Number: U-I-79/20
Date: 25 May 2021

CONCURRING OPINION OF JUDGE DR ŠPELCA MEŽNAR REGARDING DECISION NO. U-I-79/20, DATED 13 MAY 2021

The Decision on the (un)constitutionality of Points 2 and 3 of the first paragraph of Article 39 of the CDA is groundbreaking. Not due to the content (which was expected), but to the long-lasting and strenuous decision-making process that led thereto.

It is no secret that as early as last year the Constitutional Court was divided regarding the review of the CDA in case No. U-I-83/20. At that time, it decided (by a majority) that it would directly assess the substance (the proportionality) of two governmental ordinances that prohibited movement between municipalities. In doing so, it intentionaly left open the question of whether Article 39 of the CDA, on which the challenged measure was based, was in conformity with the basic principle of legality.[1] In the present Decision, the Constitutional Court admitted that the approach applied then was methodologically faulty. In fact, one of the consequences of that approach is that the two ordinances that the Constitutional Court declared consistent with the Constitution last year are no longer consistent with the Constitution, as they are based on (the unconstitutional) Article 39 of the CDA.

Due to its effects,[2] the Decision will trigger strong reactions. Justifiably, a question will be raised as to why the Constitutional Court has only now carried out a review of the constitutionality of the statutory provision that served as the basis for the vast majority of the ordinances adopted by Government in the last year.[3] Non-lawyers will perhaps ask themselves why all implementing regulations are also automatically invalid due to the bad law, regardless of how logical and beneficial the measures they regulated are from the viewpoint of the protection of public health. Some lawyers will criticise the fact that the Constitutional Court did not annul the challenged ordinances, which means that the persons who had been fined on the basis thereof but did not file legal remedies will not benefit from the Decision.

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[1] Then, there had already been several (older, i.e. previously filed) petitions by which the provision of Article 39 of the CDA was challenged. Furthermore, the content of Article 39 of the CDA was at first sight constitutionally "suspect" – which means that the Constitutional Court should also have carried out a review thereof *ex officio.* For more on this, see my dissenting opinion http://www.us-rs.si/documents/2e/ab/u-i-83-20-odklonilno-lm-dr-meznar4.pdf.

[2] Although in the case at issue the Constitutional Court established the unconstitutionality of merely five (challenged, mentioned in Point 6 of the operative provisions) ordinances, the Decision will have an effect also on all other implementing regulations adopted on the basis of points 2 and 3 of Article 39 of the CDA due to Point 1 of the operative provisions (the finding that the CDA is inconsistent with the Constitution).

[3] See, e.g., Šipec Miha, *Strahopetno sodišče* [A Cowardly Court], Pravna praksa, No. 13, 2021, p. 23.

In this separate opinion, I would like to explain in more detail my positions with respect to some of the considerations mentioned above.

I. The question of the correct methodology or why the Constitutional Court did not first assess the constitutionality of Article 39 of the CDA in Covid cases

The simple answer to the question of why the Constitutional Court did not carry out a review of the CDA already last year, before (or at the latest together with) case U-I-83/20, is that the necessary majority to do so could not be reached at the time. The more complex answer reveals that the decision was such as it was because the Constitutional Court applied the wrong method for reviewing implementing acts by which the Government interferes with human rights. It simply subordinated the substance of the implementing act/ordinance (the lower premise) to the content of Article 32 of the Constitution (the upper premise) and carried out a test of proportionality. This means that it completely disregarded the importance and the role of the statutory basis in between (Article 39 of the CDA)[4] and consequently ignored a series of constitutional axioms:

- Implementing acts are never based directly on the Constitution;[5]
- Every implementing act has to have a direct basis in a law;[6]
- The Constitution exclusively authorises the legislature to regulate human rights;[7]
- A law that does not determine for the executive branch of power the substantive framework for the regulation of human rights violates the principle of legality and is unconstitutional;[8]

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[4] The methodological approach of the Austrian (and also Croatian) Constitutional Court was different (and correct): first, it carried out a review of the law, and then assessed whether the implementing regulation exceeded the statutory framework. In some parts, the unlawfulness of the implementing regulations was established. The decision of the Austrian Constitutional Court (one of many) is published at: https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&Dokumentnummer=JFT_20200714_20V00363_00.

[5] *Cf*. Pirnat in *Komentar Ustave RS* [Commentary on the Constitution of the Republic of Slovenia] (Ed. Matej Avbelj), Part II, Nova Univerza, Evropska pravna fakulteta, Ljubljana, 2019, p. 253: "*An implementing regulation of the [state] administration is always adopted in order to implement a law; that is why it is called an implementing regulation."*

[6] *Cf*. Virant, Gregor: *Načelo zakonitosti delovanja uprave in širina (ohlapnost, nedoločnost) zakonskih pooblastil* [The Principle of the Legality of the Functioning of the State Administration and the Breadth (Looseness, Indeterminacy) of Statutory Authorisations], Javna uprava, 1999/3, p. 469: *"authoritative acts and the actions of executive authorities must be based on a law. There can be no doubt about it; this rule can only be "abolished" by amending the Constitution."*

[7] *Cf*. the second paragraph of Article 15 of the Constitution and Decisions of the Constitutional Court No. U-I-25/95, dated 27 November 1997 (Official Gazette RS, No. 5/98, and OdlUS VI, 158), Paras. 30 and 31 of the reasoning; No. U-I-287/95, dated 14 November 1996 (Official Gazette RS, No. 68/96, and OdlUS V, 155, Para. 8 of the reasoning); No. U-I-346/02, dated 10 July 2003 (Official Gazette RS, No. 73/03, and OdlUS XII, 70), Para. 10 of the reasoning; and No. Up-1303/11, U-I-25/14, dated 21 March 2014 (Official Gazette RS, No. 25/14, and OdlUS XX, 21), Para. 10 of the reasoning.

[8] An equivalent approach is used by the ECtHR: a measure must be lawful (in accordance with the law, i.e. the legality test), legitimate (the legitimacy test), and proportionate (necessary in a democratic society).

- An implementing act based on such an unconstitutional law is unlawful and ceases to be in force;[9]
- An unlawful (unconstitutional) implementing act does not produce legal effects;[10]
- Logically and conceptually, it is impossible for an implementing act to be unlawful (because it is based on an unconstitutional law), while the content thereof is consistent with the constitutional principle of proportionality.[11]

In the Slovene constitutional order, the exercise of human rights may only be regulated by laws (and not by implementing acts).[12] The Constitutional Court assesses the appropriateness of the substantive regulation of statutory interferences with human rights by means of the test of proportionality. In order for the Constitutional Court to even be able to carry out such a substantive assessment, the law must first have some minimal content.[13] An Act that authorises the Government to limit human rights without determining the substantive criteria for admissible interferences violates the principle of legality.[14] There exists ample and established constitutional case law as regards both legality and proportionality.

Article 32 of the Constitution authorises the legislature to limit freedom of movement in order to protect [people] from the spread of communicable diseases. Hence, limiting freedom of movement in order to protect [the population] from COVID-19 is undoubtedly constitutionally admissible. The principle of legality answers the question of whether in Article 39 of the CDA the legislature sufficiently precisely (in an originary manner) determined the conditions and

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[9] *Cf*. Godec, Rupko: *Upravne norme in upravni akti* [Administrative Norms and Administrative Acts], Administrative Collection, Univerza v Ljubljani, Pravna fakulteta, Inštitut za javno upravo, 1993, pp. 206, 207: "*The creation of an administrative regulation depends on the higher legal norm, just as any other norm, but this dependency does not cease with its creation, but remains in place throughout its legal existence. This is a real existential dependency where the administrative regulation is completely connected with the legal fate of the higher legal norm and also shares its end therewith. Hence, if some originary norm ceases to be a part of positive law, also the abstract legal norm derived therefrom will lose its legal validity, as well as all other hierarchically connected abstract administrative norms, in accordance with the chain reaction rule."*

[10] This follows, *inter alia*, from the *exception illegalis* constitutional institute (Article 125 of the Constitution), which imposes on courts the obligation to not apply an unlawful and/or unconstitutional implementing act. In such manner, it is already regular courts that exclude unlawful implementing regulations from the legal order and thus reduce the need for their constitutional assessment.
A different rule applies for final individual legal acts, which can produce legal effects in the legal order even if they are based on an unconstitutional law. Godec, R., p. 206: "*A concrete legal norm is existentially dependent on higher legal norms only during its creation, and not in its further existence."*

[11] This is precisely the situation that results from the simultaneous effect of Decision No. U-I-83/20 and the current Decision No. U-I-79/20. From the former, it follows that the measure of the prohibition of movement between municipalities was consistent with the principle of proportionality (and thus in conformity with the Constitution), and from the latter it follows that it was unlawful (and thus unconstitutional) because it is based on an unconstitutional law.

[12] See Article 87 of the Constitution. The purpose of this provision is to ensure that all legal norms that regulate rights and obligations of legal entities in an originary manner are created in the form of laws. This holds all the more true for the regulation of human rights and fundamental freedoms. See Decision of the Constitutional Court No. U-I-40/96, dated 3 April 1997 (Official Gazette RS, No. 24/97, and OdlUS VI, 46), Para. 13 of the reasoning.

[13] See Para. 69 of the reasoning of the Decision.

[14] For more on the principle of legality and its importance for the functioning of a state governed by the rule of law, see Virant, Gregor: *Načelo zakonitosti delovanja uprave in širina (ohlapnost, nedoločnost) zakonskih pooblastil* [The Principle of the Legality of the Functioning of the State Administration and the Breadth (Looseness, Indeterminacy) of Statutory Authorisations], Javna uprava, 1999/3, pp. 467 *et seq.*

criteria for limiting freedom of movement. Only if a law passes the legality test (Article 120 of the Constitution) can the question of its substantive appropriateness be raised and an assessment of the proportionality of the statutory regulation carried out. It is inherently impossible to substantively assess a law that does not fulfil the principle of legality – because it does not even have (sufficient) content. Until the legislature adopts a better statutory regulation, the Constitutional Court is unable to assess whether the limitation of freedom of movement determined by Article 39 of the CDA is consistent with the general principle of proportionality (i.e. whether it has an appropriate relation to the protection of public health).

In my opinion, a substantive assessment of an implementing measure by which human rights are interfered with can only be carried out after the Constitutional Court resolves the question of its legality, i.e. whether it was adopted on the basis of a law and within its limits.[15] An affirmative answer entails that the Constitutional Court does not have any reservations as to the conformity of the statutory norm with the principle of legality and that the implementing act does not exceed the framework of the statutory norm. If the statutory basis is suspect (such as is manifest at first sight with respect to the substantively empty Article 39 of the CDA), the Constitutional Court is obliged to carry out (*ex officio*) a review of the constitutionality of the law from the viewpoint of the principle of legality. Only if the statutory provision successfully passes such a review may the Constitutional Court further assess whether the implementing act remains within the limits of the law – and if it successfully passes this review too, then also a review of its content in concrete circumstances may be carried out. However, if the Constitutional Court assesses that the statutory provision violates the principle of legality, then a subsequent substantive review of the implementing act is no longer possible. In fact, an unlawful implementing act cannot produce any legal effects. **Hence, when carrying out a review of the constitutionality of an implementing measure by which human rights are interfered with, the Constitutional Court must not and cannot in any case avoid the statutory norm on which the implementing act is based.**[16]

The requirement that a review of an implementing measure cannot be carried out without taking into consideration the statutory norm on which the measure is based is not merely a formality. Since the legislature must impose limits on the executive branch of power when regulating interferences with human rights, the statutory framework plays a key role in the review of the legality of the implementing act. If the legislature for instance prescribed that a curfew must last no longer than one month[17] and a curfew introduced by an implementing regulation is to last two months, the Government would certainly thereby exceed the statutory limits. The measure would be unlawful (and thus also unconstitutional) irrespective

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[15] *Cf*. Godec, Rupko: *Upravne norme in upravni akti* [Administrative Norms and Administrative Acts], p. 202.

[16] In the case at issue, the Constitutional Court followed the described (i.e. correct) path. First it carried out a review of the Act. When it became apparent that the Act is unconstitutional, the formal finding that the challenged ordinances were unconstitutional followed (Para. 106 of the reasoning).
Cf. Para. 58 of the reasoning in case No. U-I-83/20, where the Constitutional Court "skipped" a review of the Act and thus completely avoided a review of the constitutionality of the ordinances that were challenged.

[17] Another question is whether such a statutory limitation would be in conformity with the public interest (i.e. to ensure public health) – the question of the proportionality of the statutory regulation.

of the fact that the two-month duration of the curfew might be proportionate “in the constitutional sense” (if it was prescribed by a law).

The methodology of constitutional review is not interesting merely as a subject of theoretical discussions. It is proof of an understanding of and respect for the hierarchy of legal acts, their effect on one another, and respect for basic constitutional principles.[18] Hence, a well-thought out and correct methodological approach is one of key safeguards against the arbitrary decision-making of the Constitutional Court.

II. What the unconstitutionality of the CDA means for other ordinances of the Government and why it is correct that the implementing acts share the same fate as the CDA

The vast majority of the measures in force during the epidemic were based on points 2 and 3 of the first paragraph of Article 39 of the CDA: the prohibition of movement in public areas during the first wave [of infections], the prohibition of travel between municipalities, the prohibition of travel between regions, a curfew, the prohibition of schooling in schools, the prohibition of visiting theatres, cinemas, and all other cultural and sporting performances, the prohibition of protests, etc. The unconstitutionality of a statutory provision (Point 1 of the operative provisions) has an effect on all implementing acts adopted on its basis. It is not only the challenged ordinances that are unlawful (and consequently unconstitutional) (Point 6 of the operative provisions). As regards the latter, the finding of unconstitutionality has *erga omnes* effect due to the Decision of the Constitutional Court, whereas in other instances the consequences will only arise in concrete judicial proceedings as a result of the *exceptio illegalis.* In fact, this does not entail that everyone who was fined on the basis of the unconstitutional implementing acts will be entitled to restitution of their fine. Due to the abrogation of the challenged ordinances (Point 7 of the operative provisions, Para. 108 of the reasoning), only those who challenged by ordinary or extraordinary legal remedies a fine (or other punitive measure) that they were possibly imposed will benefit from the *exceptio illegalis*. In fact, regular courts will halt [all] pending proceedings (due to the *exceptio illegalis*). Those who have paid the fine without filing a legal remedy do not have a legal basis to obtain restitution.[19] There was not a sufficient majority to support annulment.[20]

At the sessions, the idea of the excessive power of the principle of legality was expressed if the matter concerns urgent measures in the struggle against the virus. In simple terms: it was repellent to our inner feeling of justice that the ordinances of the Government adopted on the basis of points 2 and 3 of Article 39 of the CDA are unconstitutional just because they were

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[18] *Cf*. Pirnat in *Komentar Ustave RS* [Commentary on the Constitution of the Republic of Slovenia] (Ed. Matej Avbelj), Nova Univerza, Evropska pravna fakulteta, Ljubljana 2019, p. 252.

[19] I opine that the positions that appear in public and in accordance with which everyone who paid a fine (on the basis of the unconstitutional ordinances) is entitled to restitution on the basis of Article 190 of the Code of Obligations or on the basis of the liability of the state for damages are misleading and ill-considered.

[20] The effect of annulment would open the possibility of a special (“*sui generis*”) legal remedy (Article 46 of the Constitutional Court Act). Such a possibility would also benefit all those who did not file a legal remedy against [the imposed] fines.

based on a deficient Act. Namely, the majority of the measures adopted by the Government were allegedly urgent, necessary, and substantively appropriate. If we naively presuppose[21] that the measures adopted by the Government were urgent and beneficial, the key question remains: is it right that completely sensible, urgent, and beneficial implementing measures "fall flat" just because the legislature failed to do its task? Thus, is it fair that (also) the Government is punished for the negligence of the legislature, in particular in a situation wherein it had to react and had no time to wait for the legislature to appropriately correct the CDA?

While at the beginning of last year, when COVID-19 appeared, it was still true that the Government had to take action regardless of the (im)perfection of the statutory basis, the weight of this argument has decreased with every passing week. After more than a year since the beginning of the crisis, it certainly cannot be argued that the Government, one of whose fundamental constitutional powers is also preparing draft laws, is hostage to deficient legislation. Ever since the onset of the crisis, numerous legal experts have been drawing attention to the insufficient precision of Article 39 of the CDA; it became increasingly evident also because some states that we like to model ourselves on (Germany, Austria) quickly adapted[22] their (at the beginning of the crisis equally deficient) laws to the new circumstances.

However, this is not the most important reason for maintaining the existing constitutional standards. The constitutional requirement that it is exclusively the legislature that decides on limiting human rights, i.e. the directly elected representatives of the people, is a reflection of the principle of the separation of powers, of democracy, and of a state governed by the rule of law. The transfer of this competence to the Government is problematic in and of itself (see paragraphs 82 and 83 of the reasoning), and it is all the more so when the Government enjoys virtually unlimited freedom in prescribing measures. In fact, on the basis of Article 39 of the CDA, the Government was able to introduce any measure, determine its content and duration, and decided by itself whether and whom it will consult thereon, whether it will take such an opinion into consideration, and how, if at all, it will inform the public thereof and of its reasons. Such unlimited discretion of the executive branch of power when interfering with fundamental human rights – i.e. freedom of movement and [the right of] association – is undoubtedly inconsistent with the Slovene Constitution.

The finding that the governmental measures are unconstitutional because they were based on a substantively completely empty law (paragraph 106 of the reasoning) is a (necessary) reflection of the functioning of a state governed by the rule of law in which the transfer of (unlimited) legislative power to the Government is – even during an epidemic – inadmissible. Implementing acts cannot exist without a valid statutory basis. Any other decision would not only entail departing from clear and unambiguous constitutional case law. It would also entail deciding contrary to the Constitution.

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[21] With the exception of the prohibition of movement between municipalities, which was the subject of review in case No. U-I-83/20, the Constitutional Court did not substantively review any of the measures. Given the Decision at issue, it is unlikely it ever will.

[22] Germany by amending the general law on communicable diseases, and Austria by adopting a special COVID-19 law.

III. The victory of law over precaution

The COVID-19 epidemic has changed and will continue to change society. Its effect will be particularly strong in the states in the West, which entered the 21st century with powerful human rights and one's freedom as the fundamental value. In the last year, mass and intensive interferences with basic human rights have become acceptable more than ever since the Second World War. This twist happened suddenly (but not unexpectedly). The decomposition (disintegration) of human rights is not primarily connected with ideological (political) reasons. It is connected with the universal fear of an unknown illness. In the last year, constitutions, international conventions, and the content of fundamental human rights did not change. It is the psychological attitude of people towards their own freedom. We are ready to renounce it, just to be safe and sound.[23] Sooner or later, this trend will also be reflected at constitutional courts.

In the case at issue, this did not happen. After a long time, I again have the feeling that the Constitutional Court implemented the Constitution fearlessly, without making bad compromises, without a bad conscience, and without excuses. The reasoning is frank, understandable, and consistent. It does not hide behind complex linguistic acrobatics. I am proud to be among the five judges who supported this historic decision.

Dr Špelca Mežnar
Judge

[23] This occurrence is in fact not new. In a keynote address in 2006, Dr Dragica Wedam Lukić, former Constitutional Court Judge and President, stated: "After September 11, due to the threat of terrorism, the requirement as to ensuring general safety increased, due to the appearance of new communicable diseases, the requirement as to ensuring protection from epidemics increased, and the requirement as to ensuring protection of the living environment is ever more pronounced. *These reasons can certainly lead to a different answer to the question of how to establish an appropriate balance between the rights of an individual and the interests of the general community. Despite this fact, it is necessary to avoid excessive oscillations and to stick to the planned path; every deviation therefrom must be well thought out and convincingly reasoned. Above all, the requirements as to ensuring greater general safety that have already begun to manifest in the legislation of individual states should not lead to the excessive limitation of the rights of individuals."*
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