limiting access to the court buildings, taking the temperatures of visitors and enforcing the duty to wear face masks inside the buildings. Court presidents' measures recommended judges to adjourn operations

[87] Ondřej Svoboda, 'Podpořme i zaměstnance na DPP a DPČ, navrhla opozice' (*iDnes*, 7 April 2020) <https://www.idnes.cz/ekonomika/domaci/dpp-dpc-podpora-navrh-schillerova-opozice-dvacet-pet-tisic-25000.A200407_113807_ekonomika_svob>.

[88] 'Senát odmítl volnější rozpočtová pravidla, desetitisícové blokové pokuty na měsíc zablokoval' (*ČT24*, 17 April 2020) <https://ct24.ceskatelevize.cz/domaci/3078269-zive-senatori-asi-vrati-zakony-nelibi-se-jim-zmena-rozpoctovych-pravidel-ani-vysoke>.

[89] 'Senát chce od vlády údaje o nákupu prostředků proti koronaviru' (*iRozhlas*, 17 April 2020) <https://www.irozhlas.cz/zpravy-domov/senat-koronavirus-cesko-vlada-nakup-rousek_2004172255_cen>.

[90] 'Ministerstvo doporučilo soudům zvážit konání soudních jednání' (*Advokátní deník*, 13 March 2020) <https://advokatnidenik.cz/2020/03/13/covid-19-opatreni-ministerstva-spravedlnosti/>. On 17 April, the Ministry of Justice issued a recommendation suggesting that courts start returning to their usual methods of operation. Available at <https://www.ceska-justice.cz/wp-content/uploads/2020/04/doporuceni-soudum-obnoveni-chodu.pdf>.

requiring personal attendance at court with the exception of acts concerning criminal detention and other issues worthy of special consideration.[91] In this respect, it was not totally clear how emergency-related disputes will be dealt with in Czechia; it seems to have been left to the discretion of individual judges.

Nonetheless, motions challenging the legality of several emergency measures were filed with the administrative courts (particularly the Municipal Court in Prague) and the Constitutional Court. By early April, the Municipal Court in Prague had received 11 motions concerning emergency measures.[92] These included a motion requiring abolition of the state of emergency and motions questioning core emergency measures listed in part 3.1. The petitioners often criticised the lack of reasoning on the part of the government and the disproportionate, inconsistent and discriminatory nature of some of the measures.

Most motions are pending as of 24 April 2020. That seems problematic from the viewpoint of the effectiveness-enhancing theory. To be fair, the executive itself caused delays in some cases, especially by the aforementioned change of the legal regime for emergency measures – replacing Crisis Management Act measures with Ministry of Health decrees.[93] Some judges allowed petitioners to react and granted them time to amend their motions. However, one panel of the Municipal Court dismissed the motion straight away since it concerned a measure that had meanwhile been changed and did not allow the petitioner to react.[94] The latter approach is extremely problematic from the viewpoint of the effectiveness-enhancement theory. Not only did the court effectively strip the petitioners of their right to access to a court, but it also increased the abusive potential of emergency measures. In fact, this approach allows the government to evade judicial scrutiny by means of well-timed amendment of the measures. As such, the Supreme Administrative Court later quashed the Municipal Court's decision and stressed that access to court must be carefully protected during the state of emergency.[95]

The practice at the Municipal Court, however, varied. Another panel allowed the petitioner to amend the motion in question and then decided the subject-matter rather swiftly, clarifying the legal nature of emergency measures. The Municipal Court stated that the Ministry of Health's emergency measures concerning the closure of shops and restrictions on freedom of movement were unlawful for procedural reasons. The court

[91]The extraordinary measures issued by court presidents are available at <https://justice.cz/soudy>.
[92]'Městský soud v Praze řeší desítku žalob na mimořádná opatření' (*Česká justice*, 2 April 2020) <https://www.ceska-justice.cz/2020/04/mestsky-soud-praze-resi-desitku-zalob-mimoradna-opatreni/>.
[93]See n 66-67.
[94]Decision of the Municipal Court in Prague of 30 March 2020 no. 15 A 31/2020-59.
[95]Judgment of the Supreme Administrative Court of 4 June 2020 no. 6 As 88/2020-44, § 63.

argued that in a state of emergency the executive has to proceed according to the Constitutional Act on the Security of the Czech Republic and the Crisis Management Act, which are specifically designed for emergencies. Under the Crisis Management Act, it is the government as a collective body, not the Ministry of Health as a monocratic body, which has the power to adopt emergency measures restricting fundamental rights.[96] In other words, the court did not question the executive's competence to address the pandemic but insisted on strict adherence to the constitutionally foreseen procedures, which is crucial for preventing abuse and arbitrariness during emergencies and for enhancing the legitimacy of the emergency governance. Also, the court did not quash the measures with immediate effect and gave the executive several days to adopt the measures using the correct procedure. In sum, the court tried to safeguard the procedures laid down by the emergency constitution while minimising the risk of impairing the executive's basic mission – fighting the pandemic. The Prime Minister criticised the ruling as absurd, but the executive complied.[97]

Another court that came into play was the Supreme Administrative Court which considered the postponement of the Senate by-elections by the government's decision in the state of emergency. The court made clear that elections cannot be postponed by means of governmental measures since the constitution requires legislative postponement. The court thus acted as the guardian of legislature's powers and added a general educative note to the executive: In the state of emergency, 'not only health, lives and the economy must be protected, but also constitutional democracy and the rule of law'.[98] The executive complied and prepared a bill postponing the election until late June.[99]

The Czech Constitutional Court (CCC) was petitioned with complaints seeking review of the declaration of the state of emergency and follow-up emergency measures limiting the freedom of movement, introducing the obligatory wearing of facemasks, prohibiting travel outside Czechia, the closure of shops and schools.[100] Shortly after the period considered in this article, the CCC decided some of these cases. However, rather than providing a more detailed narrative about the constitutional regime of the state of emergency, the CCC approached the issue minimalistically. The decision first clarified

[96] Judgment of the Municipal Court in Prague of 23 April 2020 no. 14 A 41/2020, §§ 150–152. Note that the executive announced it would seek review of the judgment before the Supreme Administrative Court.

[97] 'Rozhodnutí soudu respektuji, ale přijde mi absurdní, řekl Babiš' (*iRozhlas*, 23 April 2020) <https://www.irozhlas.cz/zpravy-domov/andrej-babis-koronavirus-mestsky-soud-v-praze-ministerstvo-zdravotnictvi-nouzovy_2004231704_zit>.

[98] Decision of the Supreme Administrative Court of 1 April 2020 no. Pst 19/2019-12.

[99] 'Doplňovací senátní volby na Teplicku by se podle ministerstva vnitra měly uskutečnit do konce června' (*iRozhlas*, 6 April 2020) <https://www.irozhlas.cz/zpravy-domov/teplicko-kubera-volby-senat-teplice-ministerstvo-vnitra-vlada_2004061115_tkr>.

[100] 'Uzavřené hranice či školy: ÚS kvůli koronavirovým opatřením zahájil deset řízení' (*Česká justice*, 17 April 2020) <https://www.ceska-justice.cz/2020/04/uzavrene-hranice-ci-skoly-us-kvuli-koronavirovym-opatrenim-zahajil-deset-rizeni/>.

the legal status of the emergency measures.[101] Yet, then the CCC interpreted the possibility of a direct review of emergency measures upon a petition of individuals narrowly, dismissed the petitions and did not review the contested measures.[102] Despite the controversial features of the decision,[103] the CCC confirmed this approach in several subsequent rulings.[104]

Assessing the performance of Czech courts during the pandemic, their score from the viewpoint of the effectiveness-enhancing theory is mixed. The court administration managed to secure limited but continued operation during the pandemic, which is a crucial prerequisite for the judicial contribution to effective emergency governance. Regarding judicial review of emergency measures, however, there have been several issues. Due to the combination of a rather slow pace, formalistic approach of some panels of the Municipal Court in Prague[105] and the narrow review by the CCC, these courts did not answer core substantive issues surrounding the emergency measures. On the plus side, administrative courts (some panels of the Municipal Court and the Supreme Administrative Court) managed to clarify certain legal uncertainties and ensured that the procedures foreseen by the emergency legislation are strictly followed, by which they reduced the chances for abuse and arbitrariness.

4. Conclusion

This article introduced the effectiveness-enhancing theory of legislative and judicial checks in the COVID-19 emergency. I argued that the legislative and judicial checks on the executive's increased power in public health emergencies are crucial for preventing abuse *and* for improving the effectiveness of emergency policies. The executive is better designed for managing emergencies than the other branches. Legislative and judicial oversight of the emergency measures, however, can balance the executive's vices. Modified but active operation of the parliament and courts in the state of emergency can enhance the effectiveness of emergency governance and increase voluntary compliance with emergency measures by supporting their feasibility and legitimacy.

A case study of the Czech Republic illustrated the theoretical points and identified both good and bad practices affecting the legislature's and courts'

[101]See n 64 and 66. With respect to the declaration of the state of emergency the CCC held that it is a *sui generis* political act subject to judicial review only to a very limited degree: '[t]he declaration of the state of emergency could be annulled by the [CCC] if it […] resulted in changes in the essential requirements for a democratic state governed by the rule of law'. Pl. ÚS 8/20, § 27.

[102]Pl. ÚS 8/20. See also the decision of the Constitutional Court of 21 April 2020 (published on 28 April 2020) no. Pl. ÚS 7/20.

[103]Out of fifteen judges, seven issued concurring or dissenting opinions. See particularly the joint dissent of judges Šimáčková, Šimíček and Uhlíř, §§ 10 and 15.

[104]CCC, decision of 5 May 2020 no. Pl. ÚS 10/20, of 5 May 2020 no. Pl. ÚS 13/20, of 12 May 2020 no. Pl. ÚS 11/20.

[105]See n 94.

actual contribution to the effectiveness of emergency governance. As regards the Parliament, both chambers provided feedback to the government's emergency policies, pointed to overlooked issues, pressed for greater transparency, reason-giving and better planned action. Yet, the potential of this feedback was not fully met due to the government's lack of attentiveness to it. Regarding the judiciary, administrative courts resorted to procedural review and pressed the government to compliance with procedures foreseen by the emergency legislation on several occasions. However, rather slow pace and excessive formalism[106] on part of some judges, and the Constitutional Court's minimalist approach contributed to a lack of substantive rights review of emergency measures in due time. More generally, the case study showed that from the standpoint of the effectiveness-enhancing theory, the parliamentary and judicial self-governance actors must be ready to find organisational solutions allowing for safe and effective functioning of the parliament and courts during the pandemic. Yet, the mere fact that the legislature and judiciary keep on operating does not suffice. A mind-set of preparedness, flexibility and openness to a dialogue is necessary to find the right balance between respecting the executive's emergency mission, scrutinising the executive's policies and preventing the spread of the disease within the legislative and judicial institutions.

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[106]See n 94.