

Number: U-I-79/20

Date: 27 May 2021

**DISSENTING OPINION OF JUDGE
DR MARIJAN PAVČNIK REGARDING DECISION NO. U-I-79/20,
DATED 13 MAY 2021**

THE HIERARCHY OF THE LEGAL ORDER

1. COVID-19 is everything but merely a medical problem. The epidemic that it initiated requires that we also deal with it legally. In my hitherto separate opinions, I already drew attention to the importance of the system of checks and balances between the legislative, executive-administrative, and judicial authorities of the state power (in case No. U-I-83/20), the consistency of a state governed by the rule of law (in case No. U-I-455/20), the fact that “hardship teaches one to think” (in case No. U-I-473/20), and the freedom of the spirit – also at epidemiologically safe protests (in case No. U-I-50/21).

2. Let me add another aspect to these above. The Decision (in case No. U-I-79/20), which in addition to the Communicable Diseases Act also deals with freedom of movement and the right of assembly and association, draws attention to this aspect. One of the centres of gravity of the Decision is the question of how, substantively speaking, the hierarchy of the legal order should be established. What is it that the Constitution regulates? What is it that the law should regulate? And not least, what falls within the domain of implementing regulations?

3. The Constitution prescribes that freedom of movement may be limited by law also “to prevent the spread of communicable diseases.”¹ Also limitations of the right of assembly and association are admissible if “such is required [...] to protect [the population] from the spread of communicable diseases.”² Both situations are classified in the chapter on human rights and fundamental freedoms. In conjunction with the preamble and fundamental constitutional provisions, they form the systematic and teleological context that the limitations must take into consideration. The central imperative is that statutory limitations must observe the value objectives of fundamental rights and that such must also hold true for their normative concretisation by implementing regulations.

4. The statutory limitations to which the Constitution directs should enable constitutional values to coexist. Protection from the spread of communicable diseases has priority, which must not go so far as to excessively limit other constitutional values. The excessiveness starts where limitations are no longer necessary. If one continued to maintain them or

¹ The second paragraph of Article 32 of the Constitution.

² The third paragraph of Article 42 of the Constitution.

manifestly overstretched them, such would entail that they are arbitrary and that they jeopardise the limits of constitutional democracy.³

5. A normative concretisation of statutory limitations is, *volens nolens*, inevitable if the measures determined by the Communicable Diseases Act “cannot prevent the introduction of certain communicable diseases into the Republic of Slovenia and the spread thereof.”⁴ In such instances, the Government may “prohibit or limit the gathering of people in infected or directly jeopardised areas”⁵ and “prohibit the gathering of people in schools, cinemas, public bars, and other public places until the threat of the spread of the communicable disease passes.”⁶

6. Prohibitions and limitations by which the Government should normatively concretise a law by means of implementing acts are vague and indeterminate to a significant degree. To a certain extent, one can be assisted by classical methods of interpreting legal acts, by an objective-dynamic method of interpretation, by already formed standards of conduct, by the rules of the profession (e.g. of the medical profession), and in particular by constitutionally consistent interpretation.⁷ In any event, the basic guideline must absolutely be that implementing acts must not regulate that which is in the competence of the legislature. The legislature is the authority that must determine hard substantive centres of rights and obligations insofar they are not already regulated in the Constitution. The fundamental questions are in the domain of constitutional regulation and then also statutory regulation.

7. The temporal aspect is also important.⁸ It is difficult to prevent communicable diseases and to say in advance by which measures they should be contained and remedied. When COVID-19 emerged, legal measures had to be adopted insofar as and in the manner that they were already envisaged by law. It is also key that it was necessary to respond by implementing acts based on a law that was not perfect. The interpretation attempted to solve

³ See W. Hassemer, *Constitutional Democracy*, *Pravnik*, Nos. 4–5 (2003), pp. 207–226. Cf. also M. Pavčnik, *Človekovo dostojanstvo in ustava* [Human Dignity and the Constitution] (2019), in: M. Pavčnik, *Razumevanje prava* [The Understanding of Law], Lexpera, GV Založba, Ljubljana 2021, p. 55.

⁴ The first sentence of the first paragraph of Article 39 of the Communicable Diseases Act.

⁵ Point 2 of the first paragraph of Article 39 of the Communicable Diseases Act.

⁶ Point 3 of the first paragraph of Article 39 of the Communicable Diseases Act.

⁷ Also the so-called further development of the law is precious. Legality “requires that the arguments of the further development of law be *within the limits of the conception of the law*, which is directed, albeit vaguely and substantively porously, by legal principles.” (M. Pavčnik, *Argumentacija v pravu* [Argumentation in Law], 3rd edition, GV Založba, Ljubljana 2013, p. 126). As regards the further development of law, see and cf. also P. Koller, *Theorie des Rechts. Eine Einführung*, 2nd edition, Böhlau Verlag, Vienna, Cologne, and Weimar 1997, pp. 221 *et seq.*; E. A. Kramer, *Juristische Methodenlehre*, 6th Edition, Beck, Manz, Stämpfli, Bern 2019, pp. 152 *et seq.*; and B. Rüthers, C. Fischer, and A. Birk, *Rechtstheorie und Juristische Methodenlehre*, 11th edition, Beck, Munich 2020, pp. 493 *et seq.*

⁸ In this respect, see also the already mentioned separate opinion *Svoboda duha* [Freedom of the Spirit] – also at epidemiologically safe protests (in case No. U-I-50/21), paragraph 3 of the reasoning.

what could be solved. Today, the situation is significantly different. Experience has shown where the legislation is weak and deficient. The executive power should perceive that in due time and propose that the legislation be sharpened and made complete.⁹

8. Law is a fragile phenomenon. If we are aware of *Hominum causa omne ius constitutum*, the task that we need to perform is easier to perform. The law stands and falls with that which happens with it in practice.

9. These are the reasons by which I substantiate that I voted in favour of Point 1 of the operative provisions, i.e. in favour of the finding that points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act are inconsistent with the Constitution.

Dr Marijan Pavčnik
Judge

⁹ Cf. the positions in the separate opinion mentioned in note No. 8.