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PARTIALLY CONCURRING, PARTIALLY DISSENTING OPINION OF JUDGE DR RAJKO KNEZ REGARDING DECISION NO. U-I-79/20, DATED 13 MAY 2021

I Introduction

This case, in which the Constitutional Court joined different petitions for the initiation of proceedings to review constitutionality, brought up complex constitutional questions under changing epidemiological conditions. This Decision is groundbreaking. I believe that the Constitutional Court was faced with a difficult and complex task, including questions that were raised for the first time. I see the answers to some of these questions differently than the majority.

I did not vote in favour of the main Points of the operative provisions. There are a number of reasons for that. I will address the most important and most complex ones. I focused on three questions: the underlying reasons for establishing the unconstitutionality of two provisions of the Communicable Diseases Act (hereinafter referred to as the CDA),[1] the effect that the mentioned established unconstitutionality of the Act should have on the ordinances that ceased to be in force, and, finally, the constitutional aspects of the issue of informing the public.[2]

II As regards the underlying reasons for establishing that the Communicable Diseases Act was unconstitutional

The Decision established that points 2 and 3 of the first paragraph of Article 39 of the CDA were unconstitutional because the mentioned provisions were not in conformity

[1] Official Gazette RS, No. 33/06 – official consolidated text, 49/20, 142/20, 175/20, and 15/21.
[2] An alternative draft of the Decision was presented to the plenary composition of judges in which also the positions referred to in this separate opinion are advocated. Some paragraphs of the opinion are also (partially) taken from that draft.

with the principle of legality.[3] The fact that the executive branch of power (i.e. the state administration) is substantively bound by the Constitution and laws was at the forefront of the decision-making regarding the mentioned provisions of the CDA. The starting points for the assessment in paragraphs 68 through 80 of the Decision were, in my view, the underlying reasons regarding the precision, clarity, and predictability of the statutory provisions that I could not concur with in order to establish an unconstitutionality.

Firstly, it is not always easy to answer the question of how precise a law must be in order for it to be impossible to allege that it violates the principle of legality. In legal theory it is also not possible to always give a uniform answer.[4] How precise provisions must be in order to set limitations on the executive branch of power within which the latter can operate such that it does not regulate by itself that which the legislature should regulate (and thereby does not interfere with the separation of powers) depends on, *inter alia*, the field of regulation and questions as to whether in a certain field of regulation different constitutional rights and fundamental freedoms collide, which rights and freedoms these are, how strong this collision is, and also whether the act regulates situations that are difficult to predict in advance or even unpredictable, and therefore [the act] cannot be precise in predicting the measures. The strictness of the starting points for the assessment regarding at least the mentioned two elements conveys, in my opinion, inappropriate underlying reasons for establishing the unconstitutionality of the Act at issue.

At the beginning of the review with reference to the second paragraph of Article 120 of the Constitution, the Decision provides a comparison with decisions of the European Court of Human Rights (hereinafter referred to as the ECtHR) in criminal cases. I can accept that in these cases the rules are stricter, but in the CDA it is not punitive measures that are at issue but measures that arise from a collision of different human rights, including rights with a different status; on the one hand, the positive obligation of the state to protect the lives of people, their health, and the functioning of the health care system[5] is stressed, and on the other, the question of

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[3] For more on this fundamental principle, which is determined in particular by the second paragraph of Article 120 of the Constitution, see: R. Pirnat, in: M. Avbelj, *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Nova Univerza, Evropska pravna fakulteta, Nova Gorica 2019, pp. 634 *et seq.*

[4] A. Barak, Proportionality. Constitutional Rights and Their Limitations, Cambridge University Press, Cambridge 2012, pp. 110–113.

[5] In the event of the emergence of an epidemic of a communicable disease that could seriously jeopardise the health or even life of people, the too slow or inadequate response of state authorities would be inconsistent with the positive obligations of the state to protect the right to life (Article 17 of the Constitution), the right to physical and mental integrity (Article 35

the intensity of an interference with the rights to freedom of movement and association (which include negative and positive dimensions[6]) is at issue. How these human rights and fundamental freedoms collide, when and to what extent the former limit the latter, and how the legislature should determine this limit are questions that I believe we cannot answer with the underlying starting points of the assessment of the principle of legality from criminal law. Only interferences that limit freedom of movement and association are comparable to the interferences known in criminal law, but they are absolutely not the reasons themselves that lead to such interferences. Just because the effect of such measures is similar to criminal measures does not in and of itself entail that they attain the nature of the latter. We have to proceed from the field of regulation as I mentioned above. The nature of these measures is different and they also regulate situations that concern every single inhabitant of Slovenia. They require a response from the community as a whole, not merely of individuals. Above all, the starting point of the measures does not have the strict vertical relation of the precise and emphasised *de iure imperii* regulation of criminal law, where the state performs criminal prosecution against individuals due to their unlawful conduct.[7] The field of regulation of the CDA is pretty far from what I mentioned, I believe. Therefore, also the starting points for reviewing the measures that limit freedom of movement and association are different. I opine that they should proceed from the mentioned collision of human rights – when the limitation of these rights has a constitutionally admissible objective, i.e. in conformity with the third paragraph of Article 15 of the Constitution, in accordance with which human rights and fundamental freedoms may only be limited by the rights of others and in such cases as are provided by the Constitution.

Secondly, in addition to the fact that the source of limitation of both freedoms (of movement and association) follows from the sphere of the exceptionally important human rights to the protection of the life and health of people, including the health care system (which provides a completely different perspective on the justification of an interference with the mentioned two freedoms), the legislature has a second big "problem", which is reflected in the fact that what is at issue is the regulation of future,

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of the Constitution), and the right to health care (the first paragraph of Article 51 of the Constitution).

[6] See the commentary on Articles 32 and 42 of the Constitution: J. Letnar Černič (Article 32) and K. Vatovec (Article 42), in: M. Avbelj, *op. cit.*, pp. 309 and 411–412.

[7] This collision is by its nature horizontal and essentially interferes with positions between individuals, while the criminal aspect is by its nature close to a vertical relation between the state and the perpetrator of a criminal offence. The horizontal nature is not completely excluded from this perspective because also criminal offences concern a horizontal relation between the perpetrator and the victim. However, this relation is not at the forefront or the centre; the question concerning the principle of legality is distant from this relation.

unknown, momentary situations concerning communicable diseases that encompass a large number of people and can paralyse the normal functioning of the state and the life therein. Such entails that besides the fact that the field of regulation is delicate in and of itself, the legislature is also facing something unknown. Every time this is so, also the clarity and precision of statutory provisions are difficult to achieve.[8] I opine that there cannot exist identical constitutional criteria for assessing the principle of legality in different fields of regulation.[9]

The Constitutional Court has indeed already adopted the position that 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 or effect of the law on individual human rights and fundamental freedoms.[10] However, in this respect it must be taken into consideration that from the perspective of the precision of criteria, the requirement imposed on the legislature unavoidably 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, and the search for a balance between the colliding rights and thus the determination of the limits at a general and abstract level can transpire to be difficult. This is reflected in particular in instances where 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 the limitation of an individual human right.[11] The more important these constitutional

[8] As regards the element of an unknown future, see also Judgment of the German Federal Constitutional Court No. 1 BvR 357/05, dated 15 February 2006, which abrogated the provision of the Safety of Airspace Act (*Luftsicherheitsgesetz*), which enabled an airplane to be shot down in the event of a terrorist act. The topic is not at all connected with the epidemic, rather a position regarding an element of the unknown future was expressed. It namely follows from the reasoning of the Court that the legislature cannot regulate precisely and in advance the types of circumstances that will exist directly on an airplane. Such [predicted circumstances] merely entail speculation that can lead to an erroneous decision. Hence, enabling in advance certain measures that interfere with fundamental human rights in circumstances that are not precisely predictable in advance and which may be speculative is incompatible with the Basic Law (*Grundgesetz*) [i.e. the constitution].

[9] A. Barak, *op. cit*., pp. 107 *et seq.*

[10] Decision of the Constitutional Court No. U-I-92/07, dated 15 April 2010 (Official Gazette RS, No. 46/10, and OdlUS XIX, 4), Para. 150 of the reasoning.

[11] Also the ECtHR does not always consider how something is prescribed by a law in an identical manner. Certainly, the precision of a law regulating, for instance, procedural guarantees in criminal proceedings is different than that of a law regulating, for instance, freedom of expression, where there is an unlimited number of possible situations and circumstances that the legislature cannot predict.

values are, on the one hand, the more intensive can the limitations of an individual human right be, on the other.

Thirdly, I also opine that the length of the epidemic is a special circumstance affecting the review of the constitutionality of the statutory provisions at issue.[12] Not only does a longer-lasting limitation of the rights 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 thus far 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, as a general rule, increasingly researched [as time passes]. It is precisely the already recognised characteristics of the field of regulation of the struggle against the spread of a particular disease that enable a greater degree of precision of the regulation of an interference with the rights to freedom of movement and gathering at a general and abstract level of law. Hence, when there are no longer any obstacles to a more determinate 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 substance and thus to [provide] the executive branch of power a statutory framework for direct interferences with the mentioned two rights are stricter.

In fact, a longer lasting communicable disease and the progress of scientific findings thereon change the position of the legislature, which is to regulate in advance on a general and abstract level measures for combating an unknown communicable disease, to the position of regulating an already existing and better known disease.[13] Therefore, the legislature's duties as regards the requirements concerning the precision of the regulation can be different than before the outbreak of a new and unknown disease and in the initial period of an epidemic or pandemic. Within the framework of a 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

[12] Facing the COVID-19 communicable disease is such an instance. From the past, we know of the example of the epidemic or rather pandemic of the Spanish flu, which lasted several years.

[13] In such light, as time passes and events unfold, an unpredictable, perhaps even completely unknown, and very communicable disease becomes better known, more precise, and also more predictable for the legislature through scientific findings, as well as practical findings on the effectiveness of certain measures and the responsiveness of the population, etc. A great deal of unverified information as regards the characteristics, danger level, infectiousness, etc., can be verified after a certain amount of time.

authorisation can be granted to the executive branch of power to adopt measures that, in conformity with the principle of proportionality,[14] directly limit freedom of movement and gathering. Hence, the role that the National Assembly plays should be more pronounced. It is the National Assembly that must decide on interferences with fundamental rights. We elect deputies and democratic legitimacy proceeds thereafter. Therefore, as the epidemic progresses, the main questions must be regulated by the National Assembly. I could have supported a deficient regulation in the CDA (with the above-mentioned underlying reasons for the Decision),[15] in particular because once the epidemic has lasted for a longer period of time the situation must be looked at differently than at the outbreak of the epidemic.[16] Namely, in such a situation the legislature's obligations as regards the principle of legality are not identical to those in the initial phase of the appearance of a new communicable disease. In the beginning, greater discretion was possible (by taking into account the general principle of proportionality) and it was urgent to resolve the situation in the first wave directly and by means of practices deemed to be the best at that time (*Einschätzungsprärogative* – to make a binding decision as regards the appropriateness and necessity of a certain measure to attain a legitimate goal).[17]

With the development [of events] and findings (as I described above), this margin [of appreciation] in the actions of the executive branch of power narrows. It also narrows due to passivity. As stressed in multiple places in Decision No. U-I-83/20, which positioned its assessment in the initial period of an epidemic (in the beginning of the first wave), decision-making after a full year of an epidemic requires the legislature to take into consideration the mentioned development, which enables it to act with

[14] 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.

[15] The measures are indeed far-reaching (not only because of how long they last) and would require parliamentary discussion, a parliamentary compromise, and a balance between legitimate interests.

[16] Comparatively, one can assess that soon after the outbreak of the epidemic some legislatures adopted more precise rules within the framework of which the executive branch of power could operate (e.g. in Austria on 15 March 2020). They either regulated such by a general act (such as Germany in *Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz - IfSG)* or they adopted a special law, a *lex specialis* only for the COVID-19 epidemic (such as the Austrian *Bundesgesetz betreffend vorläufige Maßnahmen zur Verhinderung der Verbreitung von COVID-19 (COVID-19-Maßnahmengesetz – COVID-19-MG)* StF: BGBl. I No. 12/2020 (NR: GP XXVII IA 396/A AB 102 S. 16. BR: AB 10287, p. 903, with amendments).

[17] As I stated in my separate opinion regarding Decision No. U-I-83/20, dated 27 August 2020 (Official Gazette RS, No. 128/20), in that period it was appropriate to apply the principle of cautiousness.

greater precision,[18] but what kind of effects are prescribed for the executive regulations adopted in that period of time to implement direct measures also must be taken into account.[19]

As regards the legal effects of the unconstitutionality of the ordinances

One must proceed from the fact that the Act has not been abrogated and remains in force. When a law is abrogated, it no longer has any effect (either immediately or following a time period imposed by the Constitutional Court). At that point, the effect of the nonexistence of the law has consequences for implementing acts. These acts no longer have a legal basis. And vice versa. When a law (still) remains in force, also implementing acts [based thereon] remain in force. Why is this finding not the same

[18] The Decision in case No. U-I-83/20 stresses in multiple places that it focuses on the temporal dimension, when the disease appeared for the first time and when the beginning of the spread of that disease was concerned (i.e. the first wave, Paras. 46 and 51). In my separate opinion (in Section 2), I explained that the adopted decision of the Constitutional Court must be understood in light of the initial phase of the epidemic and pandemic, and the decision did not constitute a precedent that could be simply and completely reproduced with respect to future measures.

[19] The mentioned characteristics of the field of regulation can, in view of their nature, also require the use of indeterminate legal terms and general clauses. Such a legislative technique is not in and of itself constitutionally disputable. What is key is that the legislature regulate the essential questions concerning the field of regulation that 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. Therefore, the requirements as to precision and consequently more detailed statutory regulation that exceed the mentioned key questions can be milder in view of special characteristics when regulating individual fields. Such a situation is when it is possible to predict – precisely due to the mentioned specificities – that the measures intended to protect the legislative objective can be very diverse, and also when it is expected that the circumstances that are the subject of regulation and that are unknown or largely unknown in advance can also change quickly. *Cf.* C. Bumke and A. Voßkuhle, German Constitutional Law. Introduction, Cases, and Principles. Oxford University Press, Oxford 2019, p. 353.
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 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 quickly, due to which also the measures must be rapidly adjusted in order for the objective of protecting health and lives to even be attainable, nor the fact that a completely new, very communicable disease can also appear whose characteristics and manner of spreading are at the very beginning virtually unresearched both scientifically and medically. Irrespective of that, the legislature must adopt in advance an abstract and general regulation that will fulfil the obligation of the state to also in such circumstances respond quickly, effectively, and operatively 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.

with respect to implementing acts that ceased to be in force? At this point, the question of the effects of a declaratory decision is raised.

This question has already been addressed in the case law of the Constitutional Court.[20] In the case at issue I advocated that the implementing acts should share the fate of the decision on the Act [i.e. the CDA]. If the Act was not abrogated, why should the legal consequences regarding ordinances (which in fact are no longer in force, but remain applicable) be any different? Since the Act remains in force, such entails that also the (still) existing rules in it that direct implementing acts and pose a framework for them (albeit incompletely; this is why an unconstitutionality was established) remain in force. Such entails that the implementing acts in question still have the same, and valid, legal basis, yet on the basis of this Decision they lost their effect

[20] Declaratory decisions of the Constitutional Court are not regulated by the Constitution but by Article 48 of the Constitutional Court Act, which is modelled on the German regulation (Official Gazette RS, Nos. 64/07 – official consolidated text, 109/12, and 23/20). However, the Constitutional Court Act does not regulate their effects. As regards this question, see the Decision in case No. U-I-313/98 (Decision dated 16 March 2000, Official Gazette RS, No. 33/2000, and OdlUS IX, 60), and the separate opinions of judges Testen and Čebulj. See also Decision No. U-I-90/05, dated 7 July 2005 (Official Gazette RS, No. 75/05, and OdlUS XIV, 66), and the separate opinion of judge Ribičič. Prior to that, in case No. U-I-168/97 (Decision dated 2 July 1997) the Constitutional Court decided that the previous declaratory decision (No. U-I-18/93, dated 11 April 1996 (Official Gazette RS, No. 25/96, and OdlUS V, 40), with regard to which the time limit for remedying the unconstitutionality at issue was not observed, does not entail that the law ceased to be in force as a result (and added that it could not abrogate the provisions at issue because abrogation would excessively interfere with the constitutionally protected rights of others, due to which, in accordance with the constitutional principle of proportionality, it was necessary to decide to temporarily keep the unconstitutional norms in force). In case No. Up-624/11, dated 3 July 2014 (Official Gazette RS, No. 55/14, and OdlUS XX, 36), the Constitutional Court also explained the meaning of the manner of implementation with respect to declaratory decisions: The Constitutional Court Act does not determine what legal effects the manner of implementation by which a certain question is temporarily legally regulated should have in concrete (judicial) proceedings. The manner of implementation undoubtedly has an effect on the legal relations that will only arise after the decision of the Constitutional Court becomes applicable. Whether and how the manner of implementation has an effect on pending judicial proceedings (either non-final or final) depends on the factual and legal circumstances of concrete proceedings. In accordance with the established position of the Constitutional Court, a regulation determined by the manner of implementation has the same legal power as a law. Such entails that the interpretation and the implementation of such regulation are subject to the established methods of legal interpretation that otherwise apply to the interpretation and implementation of laws, and also to certain fundamental constitutional principles that represent constitutional limitations with regard to the interpretation of laws (e.g. the prohibition of retroactive effects determined by Article 155 of the Constitution). Failure to observe a determined manner of implementation can thus primarily entail a violation of "statutory" law, but can also reach the level of a violation of the Constitution.
For more on the effects of declaratory decisions, see also S. Nerad, *Interpretativne odločbe Ustavnega sodišča* [Interpretative Decisions of the Constitutional Court], Uradni list Republike Slovenije, Ljubljana 2007, pp. 271. *et seq*.

without a substantive assessment. I advocated a position that was different from that of the majority, one that would determine the manner of implementation such that these ordinances remain applicable in procedures.

I namely opine that the challenged provisions of the ordinances were implemented for limited periods of time after an epidemic was declared for the first time, regarding a communicable disease that at the time was largely unresearched. On the basis of points 2 and 3 of the first paragraph of Article 39 of the CDA, two human rights were limited in order to fulfil the positive obligations of the state. In such circumstances, protection of the rights determined by Articles 17 and 35 and the first paragraph of Article 51 of the Constitution had to be ensured. Had the Constitutional Court decided on the constitutionality of such implementing regulations while they were in force, it would not have abrogated them merely because the legislature had inadmissibly failed to regulate the substantive statutory framework for limiting freedom of movement and gathering. Immediate abrogation would namely cause the cessation of the validity of perhaps appropriate, necessary, and in the narrower sense proportionate limitations of two human rights by which a constitutionally admissible objective was pursued – to protect the health and lives of people. By immediately abrogating such regulations we would also have caused, due to the described gap in the CDA, i.e. at the level of statutory regulation, the state to be unable to fulfil its positive obligations as regards preventing the spread of a communicable disease, due to which irreparable adverse consequences could arise for these constitutional values, which would entail an even more unconstitutional situation.[21]

In such instances, the Constitutional Court decides to abrogate an implementing regulation in force with suspensive effect.[22] These same reasons should have led the Constitutional Court to determine that the unconstitutionality of the challenged

[21] Also the German Federal Constitutional Court has known for decades the possibility of merely establishing the unconstitutionality of implementing acts. For example, the decision in case No. 1 BvR 1137/59, 278/60, dated 13 December 1961, (BVerfGE 13, 248) merely established that an implementing decree that in the meantime had ceased to be in force was unconstitutional, but did not have an abrogating effect because otherwise the legal objective that the filed legal remedy pursued would not be attained. The [German] Constitutional Court merely decided how a situation in conformity with the Basic Law *(Grundgesetz)* should be established.

[22] *Cf.* Decisions No. U-I-146/01, dated 25 September 2003 (Official Gazette RS, No. 97/03, and OdlUS XII, 78), Point 4 of the operative provisions and Para. 14 of the reasoning; No. U-I-245/05, dated 7 February 2007 (Official Gazette RS, No. 15/07, and OdlUS XVI, 12, Point 2 of the operative provisions and Para. 10 of the reasoning); No. U-I-37/10, dated 18 April 2013 (Official Gazette RS, No. 39/13, Point 2 of the operative provisions and Para. 24 of the reasoning); and No. U-I-150/15, dated 10 November 2016 (Official Gazette RS, No. 76/16 and OdlUS XXI, 29, Point 6 of the operative provisions and Para. 47 of the reasoning).

provisions of the ordinances (which is limited to the deficiency regarding the principle of legality and does not concern their substantive review) would have an effect comparable to the abrogation of a regulation with suspensive effect. Therefore, in accordance with the principle *ad maiorem ad minus*, the established unconstitutionality would only have declaratory effect and the manner of implementation would have legal effects comparable to the legal effects of abrogation with suspensive effect. In accordance therewith, in possible individual procedures in which the mentioned provisions of the ordinances would have to be applied, they would be applied regardless of their established unconstitutionality.[23]

In such manner, until the established unconstitutionality of the CDA is remedied, in possible pending procedures, invalid implementing regulations – those that are inconsistent with the Constitution as an automatic consequence of a gap at the level of legislative regulation – would not cease to apply. [Instead,] their purpose of protecting an important value would be observed (despite the inconsistency of the Act). In fact, measures had to be adopted in order to prevent the epidemic from spreading. Despite the gap in the CDA, the possibility of further regulation by implementing regulations had to be preserved. I opine that an equivalent deficiency of a law cannot result in different consequences for the implementing regulations based thereon depending on whether this concerns a regulation at the level of implementing regulations [adopted] (i) after or (ii) before the Decision of the Constitutional Court. Hence, the Decision results in two regimes as regards the effects of the ordinances – the ordinances [adopted] before the Decision of the Constitutional Court and the ordinances [adopted] after the Decision of the Constitutional Court, all while the Act substantively remained the same. The first group of ordinances has no effects, and I see no reasons for the second group to not have effects.[24]

Such an approach also leads to the different treatment (of perhaps identical or similar content) of the ordinances that have already ceased to be in force and of the ordinances that are still in force, with regard to which, as I stress, the substance of the Act remained identical and was not abrogated. This is also the reason why I cannot concur with the position that these ordinances only had an effect in the past.[25] It is not

[23] In this respect, I do not think the question of *exceptio illegalis* is pertinent. By deciding that a certain implementing act is unconstitutional, the Constitutional Court resolves the doubt that courts would otherwise have. If the Constitutional Court also decides that the implementing act shall continue to apply (and until when), courts shall continue to apply this implementing act (in conformity with the reasons on which the decision of the Constitutional Court is based).
[24] This is how I understand paragraph 108 of the Decision.
[25] In paragraph 108, the Decision states: "The sole effect that these 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

irrelevant that the above mentioned two groups of ordinances also result in different legal situations and positions of individuals, which does not at all contribute to ensuring trust in the measures, which, however, were necessary to combat the epidemic.

I stress that these measures were intended to protect the health and lives of people, i.e. values that hold a special place in the Constitution. In my opinion, the values that they pursued are also higher than the automatic effect of legality as we know it in ordinary circumstances.[26] In the same breath, it is imperative for me to add that that does not entail denying the importance of the principle of legality as one of the fundamental principles of the regulation of the relationship between the legislative and executive branches of power. It is only a question of the effect of this principle in a situation such as that in the case at issue where the law was not abrogated and where acting in a reserved manner is appropriate in the circumstances of an epidemic (wherein it is necessary to adopt such measures so as to contain the epidemic).[27]

The Decision, even such as it is, should not give the public the impression that all the measures of the past year were erroneous. Such would namely mean that the part of the population that has already been reluctant to accept the measures and has been sceptical of them, or that has opposed them, would become even more antagonistic towards them.[28,29] This is my opinion even though I advocated a different

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contribute to the protection of the health and lives of people. Hence, the Constitutional Court had no reason to not abrogate or annul the challenged ordinances due to the finding that they were inconsistent with the Constitution."

[26] The Constitution must be flexible enough for the automatic nature of the consequences and the rigidity of a violation of the principle of legality to not always attain the legally completely substantiated (necessary and higher) objective. Quite the contrary.

[27] This is one of the biggest challenges for humanity since the Second World War. Similar is stated by M. Bošnjak, *Varstvo človekovih pravic v času pandemije* [Protection of Human Rights during a Pandemic], Dignitas: revija za človekove pravice, No. 87/88 (2021), p. 10.
The measures were urgently necessary. They pursued an exceptionally important objective, namely the protection of the life and health of people and ensuring the functioning of the health care system. To date, more than 14 million cases have been confirmed in total, more than 3 million deaths, and 223 affected states. In addition to these exceptionally tragic data, a consequence of the pandemic and the measures for combating the pandemic adopted by governments all over the world is a social and economic crisis. For the European Union, this is the second big social and economic crisis in ten years, with the first financial crisis of the euro area (2010) eventually also causing a change in its institutional manner of functioning.

[28] As the Constitutional Court has already stressed in the reasoning of Decision No. U-I-83/20 (Para. 43), individuals also have a duty towards each other and the community they are a part of. When a person renounces his or her freedom by observing limitations, he or she at the same time, precisely proceeding from responsibility towards other people, protects other particularly vulnerable groups of people whom a communicable disease could severely threaten.

interpretation of the effects of the ordinances that are no longer in force, so that the ordinances would share the fate of the Act, which was found to be unconstitutional (which would weaken the mentioned message of the Decision).

However, all the reasons mentioned above in favour of the ordinances continuing to produce effects do not entail that the Constitutional Court would not be able to abrogate, in individual cases, (substantively) unconstitutional provisions by its decisions. Hence, I do not address situations wherein an unconstitutionality of ordinances would be established on the basis of their substantive review. In such situations, the issues regarding abrogation and the effects thereof are different.

As regards informing the public

Also with respect to the question of informing the public, my views are different than those of the majority. It is truly indisputable that the Government must obtain and impart to the public information and scientific data on communicable diseases and to act on the basis thereof. Such enables individuals to promptly adapt their behaviour to the threats that result from the spread of a communicable disease. In contrast to the Decision, I do not classify [the question of] how the Government obtains information and in what manner it organises itself into points 2 and 3 of the first paragraph of Article 39 of the Act (to which the established unconstitutionality refers), but into the second paragraph of Article 39 of the CDA, which determines the obligation to inform the public. In the circumstances of an epidemic, this has great significance and the Act does not determine its substance. Also the statutory regulation of access to public information is not of help in that. By expressly requiring, in the second paragraph of Article 39 of the CDA, that the public be informed of the measures referred to in the first paragraph of that article, the CDA entails a special regulation, but does not require either that the public be regularly informed of the circumstances and expert positions that are important for obtaining information on the characteristics of an individual communicable disease that would enable people to adapt their conduct in advance, or to present more detailed reasons for individual measures based on all

[29] My opinion is that it is not true that the ordinances have already attained their objective. The consequences of the abrogation are still connected with the ordinances that are in force at this moment or that will still be adopted. In this respect, I do not merely think of the mentioned negative message and how the public will understand that it must observe, for instance, a measure equal to that that the majority abrogated, albeit in a valid ordinance and in ordinances adopted in the future. What effect this will have on the trust of the community [in the authorities] (because communicable diseases cannot be overcome only by [actions of] individuals, but collectively) is one of the questions that indicate that the effects are not limited merely to the past.

necessary data that ensure transparency in adopting measures and on such basis enable general public supervision over the functioning of the executive branch of power. Therefore, I opine that 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. However, as I have explained herein, my opinion, which contrasts with the position in the Decision, is that the second paragraph of Article 39 of the CDA is thereby inconsistent with the second paragraph of Article 39 of the Constitution.

I also add thereto the tight connection between informing the public and the trust of the community – i.e. of all inhabitants – which during an epidemic transpires to be very important. Establishing trust is particularly important with respect to those communicable diseases that are mostly transmitted in manners that individuals cannot easily perceive. When the danger is not directly perceivable, that can result in a lower degree of awareness of a direct threat to life and health, and thus can also affect the degree of trust in limitation measures. An epidemic therefore requires everyone to take action, not only individuals. Due to the infectiousness of a disease, measures obtain appropriate power only when they are commonly accepted, i.e. when the community as such reacts appropriately. In order for this to happen, it is necessary to observe the legal order. That cannot be achieved merely by imposing orders; rules must reflect the collective acceptance of the rules and values on which they are based. The law and legal certainty are necessarily interdependent; trust in the legal system defines this interdependency.[30]

Therefore, in order to elicit an appropriate reaction from the public, not only the nature of the measures is important, but also what information the authorities in power impart to the public and how comprehensive such information is. In addition to stating the reasons for measures and explaining the objectives that the measures pursue, the information must also include objective information on the consequences of the measures, in particular when the consequences are expectedly unwelcome due to their limiting effect. 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 it either the expected consequences that are the objective of the adopted measures, or the consequences that cause discomfort or opposition due to their restrictive nature. Only in such a manner is it possible to

[30] Trust is also affected by the decency of public communication. This is also an aspect of communication, which is in fact not a constitutional category and cannot be imposed by law; instead, it is a subjective characteristic of every [communicating] individual.

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.

Conclusion

Prior to the emergence of the COVID-19 epidemic, numerous questions were unanswered, *inter alia*, the intensity of the spread of infections was not known, what is needed during treatment, how long a patient stays in hospital, what the limitation of different human rights means also for those individuals who do not get sick, etc. In the initial stage of the epidemic, it was not possible to provide answers to all of these questions, nor did all these questions arise. The exceptional nature of the situation required a swift and effective response from the executive branch of power. It is also not disputable that both the Slovene executive branch of power and the governments of other states found themselves in a situation wherein their respective legislatures did not regulate with precision the measures or the scope of measures that are necessary and appropriate for combating the epidemic. The CDA has a framework that in the initial period of the epidemic indicated the possible directions measures could take. The various measures envisaged in the CDA are partially ranked, which also creates criteria for proportionality. As the epidemic lasts, as the intensity of the long-lasting measures that limit human rights in and of itself increases, and as the scientific findings increase, the role of the legislature is significantly different than its role before the epidemic or in its initial phase. As I am attempting to explain in this separate opinion, had the underlying reasons [for the Decision] been different and closer to the nature of the necessary actions that should have been taken in the field of communicable diseases, I could have supported the finding that the CDA is unconstitutional. Both the operative provisions and the reasoning of the Decision are binding, and the underlying reasons therein differ from the positions presented herein. Due to the described dichotomy, I was unable to vote in favour of the decision to abrogate the ordinances that have already ceased to be in force.

Dr Rajko Knez
Judge