Number: U-I-79/20
Date: 31 May 2021

PARTIALLY DISSENTING OPINION OF JUDGE DR DUNJA JADEK PENSA REGARDING DECISION NO. U-I-79/20, DATED 13 MAY 2021

I concur with the operative provisions insofar as they refer to the assessment of the challenged Act and the manner of implementation of this decision. What I could not agree with were the underlying reasons. I was not able to overcome disagreements about them by a concurring opinion.[1]

I opine that the majority imposed unreal requirements on the legislature. For instance, as regards the requirement that the "legislature determine with sufficient precision the admissible types, scope, and conditions regarding the restriction of the freedom of movement and of the right of assembly and association,"[2] the majority did not substantiate by which investigative method the legislature should obtain the findings regarding the characteristics of an unknown communicable disease, its hazards for the life and health of people, its spread, and the possibilities of the treatment thereof, which would enable it to fulfil the mentioned criteria referred to in the requirement.

In the reasoning, I deem that there was a split regarding the legal effect of the declaratory decision insofar as it refers to the review of a law. On the one hand, in judicial proceedings it is consistent with the Constitution to (also) take into consideration the unconstitutional two provisions of the Act and the implementing regulations that were in force when the Decision started to take effect or that will be adopted in the future on their basis, because this is necessary in order to protect the life and health of people (hereinafter referred to as the first situation).[3] On the other hand, such does not hold true as regards the challenged ordinances (they are listed in Point 6 of the operative provisions, hereinafter referred to as the second situation). Since they are based on unconstitutional statutory provisions, they lose applicability (Point 7 of the operative provisions). It namely follows from the Decision that the establishment of their unconstitutionality is an *automatic* consequence of the finding that the challenged provisions of the Act were unconstitutional;[4] this is the only allegation that concerns them.[5] However, it is with this very same allegation – namely the

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[1] The operative provisions and reasoning of a decision always entail a whole, due to which not only the operative provisions are binding, but also the reasons and positions contained in the reasoning. *Cf.* Decision of the Constitutional Court No. Up-2597/07, dated 4 October 2007 (Official Gazette RS, No. 94/07, and OdlUS V, 108, Para. 6 of the reasoning).

[2] This requirement was imposed on the legislature in paragraph 83 of the reasoning of the Decision.

[3] *Cf*. Para. 101 of the reasoning of the majority Decision.

[4] *Cf*. Para. 106 of the reasoning of the majority Decision.

[5] The challenged ordinances were not assessed from the viewpoint of the constitutional requirement as to the proportionality of the limitations of rights, their possible arbitrariness, or the [Government]

unconstitutionality of the legal basis therefor – that all of the implementing regulations relevant in this Decision are burdened with (from the first and second situations), and only the legal effect of the declaratory decision concerning this unconstitutionality is different. Let me underline that in the first situation it is in conformity with the Constitution to observe the implementing regulations, whereas in the second situation it is not. This gave rise to second thoughts. Particularly because the Decision, by its manner of implementation, determines that it is in conformity with the Constitution that the reviewed two provisions of the Act shall apply until their unconstitutionality is remedied (Point 3 of the operative provisions).[6] These two provisions are the statutory basis for the adoption of all implementing regulations determined by the first and second situations; concurrently, their unconstitutionality is the (only) reason for the decision determined by Points 6 and 7 of the operative provisions as regards the challenged ordinances.

The legal effect of declaratory decisions of the Constitutional Court is a matter of a principled question. A reply thereto should also contribute to building the internal conformity of the constitutional legal order following the publication of such a decision, so that this conformity would not perhaps be compromised because of it.

The reason for the accepted interpretation of the legal effect of a declaratory decision of the Constitutional Court in the second situation is: "The sole effect that these [challenged] ordinances still have is that they apply for disputes concerning the questions that they regulated when they were in force. However, such application has no effect on the spread of COVID-19 and cannot contribute to the protection of the health and lives of people."[7] What bothered me is that the importance of the protection of the lives and health of people is valued in the second situation differently than in the first situation. Nevertheless, also in

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overstepping [its] powers on an otherwise deficient legal basis. Hence, the position is not comparable with the position from the instances considered by the Austrian Constitutional Court (*Verfassungsgerichtshof* – hereinafter referred to as the VfGH), which I will list below. In those cases, the VfGH abrogated implementing regulations of the Minister of Health or the provincial governor and declared them *unlawful*, because the Minister or the provincial governor overstepped the powers granted by the law, because the principle of equality was not observed, or because the statutory requirement that the circumstances important for the challenged decision must be stated was missing. See the decisions in cases No. V 411/2020, dated 14 July 2020; No. V 363/2020, dated 14 July 2020; No. V 530/2020, dated 9 March 2021; No. V 512/2020, dated 10 December 2020; No. V 535/2020, dated 10 December 2020; No. V 405/2020, dated 1 October 2020; and No. V 392/2020, dated 1 October 2020.

[6] In the case at issue, a declaratory decision was adopted because immediate abrogation would cause a much worse unconstitutional situation – the state would be unable to exercise its obligation to protect the life and health of people (paragraph 101 of the reasoning of the majority Decision). Hence, this is a position that is included in the first paragraph of Article 161 of the Constitution as the possibility to abrogate a law with suspensive effect. For more regarding a declaratory decision of the Constitutional Court adopted in such a situation, see S. Nerad, *Interpretativne odločbe Ustavnega sodišča* [Interpretative Decisions of the Constitutional Court], Založba Uradni list Republike Slovenije, Ljubljana 2007, pp. 267 *et seq*.

[7] From Para. 108 of the reasoning of the majority Decision.

judicial proceedings initiated in the first situation, courts will be faced with a situation identical to that that the majority describes in the second situation. However, the instructions of the majority therefor are different – it is in conformity with the Constitution to take into consideration the two unconstitutional provisions of the Act and the implementing regulations adopted on their basis, namely due to protection of the life and [health of] people, even though in proceedings before courts the implementing regulations will no longer be in force and as such, similarly as in the second situation, they will no longer have the function of protecting the life and health of people. From the perspective of the internal consistency of the constitutional legal order, it does not appear convincing to me that the protection of the lives and health of people is concurrently important and not important. It is as if the internal consistency of the constitutional order is a machine whose gears are not meshing.[8] Therefore, I could not accept the reasons for the decision regarding the challenged ordinances.

In the decision-making process, an alternative draft of the decision was prepared. Below, I will refer to it as the **alternative draft**. I advocated for the adoption of that draft. The alternative draft substantiated the existence of an unconstitutional legal gap in the Communicable Diseases Act (Official Gazette RS, Nos. 33/06 – official consolidated text, 49/20, 142/20, 175/20, and 15/21, hereinafter referred to as the CDA), because the substantive framework for further normative concretisation by implementing regulations was not determined. Hence, it did not fault the legislature for having renounced its exclusive legislative power by the challenged provisions of the CDA, as the majority assessed.[9] Below, I will focus on the reasons for not concurring with some of the underlying reasons of the majority as regards the review of the challenged provisions of the CDA from the viewpoint of the Constitution, which I will jointly compare to my perspective and summarise only a part of the reasons from the alternative draft.

As regards some of the underlying reasons for the Decision insofar as it refers to the CDA

The incompatibility of the underlying reasons with the constitutionally determined structure of state power

"When [...] human rights and fundamental freedoms are *directly* interfered with by a general act, [...] that act must be a law."[10] On this very far-reaching position,[11] I suppose, the

[8] I derived my line of thought from the novel All The Light We Cannot See by A. Doerr (translation by A. Moder Saje), Mladinska knjiga, Ljubljana 2014, p. 263: "Each story [he] hears contains its own flaws and contradictions, as though the truth is a machine whose gears are not meshing."

[9] See Para. 97 of the reasoning of the majority Decision.

[10] Taken from Para. 72 of the reasoning of the majority Decision.

[11] A different position is expressed in A. Barak, Proportionality, Constitutional Rights and Their Limitations, Cambridge University Press, Cambridge 2012, pp. 110 *et seq*. As regards the territory of the Federal Republic of Germany, a different position is expressed in C. Bumke and A. Voßkuhle, German Constitutional Law, Oxford University Press, Oxford 2019, p. 349; and H. D. Jarass and B.

interpretation of the second paragraph of Article 32[12] and the third paragraph of Article 42[13] of the Constitution is based, in accordance with which "[a] general act that *directly* limits freedom of movement and the right of assembly and association [...] must be a law."[14] Despite the fact that the majority classifies deciding thereon to be in the exclusive competence of the legislature (as in accordance with the Constitution only the National Assembly adopts laws), it concurrently at the level of statutory regulation allows an *exception* from the exclusive constitutional power of the National Assembly in a situation concerning the spread of a communicable disease. In fact, the further underlying position of the majority reads as follows: "In this specific situation, it is thus not possible to deny the National Assembly the possibility *of exceptionally leaving it to the executive branch of power* to prescribe measures by which the freedom of movement and the right of assembly and association of an indeterminate number of individuals are directly interfered with in order to effectively protect human rights and fundamental freedoms, as well as to ensure fulfilment of the positive obligations that stem from the Constitution."[15]

Conclusion. I cannot rid myself of the feeling that the summarised two positions of the majority are incompatible with each other. The Constitution is unequivocal – laws can *only* be adopted by the National Assembly (*cf.* Article 87 of the Constitution); and not even exceptionally may this exclusive competence of the National Assembly be transferred *by a law* to the executive branch of power, because such entails an inadmissible interference with the constitutionally determined competence of the National Assembly.[16] The only possibility for legislative competence to be delegated is regulated by the Constitution – in the first paragraph of Article 108, which also determines the conditions therefor. In accordance with that provision, decrees with the force of law are to be issued by the President of the Republic (*not* the Government).

Pieroth, Grundgesetz für die Bundesrepublik Deutschland, 11th edition, Beck Verlag, Munich 2011, p. 32.

[12] This provision regulates the elements of the admissibility of the limitation of freedom of movement. It reads as follows: "This right may be limited by law, but only where this is necessary to ensure the course of criminal proceedings, to prevent the spread of infectious diseases, to protect public order, or if the defence of the state so demands."

[13] This provision introduces the elements of the admissibility of the right of assembly and association. It reads as follows: "Legal restrictions of these rights shall be permissible where so required for national security or public safety and for protection against the spread of infectious diseases."

[14] Taken from Para. 82 of the reasoning of the majority Decision. Highlighted by DJP.

[15] This position is taken from Para. 83 of the reasoning of the majority Decision.

[16] In Decision No. U-I-54/09, dated 14 April 2011 (Official Gazette RS, No. 34/11; Paras. 23 and 24 of the reasoning), the Constitutional Court explained that (1) the principle of the separation of powers is a fundamental principle of the organisation of state power and a constitutional principle *par excellence*; therefore, the fundamental rules that regulate the position and relations between the holders of individual functions of state power are determined already by the Constitution; and (2) it is only possible to more precisely delineate this constitutional subject matter by laws, but it is not admissible to introduce rules that interfere with constitutionally determined competences.

As regards the conception of the interpretation of the major premise

Hence, the majority allows the mentioned exception. The majority substantiates it with the characteristics of the position of the struggle against the spread of communicable diseases. I completely concur with these characteristics. To illustrate, I will quote the beginning of paragraph 83 of the reasoning: "The circumstances that are important for prescribing the measures determined by points 2 and 3 of the first paragraph of Article 39 of the CDA can namely change quickly; the legislative procedure, on the other hand, takes some time. If the legislature decided by itself on the introduction, modification, or abolition of such measures it would perhaps be unable to quickly enough adapt the statutory regulation to the changing epidemiological situation or expert findings from the field of the prevention of the spread of infectious diseases."

Where do I see the problem?

The building blocks of the legal order are highly nuanced and the values therein very intertwined.[17] I am sure that in the Constitution this characteristic of the subject matter of its regulation was not overlooked. If I focus on the situation of the epidemic, it is by the letter regulated at the constitutional level. Hence, the Constitution overlooked neither the situation of an epidemic nor the complexity of this position, which in extreme circumstances can even threaten the existence of the population. It is manifestly clear that preventing the spread of a communicable disease (even by limiting the freedom of movement and gathering) can save people from getting ill and consequently from death caused by a serious communicable disease. The second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution resolve the collision of the positions protected by different rights, as well as the clash of the positive and negative duties of the state in a situation entailing the spread of a communicable disease. From the perspective of the Constitution, this position is not an exception and the characteristics of a struggle against the spread of a communicable disease are not exceptional from this perspective.

Conclusion. The interpretation of the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution in accordance with which "a general act that *directly* limits freedom of movement and the right of assembly and association […] must be a law" does not convince me. Let me underline that even the majority was not able to stay true to this interpretation of the major premise. Under the weight of reality (*cf.* the description summarised above), the majority exceptionally "allowed" the *direct* limitation of rights by the prescription of measures by implementing regulations of the executive branch of power. I advocated for such an interpretation of the major premise that would establish a logical connection between existence and value. In doing so, I proceeded from the presumption that (as a general rule) the statutory reservation includes the possibility that implementing regulations be adopted on the basis of a law even if it is only such that directly interfere with

[17] "The legal system as a whole, however, is a more nuanced and complex creature." A. Barak, Proportionality, Constitutional Rights and Their Limitations, Cambridge University Press, Cambridge 2012, p. 117.

rights.[18] The Constitution, I believe, allows for and regulates the hierarchical nature of the legal order, of which groups of legal rules are characteristic (the Constitution, laws, implementing regulations, individual acts). These groups have their place in the constitutional legal order, which is reflected in their supraordination or subordination (*cf.* Article 153 of the Constitution). Separate from this is the question of the duty of the legislature to determine a sufficient substantive framework of an interference with a right for its further normative concretisation by an implementing regulation.[19] However, this is a completely ordinary requirement of the legal order expressed already by the principles of a state governed by the rule of law and also by the requirement that the regulation of interferences with rights be reserved for laws. Below I will expand on this requirement and the further requirements as regards the sufficient clarity and precision in terms of the meaning of such statutory basis in the field of the regulation of an epidemic, which should enable the further normative concretisation thereof in conformity with the Constitution.

As regards the unrealistic requirements imposed on the legislature

A limitation in order to prevent the spread of a communicable disease as referred to in the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution is allowed for prophylactic reasons, in order to manage a threat characterised by individuals getting ill and dying. Hence, the purpose of the limitation is to create conditions to exercise the right to the inviolability of life and health, as the Constitutional Court already stressed in Decision No. U-I-83/20 (paragraph 42 of the reasoning).[20,21]

An understanding that these two provisions merely regulate a basis for a classical vertical interference of the state with the rights determined by the first paragraph of Article 32 and Article 42 of the Constitution would be, I believe, too simple. I opine that the mentioned two provisions of the Constitution, in view of their purpose (i.e. to protect the inviolability of human life and of physical and mental integrity, as well as the sustainability of the health care system, which should ensure respect for human dignity when a person is ill) cannot be interpreted outside of the context of the positive obligations of the state determined by Article 5 of the Constitution, and also outside the general limitation clause determined by the third paragraph of Article 15 of the Constitution, which in the first part determines that human

[18] *Cf.*, e.g., H. D. Jarass and B. Pieroth, *op. cit.*, p. 32.

[19] *Cf.* in relation thereto A. Barak, *op. cit*., p. 111.

[20] Also the 2020 [annual] report of the German Federal Constitutional Court stresses, as regards COVID-19 cases, that in its assessment the Court took into consideration the objective of the measures – i.e. the protection of life and health. In proceedings for deciding on the temporary suspension [of the challenged regulation], the threat to life and health, which was the objective of the measures limiting freedom of movement and gathering, was attributed greater weight.

[21] Exactly the same purpose is stated in the legislative file concerning the latest amendment of the German law on the protection of the population in an epidemic, which was adopted in April 2021. In particular, it stressed the duty of the state to protect life, health, and the sustainability of the health care system as particularly important values.

rights and fundamental freedoms are limited only by the rights of others.[22] The Constitution is an indivisible whole. It must be understood that the whole process of the assessment of the collision of the positions protected by different rights must be carried out before the positive obligations of the state become provisions of a law from the perspective of the management of the threat [of a disease]. In this context, let me also stress that without freedom of movement it is difficult to imagine one's freedom in the broadest sense of the term; the prohibition of gathering in specific public places, such as, for instance, in schools, is connected with the limitation of the exercise of other important human rights; the freedom of gathering in public places is important for the exercise of the freedom of expression and thereby for ensuring the principle of democracy and political pluralism, without which there can be no free democratic society. Experiences with the long-lasting limitation of the exercise of these rights also draw attention to the serious negative effect on the mental health of the population. **In any event, by the mentioned provisions the Constitution imposes on the legislature the obligation to adopt quite complex legislation, because what is addressed is, firstly, a collision of positions that are protected by the same and different rights, and secondly, a clash of positive and negative obligations of the state in the circumstances of an epidemic.**[23]

Managing the danger is in the nature of further normative concretisation in this field of [legal] regulation. This is the subject of regulation. Only knowing and encompassing the entirety of the circumstances of the spread of an individual communicable disease can enable the legislature to make an assessment, which should reflect a balance between the colliding rights.[24] This resolves the limits of the exercise of an individual colliding right at the *sub*-constitutional level. From this, I can deduce the following: when regulating future relations that should manage a certain future threat, the legislature may only formulate statutory provisions in such a manner that they predict the totality of the specific concrete circumstances that are to be expected in its assessment. Only on such a basis can it assess the positions protected by the colliding rights and adopt a position as to the positive obligations of the state in the field of the protection of the rights to life and health in an epidemic. This process inevitably presupposes numerous assessments of a certain situation that is dangerous for the life and health of people.

However, when a danger is predicted the uncertainty is unavoidable. Even when, for instance, an outbreak of an epidemic of a certain already known communicable disease is regulated, it is not possible to envisage in advance whether at that moment there will be enough medicine on the market for all ill people, enough protective gear for health care workers and doctors, enough space in hospitals, and so on. How real the danger is in its

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[22] As regards the importance of the limitation clause, which is included in the majority of modern catalogues of human rights and which follows (in simplified terms) from the fact that in certain instances rights must be limited, see M. Klatt and M. Meister, The Constitutional Structure of Proportionality, Oxford University Press, Oxford 2012, pp. 18 *et seq*.

[23] As regards the positive obligations of the state during the COVID-19 pandemic in the field of the protection of life and health, see M. Bošnjak, *Varstvo človekovih pravic v času pandemije*, [Protection of Human Rights during a Pandemic], Dignitas, Nos. 87/88 (2021), pp. 9 *et seq*.

[24] In relation thereto, c*f.,* e.g., A. Barak, pp. 38 *et seq*.

whole scope will only be revealed in light of experiences when dealing with the epidemic and all of its specific circumstances, which are numerous. What is it that should formulate the concrete content of the obligation of the state in the situation of an epidemic from the perspective of the protection of the right to life and health, and the sustainability of the health care system when no matter how precise and diligent the analysis of the given data is, the shift thereof into the future cannot be reliable.[25] I also doubt that when regulating an outbreak of a thus far unknown disease its danger for the life and health of people can be envisaged, as well as the possibility of the treatment thereof and the capacity of the health care system to respond thereto. It should be understood that the provisions of the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution encompass all spectrums of the threat of the spread of communicable diseases, both known and thus far unknown. Also the CDA comprehensively regulates these requirements of the Constitution and the response of the state to the emergence of known and unknown communicable diseases; furthermore, the review by the Constitutional Court must encompass all spectrums of facing communicable diseases. However, if an assessment is not possible due to difficulty in learning about a new disease, the requirement that when transferring authorisations to the executive branch of power the law must determine in advance and "with sufficient precision the admissible types, scope, and conditions regarding the restriction of the freedom of movement and of the right of assembly and association" – as follows from paragraph 83 of the reasoning of the majority Decision – cannot be realistic. The majority did not explain by which research method the legislature should – in the situation of an outbreak of an unknown communicable disease – discover in advance the characteristics of that disease, its spread, and treatment on the basis of which it would be able, in the statutory text, to "determine with sufficient precision the admissible types, scope, and conditions regarding the restriction of the freedom of movement and of the right of assembly and association." Furthermore, in the quoted text the criterion "with sufficient precision" remained, I believe, undefined, which is likely to cause trouble in the interpretation and implementation of the requirements stemming from the Decision.

Conclusion. I could not accept the interpretation of the second paragraph of Article 32 and the third paragraph of Article 43 of the Constitution, which, as I understand it, deems that the mentioned two provisions regulate a classical vertical interference by the state with the rights determined by the first paragraphs of the mentioned two Articles. I believe that it was not taken into consideration that the Constitution is an indivisible whole and that the purpose of the constitutional regulation of the mentioned provisions of the Constitution was not recognised, as well as the collision of the positions protected by different rights and the mentioned capacities of a person to learn [about a disease] when predicting and assessing unknown variables in unknown circumstances. The requirement imposed on the legislature to "determine with sufficient precision the admissible types, scope, and conditions regarding

[25] With respect to the difficulties regarding the statutory regulation of preventive measures that should manage the future threat, *cf.* Judgment of the First Panel of the German Federal Constitutional Court No. 1 BvR 357/05, dated 15 February 2006 (*Luftsicherheitsgesetz*).

the restriction of the freedom of movement and of the right of assembly and association" for all (known and unknown) communicable diseases is in my opinion unrealistic.[26]

The alternative draft*

[* Translator's note: Unless marked otherwise, all quotes are from the alternative draft of the Decision in this case.]

This draft took into consideration one of the fundamental characteristics of the legal order, namely its hierarchical nature; at the principled level, it included the possibility that the legislature, within the framework of a statutory reservation, transfers an authorisation to the executive branch of power for further normative concretisation by implementing regulations. It defined the requirement of the clarity and substantive precision of the regulation of an interference with the right to freedom of movement and gathering (from the first paragraphs of Articles 32 and 42 of the Constitution) – which should enable further normative concretisation by means of a substantive framework – in relation to the complexity of the subject of legal regulation.[27] In this respect, I opine, it did not impose an unrealistic requirement on the legislature. Hence, it was based on different underlying reasons; it namely substantiated the existence of an unconstitutional legal gap because the legislature failed to determine the substantive framework for further normative concretisation by implementing regulations. It observed the requirement of the clarity and substantive precision of the statutory basis for limiting rights, in which the requirement of sufficient clarity is embedded,[28,29] from the perspective of the subject of regulation. Although as high a degree of clarity as possible in the field of statutory regulation is by all means welcome, experience shows that it is not always attainable;[30] and also, which I think is particularly important for the case at issue, excessive precision may, on the other hand, be reflected in the law being [too] rigid when faced with reality, because the law must enable the changing circumstances to be taken into account when the law touches reality.[31] Last but not least, it took into account that the situation of an epidemic of a certain communicable disease that lasts a longer period of

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[26] For a comparison: § 28 of the German Prevention and Control of Communicable Diseases Act (*Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen - Infektionsschutzgesetz – IfSG*), which is applicable as regards all communicable diseases, determines (*inter alia*) that in the event infected persons are found or if there is suspicion that people are infected or transmitters of a disease, or if it is confirmed that a deceased person was either ill with or the transmitter of an infection, the competent authorities must adopt necessary measures, in particular those listed in § 28a and §§ 29 through 31, namely in such scope and duration as are necessary for the prevention of the spread of communicable diseases. Translation by DJP.

[27] "The clarity required *is* relative to the complexity at the issue at hand." A, Barak, *op. cit.* p. 116.

[28] As regards the doctrines developed by the German Federal Constitutional Court in this field, *cf.* C. Bumke and A. Voßkuhle, German Constitutional Law, Oxford University Press, Oxford 2019, pp. 349 *et seq*.

[29] A. Barak, *op. cit.*, p. 116.

[30] From the Judgment of the European Court of Human Rights in *Sunday Times v. The United Kingdom*, dated 26 April 1979, Para. 49 of the reasoning.

[31] *Ibidem.*

time as a general rule reduces the difficulty in learning [about the disease] in this field of regulation, whereas the invasiveness of interferences with the freedom of movement and gathering increases the longer they last. This imposes on the legislature the obligation to adopt a more precise statutory regulation and thus a clearer substantive framework for further normative concretisation; then, as regards knowing the circumstances that are important for managing the threat caused by that same disease, there are either no more gaps in our knowledge or the extent of that which is unknown is greatly reduced.

Let me add that in a case wherein the VfGH reviewed the provisions of a law that regulated an authorisation given to the executive branch of power to adopt implementing regulations specifically due to COVID-19, and in which the mentioned Court adopted Judgment No. V 363/2020, dated 14 June 2020, which addressed the requirements as to the precision of the statutory basis from the perspective of the authorisation given to the executive branch of power, the VfGH stressed the following: according to the VfGH, these requirements must not be excessively strict when an expeditious response is necessary to ensure a reasonable and effective regulation, taking into account various spatially and temporally diverse elements (*Prognosespielraum*). With respect to the requirements as to the precision of the statutory basis from the perspective of the authorisation given to the executive branch of power, the VfGH stressed that a margin of appreciation in balancing proportionality is granted to the executive branch of power (*Abwägungsspielraum*).

Below, I will concisely summarise (only) two elements from the alternative draft. Firstly, **the reasons concerning the interpretation of the major premise** and thus the starting points for reviewing the challenged provisions of the CDA. And secondly, **the reasons concerning the review of the second paragraph of Article 39 of the CDA from the perspective of the second paragraph of Article 39 of the Constitution**. What is at issue is the assessment of the petitioners' allegations concerning the unconstitutional legal gap from the viewpoint of the constitutional requirement concerning public information in the situation of an epidemic. The majority Decision assesses the duty to inform [the public] from the viewpoint of Article 120 of the Constitution, namely as a safeguard against arbitrary interferences by the executive branch of power when the exclusive legislative competence of the National Assembly is exceptionally transferred thereto (paragraph 95 of the reasoning). In contrast to the majority, I opined that the question of providing information in the situation of an epidemic falls within the field of regulation of the right to obtain information of a public nature (the second paragraph of Article 39 of the Constitution); and not within the field of the regulation of Article 120 of the Constitution.

As regards the interpretation of the major premise

"In conformity with the established constitutional case law, the legislature is obliged to establish a substantive framework as the basis for the more detailed regulation of individual questions in an implementing regulation, as the latter must not contain provisions that do not have a basis in the law, and in particular it must not regulate rights and obligations in an

originary manner.[32] Namely, the provisions of the implementing regulation must always be within the substantive framework, which must be expressly determined by law or at least determinable therefrom by interpretation,[33] which entails the establishment of a substantive framework in the law that has a determinable meaning. **In this respect, the use of general clauses and indeterminate legal terms is not prohibited**."[34] The alternative draft did not overlook the position of the Constitutional Court in accordance with which the statutory authorisation granted to the executive branch of power to adopt an implementing regulation under certain conditions must be all the more restrictive and precise the greater the interference with or effect of the law on individual human rights and fundamental freedoms.[35] It took into consideration that "from the perspective of the precision of criteria, the requirement imposed on the legislature unavoidably also depends on the answer to the question of what the field of regulation is and how tightly connected the field of regulation is with the exercise of other rights that are in collision with the former ones." The legislature must take them into account, whereas the search for a balance between the colliding rights, which merely enables the determination of limits for the exercise of the colliding rights at a general and abstract level, can transpire to be difficult. "This is in particular reflected in instances when unclear future circumstances ([such as] an outbreak of an unknown communicable disease) are concerned and when rights guaranteed directly on the basis of the Constitution are in collision. What must be taken into consideration is precisely what constitutional values require a limitation of an individual human right. The more important these constitutional values are, on the one hand, the more intensive the limitations of an individual human right can be, on the other. [...] What is key is that the legislature regulate the essential questions concerning the field of regulation,[36] which should resolve the collision of the positions protected by the rights in collision, and that it does not leave the decision thereon to the executive branch of power. Furthermore, it must be taken into consideration that due to the specificities of the field of regulation it is reasonably possible to predict that the measures intended to protect the legislative objective can be very diverse, which is also true when it is expected that the circumstances that are the subject of regulation are unknown or largely unknown in advance and can also change rapidly.[37] The above-mentioned in particular holds true in the field of the prevention of communicable diseases, which are not always known in advance, when it also is not known what type of concrete measures are necessary, and when it is also not possible to overlook the fact that the circumstances can change very rapidly, due to which also the measures must be adapted very quickly in order for the objective of protecting health and lives to even be attainable, nor the fact that also a completely new, very communicable disease can appear, whose

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[32] Such is stated in Decision of the Constitutional Court No. U-I-73/94, dated 25 May 1995 (Official Gazette RS, No. 37/95, and OdlUS IC, 51), Para. 19 of the reasoning.

[33] This was stated in Decision of the Constitutional Court No. U-I-84/09, dated 2 July 2009 (Official Gazette RS, No. 55/09, and OdlUS XVIII, 31), Para. 8 of the reasoning.

[34] *Cf.* Decision of the Constitutional Court No. U-I-71/98, dated 28 May 1998 (Official Gazette RS, No. 45/98, and OdlUS VII, 95), Para. 17 of the reasoning.

[35] Decision of the Constitutional Court No. U-I-92/07, Para. 150 of the reasoning.

[36] "*Wesentlichkeitstheorie*" – C. Bumke, H. C. Voßkuhle, *op. cit.*, p. 350.

[37] *Cf.* C. Bumke, H. C. Voßkuhle, *op. cit.,* p. 353. The authors refer to the judgment of the German Federal Court in *Kalkar I*.

characteristics and manner of spreading are at the very beginning virtually unresearched both scientifically and medically. Irrespective of that, in accordance with the Constitution, the legislature must adopt in advance an abstract and general regulation that will observe the obligation of the state to also in such circumstances respond quickly, effectively, and functionally by exercising its positive obligation to protect the rights determined by Articles 17 and 35 and the first paragraph of Article 51 of the Constitution."

"A different situation is in an epidemic of a certain communicable disease of larger proportions, which can also last a longer period of time.[38] Not only does a longer-lasting limitation of the right to freedom of movement and gathering entail an ever more invasive interference with the mentioned rights and with the exercise of other rights, but also the hitherto insufficiently clear circumstances in the field of regulation of the protection of the rights determined by Articles 17, 35, and 51 of the Constitution become ever more clarified and known in light of the fact that the disease is increasingly researched [as time passes]. [...] Hence, when there are no further obstacles to more precise regulation of the set of measures and the conditions for their further regulation at the level of implementing regulations, i.e. obstacles that were a result of a gap in how well known the field of regulation was, the constitutional requirements imposed on the legislature in the sense of [the obligation] to precisely determine the mentioned subject matter and thus to [provide] the executive branch of power a statutory framework to directly interfere with the mentioned two rights are stricter. [...] Within the framework of more precise regulation that in relation to the general regulation will as a general rule be expressed in the form of a special regulation, in such a situation an authorisation can be granted to the executive branch of power to adopt measures that in conformity with the principle of proportionality[39] directly limit freedom of movement and gathering."

As regards the duty to provide public information during an epidemic

"**In the circumstances of the spread of a communicable disease that can threaten the health and lives of people, public information has specific weight.** On the one hand, this concerns informing the public in advance as much as possible, which entails to the extent possible given the scientific and medical findings regarding the manner the communicable disease at issue spreads, and its characteristics and consequences for the health and lives of people, in short, findings as regards everything that can affect the rights of people determined by Articles 17, 35, and the first paragraph of Article 51 of the Constitution with respect to that communicable disease. Since in accordance with Article 5 of the Constitution the state has a positive obligation to protect these rights, there also follows therefrom the obligation to regularly impart the mentioned information, which enables people to promptly adapt their behaviour to the dangers that stem from the spread of the communicable

[38] Dealing with the COVID-19 communicable disease is such an instance.

[39] The general principle of proportionality, which is immanent in a state governed by the rule of law, is binding on all state authorities. *Cf.* L. Šturm in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 55.

disease. On the other hand, this concerns the fact that people must also be regularly and promptly informed of all measures and the reasons therefor, which the state, i.e. – in conformity with the mentioned provision of the CDA – the executive branch in power, adopts in order to prevent the spread of the communicable disease and to manage it. In such a manner, the public is informed of the characteristics of the communicable disease and of the need to prevent the spread thereof, and also the public nature and transparency of the functioning of the executive branch of power are ensured, which enables the establishment of trust of people as to the necessity of the adopted measures. [...] The exceptional preventive importance of the measures for combating the spread of a communicable disease imposes on the competent authorities [...] the argumentative burden of explaining the adopted measures and the consequences they cause, be they either the expected consequences that are the objective of the adopted measures or consequences that cause discomfort due to the restrictive nature of the measures. Only in such a manner is it possible to substantiate in the public the appropriateness, necessity, and proportionality in the narrower sense of the measures in the given circumstances of the spread of a communicable disease."

"When measures limiting human rights are at issue that, on a statutory basis under the CDA, are adopted by the Government, which in view of the factual circumstances concretises the necessary measures for attaining the constitutionally admissible objective by means of regulations with direct effect addressed to the entire population, the mentioned right to obtain information of a public nature also cannot be ensured in a manner that would require every individual to separately obtain such information again every time necessary. In the mentioned circumstances, the consequence would entail the utterly ineffective exercise of the right determined by the second paragraph of Article 39 of the Constitution. [...] By the second paragraph of Article 39 of the CDA, the legislature failed to fulfil the constitutional requirement as to ensuring the effective exercise of the right to obtain information of a public nature when the state has to fulfil the positive obligation to protect the health and lives of people. Therefore, the CDA is also inconsistent with the second paragraph of Article 39 of the Constitution."

Conclusion

The alternative draft faulted the legislature (1) for not determining in the CDA the substantive framework for the further normative concretisation of direct interferences with the right to freedom of movement and gathering by implementing regulations; (2) for not determining even in the form of examples the types of admissible limitations of the rights determined by Articles 32 and 42 of the Constitution. Furthermore, by the regulation determined by the second paragraph of Article 39 of the CDA, in accordance with which the Government must inform the public of the adopted measures, the legislature failed to ensure effective exercise of the right to obtain information of a public nature. Due to the mentioned reasons, I was able to concur with the declaratory operative provisions of the majority decision insofar as they refer to the challenged provisions of the CDA. In addition, I opined that also the second paragraph of Article 39 of the CDA is inconsistent with the Constitution. If I could vote in favour of establishing the inconsistency of the CDA with the Constitution, I would concur with

the manner of implementation of the declaratory decision in Point 3 of the operative provisions. This Point further ensures an unconstitutional statutory basis (i.e. points 2 and 3 of Article 39 of the CDA) for the further adoption of implementing regulations in order to protect the lives and health of people.

Dr Dunja Jadek Pensa
Judge