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# Threshold of Justification of Emergency Regulations: On Coherentism Requirement for the Justification of Measures Adopted in the Czech Republic during the COVID-19 Pandemic[2]

## 1. Introduction

The COVID-19 pandemic was undoubtedly the most significant event of 2020. It affected all the countries worldwide and took its toll on the economy, law, healthcare, education, and other social subsystems. Impacts in the field of law were many – the most important being perhaps an unprecedented limitation of a number of fundamental rights with a view to protecting public health, in terms of both the number of various restrictions and the intensity of interference with the individual rights. A state of emergency was declared in a number of countries, often for prolonged periods of time. Some countries even derogated from certain commitments they have under international human rights conventions.[3] A related issue, which will be addressed by this article, was that many of the adopted measures were not sufficiently substantiated. This raised doubts as to whether such measures actually required statement of reasons (and, from the theoretical perspective, justification), and if so, to what extent.

The more abstract question of justification of enacted regulations can be examined from various angles. Along with the viewpoint of political philosophy, which deals with the issue of public justification for acts of public authorities, and even the very legitimacy of a public authority, we can also address more specific impacts of justification

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2 The article was written within the Czech Science Foundation (GA ČR) project reg. No. 19–10723S entitled *What unifies current law and what fragmentises it from the perspective of legal theory and judicial practice?* The author wishes to thank Viktor Gazda, Jana Ondřejková, Jan Wintr, and two anonymous reviewers for their extremely helpful comments.
3 See e.g.: the Derogation contained in a Note verbale from the Permanent Representation of Georgia, dated 21 March 2020, registered at the Secretariat General of the Council of Europe on 23 March 2020, Council of Europe, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=ngpasGA9, accessed on: 15 January 2021. Let us leave aside for the moment whether such a derogation is indeed necessary to prevent threats to public health at a time when health protection serves simultaneously as a legitimate reason for limiting human rights protected by international treaties.

based on the theory of lawmaking and, if appropriate, within the framework of legal argumentation.[4] The all-important context of the topic under scrutiny, which I shall also focus on in this paper, is clarified by various approaches taken by political science and constitutional theory to the concepts of "state of exception", "rule of law" and "proportionality" of the adopted measures, with the last of the three serving as an important tool in the review of constitutionality.

This article will focus on justification of acts taken by public authorities as part of a state governed by the rule of law (*Rechtsstaat*). The specific circumstances surrounding the introduction of states of emergency ("states of exception") declared by individual countries add a new dimension to the topic, as a certain minimum threshold set for justification of the measures being adopted could resolve a number of practical questions. Such a threshold should reflect both the theoretical requirements on the right to justification when an individual right is interfered with, and the practical requirements on justifying legislative acts, while simultaneously noting the specific consequences following from a state of emergency.

As an example of emergency measures, I will refer to measures adopted to avert the threats ensuing from the COVID-19 pandemic. The theoretical conclusions presented in the article are supported by several practical examples from the Czech Republic. These examples are mostly an indication of "bad practice", as the justification provided by Czech authorities for their emergency measures has received some criticism from jurisprudence.[5]

First, I consider it necessary to describe in concise terms the context in which emergency measures were adopted in the Czech Republic. In March 2020, the Czech Republic initially reacted by adopting very strict measures that succeeded in slowing down considerably the spread of COVID-19 during the spring and summer months.[6] The state of emergency and crisis measures declared by the Czech government, as well as emergency measures taken by the Czech Ministry of Health, significantly restricted movement, business, as well as religious freedoms, the freedom of assembly and some other rights and freedoms. However, the developments in the following months were influenced by dropping public confidence in the measures taken by the Czech government.[7] This fact was the likely primary cause of the opposite trend in the pandemic since October 2020, when the Czech Republic eventually found itself among the countries with the highest numbers of COVID-19 infections in proportion to the number of inhabitants.[8] The numerous emergency measures which the Czech Republic had had in place since the spring months were characterized, among other things, by frequent changes, somewhat inadequate quality of the legislative technique, and especially absence of any substantiation, generally provided for other legal regulations (in the

[4] On the relationship between justification and justice, see e.g.: N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford 1978, p. 73ff.

[5] J. Wintr, *K ústavnosti a zákonnosti protiepidemických opatření na jaře 2020* [Eng. *On the Constitutionality and Legality of Anti-Epidemic Measures in the Spring of 2020*], "Správní pravo" 2020/5–6, p. 297.

[6] An excellent overview of the measures adopted during the spring "first wave" of the pandemic in the Czech Republic is provided by Zuzana Vikarská in: Z. Vikarská, *Czechs and Balances – If the Epidemiological Situation Allows…*, Verfassungsblog on Matters Constitutional, 20 May 2020, https://verfassungsblog.de/czechs-and-balances-if-the-epidemiological-situation-allows/, accessed on: 15 January 2021.

[7] Sociological surveys have shown that this was especially true of younger people (up to 34 years of age), who were also found to pay significantly smaller attention to anti-COVID measures (e.g. wearing face masks or restriction of social contacts). See: *Život během pandemie* [Eng. *Life in Czechia during the Pandemic*], PAQ Research, https://zivotbehempandemie.cz/protektivni-aktivity, accessed on: 15 January 2021.

[8] *New Cases of Covid-19. Cases in World Countries*, Johns Hopkins University and Medicine Coronavirus Research Centre, https://coronavirus.jhu.edu/data/new-cases, accessed on: 15 January 2021.

form of explanatory reports). The government began to publish the reasons behind the individual measures on its website only almost a year after the first emergency measures were adopted in a state of emergency.[9]

For almost a year, lack of substantiation brought certain practical problems, reflected in ambiguous interpretations of the rules comprised in extraordinary measures. As an example, we could mention the emergency measure of 21 October 2020, whereby the government prohibited all retail sales, subject to only several exemptions, such as the operation of "stores selling household goods and hardware stores".[10] This prompted the question which businesses were actually covered by this exemption (the concept of "household goods" is vague and can include a number of articles used in a household). Without an explanatory report or some other clarification, the scope of this rule had to be interpreted solely in view of subsequent statements made by government officials. Only during the preparation of a new measure restricting retail sales was this provision further specified in that the exemption applied to "stores selling household goods and hardware stores, where household goods are not deemed to include furniture, carpets and other flooring materials".[11] Although substantiation of a legislative act (a statement of reasons for its adoption) is not binding in itself, it provides an important guideline for interpretation, especially if the contents or purpose of the provision in question are unclear based on its wording.

Following the introductory part, describing the context in which the justification provided for emergency measures is examined, my article will focus, in turn, on the following three interrelated topics: first (in section 2), I will introduce the key concept of "threshold of justification", as it follows from the coherentist theory of epistemic justification. Further, (in section 3), I will concentrate on the concept of "state of exception" and, specifically, on how it can affect the threshold of justification for emergency measures. Finally (in section 4), I will focus on two practical consequences linked with the theory of justification of emergency measures. They relate to a review of measures in terms of their reasonableness and proportionality, where justification of a certain measure plays the key role.

## 2. Public justification and its threshold

Paul W. Kahn defines a modern state based on the rule of law as "the internalization of reason itself as a regulative ideal within the political order".[12] Thus, modern constitutions

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[9] This was true, specifically, of the crisis measures adopted after 26 February 2021. As I mention below, the fact that the government started to substantiate its crisis regulations clearly relates to the judgment issued by the Constitutional Court on 9 February 2021 (Pl. ÚS 106/20), where the Court fiercely criticized the absence of substantiation. The Constitutional Court pointed out, among other things, that the Czech practice of not substantiating extraordinary measures was quite rare in the region. Cf. also an analysis by Jan Wintr, to which the Constitutional Court refers in J. Wintr, *Neodůvodněná krizová opatření vlády odporují principům demokratického právního státu. Právo a krize* [Eng. *Government's Crisis Measures Lacking Substantiation Contradict the Rule of Law. The Law and Crisis*], Právo a krize, https://pravoakrize.net/neoduvodnena-krizova-opatreni-vlady-odporuji-principum-demokratickeho-pravniho-statu/, 30 January 2021, accessed on: 1 March 2021.

[10] Article I(1) of the Government crisis measure of 21 October 2020, No. 1079 (Czech title: Usnesení vlády České republiky ze dne 21.10.2020 č. 1079 o přijetí krizového opatření), (No. 425/2020 Coll.), MVCR.cz, https://aplikace.mvcr.cz/sbirka-zakonu/, accessed on: 15 January 2021.

[11] Article I(1) of the Government crisis measure of 23 December 2020, No. 1376 (Czech title: *Usnesení vlády České republiky ze dne 23.12.2020 č. 1376 o přijetí krizového opatření*), (No. 596/2020 Coll.), MVCR.cz, https://aplikace.mvcr.cz/sbirka-zakonu/, accessed on: 15 January 2021.

[12] P.W. Kahn, *Comparative Constitutionalism in a New Key*, "Michigan Law Review" 2003/110, p. 2698.

are not "the analogue of God's speaking the world into existence, but rather a kind of Rawlsian inquiry into the reasonable structure of a common political project".[13]

Contemporary states still need to deal in a way with a question already described in the works of early modern political philosophers, theorists of the social contract (Thomas Hobbes, John Locke, and Jean-Jacques Rousseau). This question is as follows: how to harmonise the diversity and disagreements in various areas of human conduct with the idea of political power as an exercise of the will of citizens in the given political community?[14] According to Czech political philosopher Pavel Dufek, the answer to this question "is based on the idea that decisions made by a political authority (usually meaning the state) must be acceptable for everyone – or more specifically, justifiable to everyone – to whom they are addressed"?[15] Similarly, reference can be made to a "pull of justification", understood as "the requirement that official decisions must be justified by reasons when they affect legally protected, individual interests – [which] is ultimately driven by a normative vision of political society".[16]

As regards interference with human rights, works describing the theory of constitutional argumentation denote justification of any interference with fundamental rights as the key argument in applying any conditions limiting constitutional rights. These rights are only violated in cases where the interference is unjustified.[17] Similarly, from the perspective of political philosophy, German philosopher Rainer Forst describes justification as a key aspect of any human conduct.[18] The foremost position among all human rights is occupied by the right to justification, which he conceives as "the right to be respected as a moral person who is autonomous at least in the sense that he or she must not be treated in any manner for which adequate reasons cannot be provided".[19]

Along with the above contexts, as described primarily in political philosophy, we can encounter justification in its practical form in the theory of lawmaking and also in application of the law, specifically in substantiation of normative and individual acts. This article deals only with generally binding acts; I shall disregard the more subtle differentiation between generally binding acts (Czech: *právní předpisy*) and generally specific acts (Czech: *opatření obecné povahy*) acts in public administration.[20]

I also believe that arguments regarding the substantiation (and thus also justification) of legislative acts tend to be more complex because – unlike in individual decisions – providing the reasons for their adoption (although regularly included in these acts, too) is not a condition for their validity and does not constitute an authoritative and thus binding interpretation of the legal regulation; deficits of reasoning generally

[13] P.W. Kahn, *Comparative Constitutionalism*…, p. 2698.

[14] P. Dufek, *Veřejný rozum a právo* [Eng. *Public Reason and Law*], in: T. Sobek, M. Hapla (eds.), *Filosofie práva* [Eng. *Legal Philosophy*], Brno 2020, p. 228.

[15] P. Dufek, *Veřejný rozum*…, p. 228.

[16] D. Dyzenhaus, *Proportionality and Deference in a Culture of Justification*, in: G. Huscroft, B. Miller, G. Webber (eds.), *Proportionality and Rule of Law. Rights, Justification, Reasoning*, Cambridge 2014, p. 254.

[17] K. Möller, *The Global Model of Constitutional Rights*, Oxford 2012, pp. 4–5; A. Barak, *Proportionality. Constitutional Rights and Their Limitations*, Cambridge 2012, p. 20.

[18] Forst's theory follows from the conception of people as "justificatory beings": "They not only have the ability to justify or take responsibility for their beliefs and actions by giving reasons to others, but in certain contexts they see this as a duty and expect that others will do the same. If we want to understand human practices, we must conceive of them as practices bound up with justifications; no matter what we think or do, we place upon ourselves (and others) the demand for reasons, whether they are made explicit or remain implicit (at least initially)". R. Forst, *The Right to Justification*. *Elements of a Constructivist Theory of Justice*, New York 2011, p. 1.

[19] R. Forst, *The Right to Justification*…, pp. 209–210.

[20] This is so although various acts are issued in practice in the context of measures taken against the pandemic of COVID-19 (i.e. not only general, but also generally specific).

do not constitute a ground for annulment of the legislative act. However, the arguments of political philosophy described above show that there exists at least a moral right of a human being to obtain justification if his or her individual right is interfered with by a public authority. In the following part, I will focus on the legal consequences of deficits in the justification of legal regulations adopted during a state of emergency.

The basic consideration in this regard is that proper justification of a legal act is a matter of degree. While there may be cases where a statement of reasons (and thus, justification) is completely lacking, much more often it will be present, but inadequate. We can encounter both these situations in the Czech Republic: government measures adopted to combat the COVID-19 pandemic were in no way substantiated until the end of February 2021,[21] while other acts, specifically measures of the Ministry of Health and regional public health authorities, were substantiated, but the courts often considered their statements of reasons inadequate.[22] With regard to substantiation of one of the measures adopted by the Ministry of Health, the Municipal Court in Prague stated as follows:

> Emergency measures adopted during times of an epidemic certainly cannot be measured by excessively formalistic criteria and, depending on the circumstances, the statement of reasons may be relatively concise. It should be highlighted, on the other hand, that the Ministry should always substantiate the measures it takes as specifically as possible so as to clarify to the public why their rights are being limited. At the same time, it holds in general that the Ministry can be expected to become better informed about the imminent risks while the need for a rapid response will gradually subside; any emergency measures should therefore be substantiated in more detail.[23]

The Czech Constitutional Court based its requirements regarding substantiation of the government's generally binding extraordinary measures on this general principle:

> [I]n a modern constitutional state, the regulation of the rights and obligations of individuals, and decision-making on which group of inhabitants will retain their rights and, in contrast, who will bear the burdens associated with their limitation, must not be merely a manifestation of political will. Indeed, the fact that a public authority has the power to regulate the rights and obligations, and at the same time, attains the necessary majority to exercise this power, does not – in itself – suffice for issuing a legal act conforming to the Constitution. Such a legal regulation – especially, if fundamental rights are being restricted – must also reflect the requirement of rationality, i.e. it must be based on reasonable and generally acceptable grounds, and these grounds must also be discernible for third parties.[24]

However, what has avoided the spotlight in case law so far is the question of what exactly should be substantiated, and how. The answer to this question can be sought at two levels that permeate each other. In theory, public justification of acts of a public authority is usually associated with the notion of public reason. John Rawls understands it in the way that "comprehensive doctrines of truth or right [are] replaced by an idea of the politically reasonable addressed to citizens as citizens".[25] This is thus a set of certain rules regulating the political debate[26] which imply that "only those laws that are based

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[21] However, this fact has not yet been the reason for their annulment by the Czech Constitutional Court.

[22] For a critical voice regarding insufficient substantiation, see especially J. Wintr, *K ústavnosti a zákonnosti protiepidemických*…, p. 295.

[23] Judgment of the Municipal Court in Prague of 7 May 2020 (10 A 35/2020–261), para. 62.

[24] Judgment of the Constitutional Court of 9 February 2021 (Pl. ÚS 106/20), para. 68.

[25] J. Rawls, *Public Reason Revisited*, "The University of Chicago Law Review" 1997/3, p. 766.

[26] P. Dufek, *Veřejný rozum*…, p. 231.

upon arguments and reasons to which no members of society have good moral reason to object can boast political legitimacy".[27] In an environment of plurality and reasonable disagreement, public reason creates a desirable form of relationships between the government and individuals, and also among individuals themselves.[28]

Besides this theoretical level, the degree of justification of legal regulations is also the subject of the "theory of rational legislation", i.e. legisprudence.[29] It is based on the idea that the legislator acts rationally and makes rational decisions. However, the reality of a norm-making process is not aligned with this perfectionist view and forces us to perceive the rationality of this whole process as bounded.[30] One of the reasons why this is so is that in a democratic state governed by the rule of law, any legal regulation is a political compromise, which need not necessarily be rational, but nevertheless cannot be perceived as illegitimate since it is based on democratic legitimacy.[31]

The inherent conflict between the abstract theory of public reason and the concrete practice of bounded rationality of the lawmaking process enshrined in the statement of reasons for an act of public authority calls for setting an appropriate degree of justification with regard to a specific enacted rule. This degree should primarily correspond to the intensity of the interference with individual rights. In the context of measures to combat the COVID-19 pandemic, we can use as an example the requirement of justifying the curfew imposed between 9 p.m. and 5 a.m. Such a restriction should not be justified by merely stating in general that it would be suitable not to meet with other people. Instead, it should be explained why it is prohibited to leave home precisely from 9 p.m. to 5 a.m., rather than, for example, from 10 p.m., as this represents a significant restriction of the freedom of movement. On the other hand, I believe that the requirement for social distancing or wearing face masks need not be substantiated in detail for two reasons: firstly, in the context of the current public debate, an informed and reasonably acting person will understand the importance of wearing a face mask and practising social distancing for getting the pandemic under control, and, secondly, the actual requirement for wearing a face mask and adhering to basic rules of hygiene is unlikely to constitute an intensive interference with any of the fundamental rights (or is rather a substantially smaller interference than the above-mentioned restriction of the freedom of movement, if conceived without any exceptions).

Consequently, the more significant the interference with a right, the greater the need for a clear and detailed justification. Then, the minimum threshold of justification relates to the idea of public reason in that the reasons for a measure should be perceived as sufficient if a reasonable person understands them as justifiable based on the facts contained in the statement of reasons in combination with other knowledge acquired with regard to the given issue. This concept of justification is thus based on the coherentist theory of epistemic justification. According to this theory, "a belief or set of beliefs is justified, or justifiably held, just in case the belief coheres with a set of beliefs,

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[27] W. Sadurski, *Judicial Review and Public Reason*, in: E.F. Delaney, R. Dixon (eds.), *Comparative Judicial Review*, Cheltenham–Northampton 2018, p. 337.

[28] P. Dufek, *Veřejný rozum…*, p. 230.

[29] For more details on this theory, see: L. Wintgens, *Legisprudence. Practical Reason in Legislation*, Farnham-Burlington 2012; L. Wintgens, *Legisprudence as a New Theory of Legislation*, in: L. Wintgens (ed.) *The Theory and Practice of Legislation. Essays in Legisprudence*, Farnham–Burlington 2005, pp. 3–25.

[30] L. Wintgens, *The Rational Legislator Revisited. Bounded Rationality and Legisprudence*, in: L. Wintgens, A.D. Oliver--Lalana (eds.), *Rationality and Justification of Legislation*, Dordrecht 2013, pp. 14–16.

[31] P. Dann, *Verfassungsgerichtliche Kontrolle gesetzgeberischer Rationalität* [Eng. *Constitutional Review of Legislative Rationality*], "Der Staat" 2010/4, p. 640.

the set forms a coherent system or some variation on these themes".[32] The application of this theory to justifying legal rules is a matter of establishing a coherent set of reasons that are present in the actual statement of reasons for a legal regulation or follow from other information available to the addressees. All this information, in aggregate, provides substantive reasons for the adopted measures and the rationale behind them, thereby explicitly legitimating the encroachment on an individual's freedom. At the same time, the coherentist theory reflects the changing level of knowledge regarding a crisis situation, which may be scarce, especially at the initial stages of legislative resolution of the situation.

Justification of acts issued by a public authority relates to a "culture of justification", a concept first briefly introduced by South African lawyer Etienne Mureinik in his article describing the transition of South Africa from a culture of authority to a culture of justification after the Interim Bill of Rights was enacted in 1993.[33] This "culture of justification" subsequently became a concept referred to by many of authors in debates on both general and specific problems of public authority. Iddo Porat and Moshe Cohen-Eliya describe the differences between the American culture of authority and the European culture of justification in that, in a culture of authority, acts of public authorities are legitimized by the very existence of the authorities. On the other hand, a culture of justification requires more than a mere existence of a public authority; each individual act of a public authority must be substantiated as reasonable.[34] This fact is reflected in the different position of fundamental rights on the European continent and in the United States of America. Cultures of justification and of authority also differ in many other ways. In this journal, Marek Smolak used this theory to describe the concept of motions presented by members of the Polish Parliament to the Constitutional Tribunal.[35]

In the following section, I will attempt to answer the question of whether the threshold of justification differs in a "state of exception", as compared to the "state of normalcy".

## 3. Justification in a "state of exception"

The answer to the question of whether justification of measures in a "state of exception" exhibits any specific features is – in my opinion – associated with deeper structural transformations of the government's activities at a time when there is a "state of exception". Kim Lane Scheppele and other contemporary authors distinguish legal and extralegal approaches to the "state of exception".[36] A typical extralegal approach was that of the German constitutional theorist Carl Schmitt, whose argumentation was based on sovereignty, which manifests itself, *inter alia,* in "states of exception". As a matter of fact, he believed general rules to be impracticable in crises because of their unpredictability.[37] A legal approach calls for a legal response to the "state

[32] E. Olsson, *Coherentist Theories of Epistemic Justification*, in: E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, 2017, https://plato.stanford.edu/archives/spr2017/entries/justep-coherence/, accessed on: 15 January 2021.

[33] "If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified". E. Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, "South African Journal on Human Rights" 1994/10, p. 32.

[34] I. Porat, M. Cohen-Elyia, *Principle of Proportionality and Constitutional Culture*, Cambridge 2013, p. 112.

[35] M. Smolak, *The Culture of Justification and Public Reason: Comments on the Motion of Members of the Polish Parliament to the Constitutional Tribunal*, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2019/2, pp. 29–38.

[36] K.L. Scheppele, *Legal and Extralegal Emergencies*, in: K.E. Whittington, D. Kelemen, G. Caldeira (eds.), *The Oxford Handbook of Law and Politics*, Oxford 2008, p. 165.

[37] C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, Chicago 2005, pp. 6–7.

of exception", either through the application of generally valid measures, which also apply outside the "state of exception", or through the adoption of special measures to deal with such a state (which measures can be general or *ad hoc* in nature). It must be borne in mind in this regard that the legislator need not always find the best approach to a specific crisis situation. A "state of exception" may also be resolved in some other way (e.g. by *ultra vires* actions of governmental bodies or an action that is contrary to the existing positive law).[38] Normalcy is thus a "segment of reality corresponding with the program of the norm".[39]

Provided that we operate within the limits of the law when dealing with an exceptional situation or crisis – and there are a number of reasons to do so in a contemporary state[40] – we can recognize, in particular, the following three functions of legislation: 1) just like outside a "state of exception", the law is an instrument for regulating the rights and obligations of its addressees, but also those of public authorities; 2) the law represents a limit to the state's power in activities aimed at averting the "state of exception" (public law is governed by the principle that allows authorities to only act *secundum et intra legem*, while individuals may also proceed *praeter legem*); 3) the law is an instrument for restoring normalcy.[41] All these functions aim to ensure that a "state of exception" is only temporary and does not become a rule.[42]

With regard to the topic under scrutiny, the key question is the effect of a "state of exception" on the threshold of justification of the adopted measures. It could be argued, on the one hand, that a "state of exception", as compared to the "state of normalcy", calls for a quick response to the prevailing situation, which rules out detailed substantiation of all the adopted legal norms. This would raise this threshold significantly higher than during the "state of normalcy". On the other hand, however, one may argue by the rule of law, which must be maintained even during a "state of exception".[43] Moreover, although decisions made during a "state of exception" are often plagued by uncertainty, the measures adopted must be rationally justifiable and should rely on the latest findings regarding the given situation and, for example, also on the precautionary principle.[44]

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[38] L. Kollert, *To Regulate, or Not to Regulate? A Study on the State of Exception and Its Regulation*, in: J. Jinek, L. Kollert (eds.), *Emergency Powers*, Baden-Baden 2020, pp. 82–83.

[39] J. Isensee, *On the Validity of Law with Respect to the Exceptional Case*, in: J. Jinek, L. Kollert (eds.), *Emergency…*, p. 11. On "usualness" as a prerequisite for functioning of the law, cf. also J. Kysela, *Exceptionality in Law*, in: J. Jinek, L. Kollert (eds.), *Emergency…*, pp. 108–109. It holds at the same time, however, that the law does envisage a number of exceptional situations. These need not be outright catastrophes; an exceptional situation may also arise following local flooding or outbreak of an infectious disease. In these situations, an exemption serves to limit the application of certain rules envisaged by the law, rather than to create an extralegal state of affairs.

[40] L. Kollert, *To Regulate, or Not to Regulate?...*, p. 100.

[41] P. Ondřejek, *Výjimečné stavy a úskalí legality* [Eng. *State of Emergency and Pitfalls of Legality*], in: V. Bílková, J. Kysela, P. Šturma (eds.), *Výjimečné stavy a lidská práva* [Eng. *State of Emergency and Human Rights*], Prague 2016, pp. 52–53.

[42] B. Ackerman, *The Emergency Constitution*, "Yale Law Journal" 2004/113, pp. 1044–1045. Possible continuation of certain restrictions after the "state of exception" has already been lifted – leading to its normalization – is a separate question.

[43] N. Alivizatos, V. Bílková, I. Cameron, O. Kask, K. Tuori, *Respect for Democracy, Human Rights and the Rule of Law during States of Emergency – Reflections*, pp. 3–4, Venice Commission (CDP-PI(2020)005rev of 26 May 2020), https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)005rev-e, accessed on: 5 July 2020.

[44] Czech legal theorist Tomáš Sobek treats the precautionary principle in decision-making at times of a "state of exception" as decision-making regarding an acceptable risk. That being said, one should better assume that a catastrophe is impending, because even if stricter measures are adopted and the threat does not materialize, the consequences of underestimating the situation would be far worse. For details, see: T. Sobek, *Jaké je to být odepsaný* [Eng. *How Does it Feel to be Doomed?*], in: M. Šejvl, P. Agha, T. Sobek, J. Kokešová, D. Černý, *Vítězové a poražení: Právní a etické problémy současné koronakrize* [Eng. *Winners and Losers: Legal and Ethical Issues in the Current Coronavirus Crisis*], Prague 2020, pp. 40–41.

Returning to the above-mentioned practice in the Czech Republic in the context of distinguishing between a culture of justification and a culture of authority, if extraordinary measures were indeed recently not substantiated formally in any way and the relevant legislative acts were merely issued, and they moreover substantially interfered with individual rights, this must be considered, at the very least, questionable in terms of legitimacy of the state's authority. Indeed, we can legitimately ask ourselves whether this amounts to a transition from a culture of justification to a culture of authority during "states of exception". In my opinion, this is not the case.[45] Although the executive branch does obtain more powers with a view to averting the relevant threats, it still remains under some control of the legislature and the judiciary.[46] Effective control, however, is conditional on the government providing reasons for its actions. Without knowing these reasons, the courts are often left in the dark as to the rationale behind a certain measure. In the following part of this article, I will point out that an absence of reasons (and thus of justification) also causes problems in reviewing the proportionality of a given measure.

As indicated above, examination of the threshold of justification during "states of exception" turns on the degree in which emergency measures interfere with individual rights. The greater the interference, the more urgent the requirement for justification. While it is true that the need for immediate response may lower the threshold of justification, more detailed statements of reasons will be required in the case of measures adopted weeks or even months after the outbreak of the crisis, as such measures will already be based on more exhaustive information.[47]

The issue of practical consequences of justification has arisen in the past decade in judicial review of legislative and executive regulations. Within the bounds of the principle of consistency, the rational-basis test, and review of proportionality, constitutional courts and supreme courts are called on to determine, among other things, whether the lawmaker has adhered to the principles of rational lawmaking. The following part deals with the links among the ideas of public justification, reasonableness of law, and proportionality.

## 4. Justification review: reasonableness and proportionality

In the conclusion of the previous section, I indicated the practical aspects of justifying legal acts in connection with constitutionalization of the theory of rational lawmaking.[48] In some cases, the constitutional courts or supreme courts are in fact asked to determine, e.g. when reviewing proportionality of a legislative measure, whether the outcomes of legislative activities are rational. Such a review of rationality is controversial,[49]

[45] As pointed out by one of the reviewers of this article, the idea of justification is also associated with the rule of law. In connection with the developments in South Africa, as briefly described in section 2 above, David Dyzenhaus emphasizes that by giving reasons for their decisions, authorities simultaneously honour the values of dignity and equality, that is, the values which distinguish "decent" legal systems from "wicked" ones. See: D. Dyzenhaus, *Dignity in Administrative Law. Judicial Deference in a Culture of Justification*, "Review of Constitutional Studies/Revue d'études constitutionnelles" 2012/1, pp. 110–112.

[46] N. Alivizatos, V. Bílková, I. Cameron, O. Kask, K. Tuori, *Respect for Democracy*..., p. 4.

[47] This argument, too, was crucial in the judicial rulings rendered in the Czech Republic in late 2020 and in early 2021, when courts argued that long after the COVID-19 pandemic had started, governmental authorities should already have possessed the relevant information to ensure that they could rationally justify the measures being adopted. See e.g.: judgment of the Constitutional Court of 9 February 2021 (Pl. ÚS 106/20), paras. 79–81.

[48] On the history of this phenomenon, cf. A.D. Oliver-Lalana, K. Meßerschmidt, *On the "Legisprudential Turn" in Constitutional Review: An Introduction*, in: A.D. Oliver-Lalana, K. Meßerschmidt (eds.), *Rational Lawmaking under Review. Legisprudence According to the German Federal Constitutional Court*, Cham 2016, p. 3.

[49] Cf. A.D. Oliver-Lalana, K. Meßerschmidt, *On the "Legisprudential Turn"*..., p. 3.

especially if it is not accompanied by a high degree of judicial deference in favour of political decisions.

In my opinion, the requirement that acts of public authorities be proportionate is the most common judicial test which can be used to examine the rationality of legislative measures and their justification. Proportionality means in general that a limitation of a fundamental right is aimed exclusively at attaining one of the legitimate objectives and, therefore, this limitation is not greater than is absolutely necessary.[50] Proportionality is associated with justifying a legal regulation, especially at the stage of examining the suitability and necessity of a regulation which limits a fundamental right.[51] Proportionality relates to the concept of public reason[52] and, in general, rationality of the law;[53] at the same time, it involves a stricter scrutiny of constitutionality than the rational-basis test, which is used, for example, for reviewing interferences with socio-economic rights.[54]

Near the end of 2020 (almost eight months after the first emergency measures were adopted), the Czech judiciary first ruled on the question of proportionality of an emergency measure.[55] In its judgment of 11 November 2020, the Municipal Court in Prague dismissed a lawsuit aimed to annul the consequences of an emergency measure adopted by the government one month after discovery of the COVID-19 contagion in the Czech Republic.[56] The measure banned Czech workers from commuting to Germany and Austria unless they stayed abroad for more than 21 days.[57] The lawsuit was brought by a single mother of two young children who had been unable to travel abroad for three weeks. The Municipal Court eventually dismissed the suit as the judge adopted a deferential approach to the government's procedure, where an important argument was based on review of the measure's proportionality. The key argument was that the measure was not clearly unreasonable (as I mentioned above, moreover, the measure was adopted relatively quickly after the outbreak of the epidemic in the Czech Republic, i.e. at a time when there was no reliable information as to what measures would be effective and necessary). The court correctly assessed the measure's proportionality in view of the information available at the time when the measure was issued, rather than with regard to the information that became available later.

As to the requirement of justifying the measure, the court stated:

> [A]t the beginning of the pandemic, the government cannot be asked to have thorough analyses available for all its steps, proving that the measures it is taking are necessary in the given situation for the protection of public health. The travel ban was subject to several exceptions, including one applicable to cross-border workers such as the Plaintiff. The government thus

[50] The present article does not give me space to go deeper into this line of argument based on constitutional law. A comprehensive analysis is provided especially in: A. Barak, *Proportionality*…

[51] C. Waldhoff, *On Constitutional Duties to Give Reasons for Legislative Acts*, in: A.D. Oliver-Lalana, K. Meßerschmidt (eds.), *Rational Lawmaking*…, p. 133.

[52] P. Dufek, *Veřejný rozum*…, p. 233.

[53] R. Alexy, *Constitutional Rights, Balancing, and Rationality*, "Ratio Juris" 2003/2, pp. 131–140. J. Sieckmann, *Rational Lawmaking, Proportionality and Balancing*, in: A.D. Oliver-Lalana, K. Meßerschmidt (eds.), *Rational Lawmaking*…, pp. 349–372.

[54] Z. Červínek, *Proportionality or Rationality in Socio-Economic Rights Adjudication? Case Study of Czech Constitutional Court's Judgment in Compulsory Vaccination Case*, "UCL Journal of Law and Jurisprudence" 2018/1, pp. 86–102.

[55] For more details on this decision, see: P. Ondřejek, *Proporcionalita opatření přijímaných ve výjimečných stavech* [Eng. *Proportionality of Measures Adopted in the Emergencies*], "Časopis pro právní vědu a praxi" 2020/4, p. 616ff.

[56] Government emergency measure of 30 March 2020, No. 334 (Czech title: Usnesení vlády České republiky ze dne 30.03.2020 č. 334 o přijetí krizového opatření), (No. 142/2020 Coll.), VLADA.cz, https://apps.odok.cz/attachment/-/down/IHOABN7SBPR6, accessed on: 21 January 2021.

[57] Judgment of the Municipal Court in Prague of 11 November 2020 (14 A 45/2020–131).

> did not impose a blanket travel ban. It was probably aware that such a measure would be inadmissible. At the same time, however, it knew that the coronavirus had gotten to the Czech Republic from abroad, and therefore considered it necessary to restrict cross-border travel (...). Nonetheless, the measure did not apply to travels to all the neighbouring countries either, since the restrictions did not cover people commuting to Poland and Slovakia. The government thus reflected the more favourable epidemiological situation in these countries as compared to Germany and Austria.[58]

In my opinion, the court's requirements pertaining to justification of the emergency measure by the government were appropriate. Statement of reasons should not be merely formal; it has to rely on relevant information available at the time when the measure is adopted, and also inherently reflects a certain degree of uncertainty. No great demands should be placed on justification during a "state of exception", if only because some of the decisions being adopted are very complex in both moral and political terms. For instance, allowing for a certain number of casualties is highly controversial, but may be inevitable for handling a crisis situation; nevertheless, I believe that highly detailed information in this respect would tend to hinder the resolution of the situation.

The Czech Constitutional Court also pointed out the link between a review of proportionality and reasons given for an extraordinary measure in the ruling in which it examined the constitutionality of the prohibition of selling certain goods and the closure of part of retail stores in 2020. It stated, specifically:

> It was up to the government itself, in the case under scrutiny, to present sufficient and rational reasons why it had adopted the contested measure in the form in which it was adopted. Only on their basis could the Constitutional Court properly perform its task and review compliance of the contested legal regulation with the law and the constitutional order. In the case at hand, the applicant points out the lacking substantiation with regard to both the prohibition as such and the exemptions from it, and provides some specific examples which the applicant considers illogical (…). Under these circumstances, without any statement of reasons whatsoever, it is not even possible to weigh the mutually colliding fundamental rights (the right to freely operate a business and ownership rights v. the right to protection of health or the right to life). (…) What is important, however, is that the government must be able to properly and conclusively explain 1) on what grounds it was necessary to completely prohibit retail sales and the provision of services on business premises (i.e. especially why the same result could not have been achieved by less intrusive means, e.g. by limiting the numbers of customers present on the premises and other measures); and 2) why the exemptions from the prohibition should be considered rational.[59]

Review of proportionality of a measure adopted in a "state of exception" is quite common in litigation concerned with the validity or constitutionality of such a measure. In this case, the government (and thus its bodies) must prove that the measures taken are based on accurate information and that they are suitable, necessary and proportionate. The duty to present arguments does not differ from other disputes concerning proportionality: the applicant is supposed to assert and prove that a measure is contrary to the Constitution,[60] while the author of the relevant measure (the government,

[58] Judgment of the Municipal Court in Prague of 11 November 2020 (14 A 45/2020–131), paras. 98–99.

[59] Judgment of the Constitutional Court of 9 February 2021 (Pl. ÚS 106/20), paras. 86–88.

[60] In the above-mentioned judgment of 11 November 2020, the Municipal Court in Prague dismissed the plaintiff's claim, noting in the reasoning that although the Government's statement regarding the proportionality of the measure was quite general, "the Plaintiff fails to put forth any further arguments as to the disproportionate impact of the crisis measure". Judgment of the Municipal Court in Prague of 11 November 2020 (14 A 45/2020–131), para. 104.

a ministry, the parliament) argues, in turn, that it is proportionate.[61] All information concerning proportionality of the given measure can thus be discussed and considered in detail in case of a dispute.

## 5. Conclusion

Unlike the absence of a statement of reasons for an administrative or judicial decision, lack of substantiation of a legal regulation is not a ground for its annulment. Nonetheless, such failure to disclose the reasons poses a problem from a theoretical point of view. A "state of exception" as such does not justify failure to give reasons for a legislative act. The article provides an example from the Czech practice of adopting measures at times when a state of emergency was declared, which failed to reflect even the minimum requirements on substantiation of crisis measures adopted to combat the COVID-19 pandemic in the period from March 2020 to February 2021. With regard to both justification and proportionality, which is an expression of the requirement for rationality of legal regulation, the judiciary employs a highly deferential approach towards the government and public administration.

The article argues that courts must apply a stricter degree of scrutiny with a view to ensuring respect for the principles of a state governed by the rule of law, which continue to apply even during a "state of exception". I believe it is important to insist on maintaining safeguards of the rule of law, which – in my opinion – also include justification of acts issued by public authorities, as these very safeguards, such as the separation of powers and protection of individual rights, might be perceived as obstacles that need to be set aside in order to overcome the crisis.[62]

The article defends the thesis that even in a "state of exception" a state governed by rule of law continues to be based on a culture of justification, rather than on a culture of authority. Justification of a measure adopted in a "state of exception" follows from the abstract theory of public justification of acts taken by public authorities. The article refers to an appropriate scope of substantiation, which is denoted as the threshold of justification. The latter is based on the coherentist theory of epistemic justification. If we insist on justifying measures adopted during a "state of exception", the benefit will be two-fold: theoretical, in terms of the philosophical right to justification provided by public authorities, and practical, making it easier to interpret hastily adopted measures.[63]

[61] A. Barak, *Proportionality*…, p. 449. For more details, see also: P. Ondřejek, *Proporcionalita opatření přijímaných*…, p. 628.

[62] Professor Roman Prymula, a distinguished Czech epidemiologist and a government expert (for a brief period, also the Minister of Health), who was at the forefront of Czech fight against the COVID-19 pandemic, expressed a similar – and from my point of view, controversial – idea in an interview he gave in March 2020: "While we are experiencing certain discomfort, we are still living in a relatively robust democracy and want to deal with things rationally. But we must bear in mind that our 'hyperdemocracy' does not go well with an effective control of the epidemic as could be seen in some Asian countries", NOVINKY.cz, 11 March 2020, https://www.novinky.cz/domaci/clanek/prymula-deti-jsou-pro-sve-prarodice-v-sireni-koronaviru-jen-malym-rizikem-40316275, accessed on: 15 January 2021.

[63] On the poor legislative technique of some of the adopted measures, see: J. Wintr, *K ústavnosti a zákonnosti protiepidemických opatření*..., p. 295.

**Threshold of Justification of Emergency Regulations: On Coherentism Requirement for the Justification of Measures Adopted in the Czech Republic during the COVID-19 Pandemic**

**Abstract:** The article deals with justification of generally binding legal acts as part of a state governed by the rule of law. The "state of exception" caused by the COVID-19 pandemic adds a new dimension to the issue of justification. The practice prevailing in the Czech Republic in 2020 did not reflect even the minimum requirements for justifying emergency measures, which brought on problems both in the practical application of the adopted measures and in their subsequent judicial review. The article attempts to find an appropriate level of justification, referred to as the threshold of justification and based on the coherentist theory of epistemic justification. The basis of such justification lies in the idea that individual grounds for justification can be found in the explanatory reports of the legislation, on the one hand, and in various pieces of relevant information available to the addressees, on the other hand. All these reasons should form a coherent whole and they should ultimately legitimize restrictions on the freedom of individuals. The final part of the article describes the importance of the threshold of justification for the review of proportionality and even reasonableness of the law.

**Keywords:** public justification, public reason, coherentism, theory of rational lawmaking, state of exception, proportionality, reasonableness of the law

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