Number: U-I-79/20
Date: 27 May 2021

CONCURRING OPINION OF JUDGE DR KATJA ŠUGMAN STUBBS REGARDING DECISION NO. U-I-79/20, DATED 13 MAY 2021, JOINED BY JUDGE DR. ROK ČEFERIN

In front of us is a groundbreaking decision, actually the uber-decision of all COVID-19 cases. It is a decision by which we decided that, due to the insufficient substantive basis for exercising the authorisation given to the Government (the principle of legality), the part of Article 39 of the Communicable Diseases Act (hereinafter referred to as the CDA) on the basis of which ordinances that limited the movement and gathering [of people] during the first wave of the COVID-19 epidemic (see paragraph 100 of the reasoning) is inconsistent with the Constitution. In my separate opinion I wish to explain the key reasons that guided me in deciding in this case and some of the circumstances that accompanied the adoption of the decision.

I

A lawyer could see at first sight that the reviewed part of Article 39 of the CDA is insufficiently precise. It is substantively empty to such a degree that the reviewed part of the provision could serve as a textbook example for first-year law students of a virtually completely blank statutory authorisation given to the executive branch of power, like an example by which a professor could show the issues that such violations of the principle of legality represent for the basis of a democratic state. It is true that the reviewed provision was adopted in 1994 and that from then until the first wave of the epidemic it was never subject to review or application in judicial proceedings and thus escaped critical examination. Since 1994 also the requirements for a review of the constitutionality of similar norms have become stricter.

In the meantime, the Constitutional Court relatively often abrogated implementing acts that were based on an insufficiently precise legal basis. Thus far, the following statutory provisions were found to be insufficiently precise, and due to violations of the principle of legality all led to the abrogation (or the finding of inconsistency with the Constitution) of both the statutory provisions and the implementing acts based thereon:

- A part of Article 162 of the Pension and Disability Insurance Act, which authorised the Pension and Disability Insurance Institute to carry out, by itself, in instances and in a manner it determines itself, the balancing of pensions on the basis of the differences that arise with regard to the levels of pensions that apply in individual periods.[1]

[1] Decision No. U-I-123/92, dated 18 November 1993 (Official Gazette RS, No. 67/93, and OdlUS II, 109).

- A part of the second paragraph of Article 48 of the Securities Market Act, because the legislature thereby "granted, *mutatis mutandis,* the Securities Market Agency the authorisation to determine the conditions for revoking brokers' permit to carry out transactions with securities. In such manner, it transferred thereon in its entirety the right to regulate questions that are statutory subject matter and which the legislature should have regulated by itself or at least determined the basis and framework for regulation by implementing acts."[2]

- Article 33 of the Road Transport Act and the rules based thereon. The challenged Article determined that the ministry [responsible for traffic] grants permits in accordance with the criteria, procedure, and manner determined by the rules adopted by the minister responsible for traffic.[3]

- Article 17 of the Trade Act and the rules of the competent minister based thereon. The abrogated Article provided that the minister responsible for trade determine the criteria for setting the timetable of the working hours of shops.[4]

- The second paragraph of Article 74 of the Gaming Act and a decree based thereon. The challenged paragraph stipulates that the minister competent for tourism shall determine limited tourist areas in accord with local communities in individual areas.[5]

- The fourth paragraph of Article 30 of the State Prosecution Act, which stipulated that the Government shall determine, by a decree, the conditions, criteria, and amount of payment for an increased amount of work or additional workload for individual state prosecutors or assistants to state prosecutors.[6]

- Article 57 of the Health Care and Health Insurance Act, by which the Act transferred to the Health Insurance Institute of Slovenia the authorisation to determine lump sum contributions without providing guidelines, directions, or a framework for determining them.[7]

- The first paragraph of Article 11 of the Financing of Municipalities Act because the second paragraph of the mentioned Article transferred to the Government the competence to determine in more detail tasks whose costs are taken into account when determining the amount of funds for funding the tasks of municipalities and the methodology for calculating

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[2] Decision No. U-I-287/95, dated 14 November 1996 (Official Gazette RS, No. 68/96, and OdlUS V, 155), Para. 10 of the reasoning.

[3] Decision No. U-I-58/98, dated 14 January 1999 (Official Gazette RS, No. 7/99, and OdlUS VIII, 2).

[4] Decision No. U-I-16/98, dated 5 July 2001 (Official Gazette RS, No. 62/01, and OdlUS X, 144).

[5] Decision No. U-I-50/00, dated 30 May 2002 (Official Gazette RS, No. 54/02, and OdlUS XI, 93). The determination of these areas was important because a part of the concession contribution from gaming belonged to the local communities in a defined tourist area.

[6] Decision No. U-I-60/06, U-I-214/06, U-I-228/06, dated 7 December 2006 (Official Gazette RS, No. 1/07, and OdlUS XV, 84).

[7] Decision No. U-I-390/02, dated 16 June 2005 (Official Gazette RS, No. 62/05, and OdlUS XIV, 58).

such lump sum, and in doing so the first paragraph only determined the individual fields in the competence of municipalities with regard to which the tasks and expenses of their financing will be taken into account when establishing the appropriate amount of funds, but failed to substantively determine these tasks in more detail and thus did not ensure the decree a sufficient, clear, and substantive statutory basis for determining the tasks regarding which costs are taken into account and the methodology for calculating such lump sum.[8]

The list is relatively long and boring on purpose. It is long because I want to demonstrate how numerous these (non-exhaustively listed) cases are, and boring because I want to illustrate that the situations concerned are very diverse and that significantly less important competences were transferred to the executive branch of power than in the case at issue. Furthermore, the mentioned instances mostly did not concern the regulation of interferences with human rights or fundamental freedoms, or the interferences were significantly less invasive than in the case at issue. So, *a minori ad maius* it is impossible to overlook the comparative specificities of the case at issue: both the intensity of the interferences with freedom of movement and freedom of association (e.g. the prohibition on leaving one's municipality), as well as the long-lasting nature and mass character thereof (the ordinances applied to all residents in the Republic of Slovenia).

In all the other mentioned instances, the Constitutional Court, when carrying out similar reviews, encountered incomparably milder interferences, which, as a general rule, applied to a smaller circle of people.[9] In other words: since the Second World War we have not encountered such intense, long-lasting, all-encompassing, and mass limitations of the freedom of movement and freedom of assembly and association than precisely during the COVID-19 epidemic. It seems that, in view of the hitherto case law, all these factors should lead to a relatively quick and simple review of the question before us. The statutory basis is so evidently under-normed that it simply has to lead to the finding that the Act is inconsistent with the Constitution due to a violation of the principle of legality. The fate of ordinances is sealed by the self-evident consequence of such a finding – the finding of inconsistency with the Constitution.[10]

II

Whoever would think that it is unusual that ordinances "which save lives, after all" are abrogated "merely" because of some sort of formality such as the principle of legality does not understand the principle of the separation of powers, on which the functioning of the modern democratic state is based.[11] In a democratic state, interferences with human rights

[8] Decision No. U-I-24/07, dated 4 October 2007 (Official Gazette RS, No. 101/07, and OdIUS XVI, 74).

[9] By stating this, I, of course, do not wish to underestimate the possible severe consequences that the unconstitutional norms had for the addressees in the above instances.

[10] Courts must not apply implementing acts that are inconsistent with the Constitution – *exceptio illegalis* (Article 125 of the Constitution).

[11] For the English variant of this principle, see Jason N. E. Varuhas, The Principle of Legality, Cambridge Law Journal, Vol. 79, No. 3, 2020, pp. 578–614.

may only be adopted by directly elected representatives of the people.[12] This automatically entails that such interferences may only be regulated by laws and absolutely not by hierarchically lower legal acts, such as ordinances. The competence to interfere with human rights must never be transferred to the executive branch of power, which may only operate on a substantive basis and within the framework of laws.[13]

All of this follows from the principle of the separation of powers, as the competence to legislate is exclusively in the hands of the National Assembly (Articles 86 through 89 of the Constitution), and no other state authority may regulate statutory subject matter. [14] It is precisely this that the reviewed points 2 and 3 of Article 39 of the CDA enable the executive branch of power to do. A substantively void norm such as the one at issue namely causes that interferences with human rights are no longer decided on by a democratically elected legislative branch of power, but by the executive branch. In a state governed by the rule of law conceived on the idea of the separation of powers,[15] which is also tightly connected with the idea of a state governed by the rule of law,[16,17] this is unacceptable.[18]

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

[13] Decisions of the Constitutional Court No. U-I-123/92 and No. U-I-73/94, Para. 18 of the reasoning.

[14] The only exception is a state of emergency (Articles 92 and 108 of the Constitution). In such an event, when the National Assembly is unable to convene due to a state of emergency or war, the President of the Republic may, on the proposal of the Government, issue decrees with the force of law. Also in such an instance decrees with the force of law cannot be adopted directly by the Government, and even when they are adopted, the President of the Republic must submit them to the National Assembly for confirmation immediately upon it next convening.

[15] The idea of the separation of powers originates in the Age of Enlightenment, beginning with Locke, who was amongst the first to criticise the idea of the king's power originating from God, and conceptualised the separation of powers (with the power belonging to the people) to the executive and legislative branches. The key idea of the separation of powers was further developed by Montesquieu in his book "Spirit of Laws" (from 1748). Not only did he draw a distinction between the legislative, executive (one can also say administrative), and judicial branches of power, but he also formulated the requirement that these functions must be distributed between different state authorities that are independent of one another. See, e.g., Sharon Krause, The Spirit of Separate Powers in Montesquieu, The Review of Politics, Vol. 62, No. 2, 2000, pp. 231–265, Céline Spector, Montesquieu, Encyclopedia of the Philosophy of Law, Sorbonne, hal-03149778.

[16] The German analogue *Rechtsstaat* is based on two principles: the principle of legality and the principle of proportionality. See, e.g., Christian Bumke, Andreas Voβkuhle, German Constitutional Law. Introduction, cases and principles. Oxford University Press, New York, 2019.

[17] See, e.g., Jeremy Waldron, Separation of Powers in Thought and Practice?, Boston College Law Review, Vol. 54, No. 2, 2013, pp. 433–468, Richard Bellamy, The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy, Political Studies, Vol. XLIV, 1996, pp. 436–456.

[18] As stressed by Marijan Pavčnik (*Teorija prava, Prispevek k razumevanju prava* [Theory of Law: A Contribution to Understanding Law], 5th revised edition, GV Založba, Ljubljana 2015, p. 79), "[a] state governed by the rule of law is created as a reaction against a state organisation in which the activity of central state authorities is not determined in advance or at least determinable by appropriate general

In this context, the warnings in the Decision that "the degree to which the statutory authorisation is precise and accurate can vary depending on the subject matter of the regulation and the envisaged intensity of the interference with human rights or fundamental freedoms" (see paragraph 72 of the reasoning) are of particular significance. However, the statutory authorisation granted to the executive branch of power must be more restrictive and precise the greater the interference or effect of a law on the human rights and fundamental freedoms of an individual.[19] The statutory authorisation must be so precise that it does not allow the executive branch of power to regulate human rights and fundamental freedoms in an originary manner. Thereby, predictability and legal certainty with respect to the exercise of human rights and fundamental freedoms are ensured, and concurrently the threat of the arbitrary limitation thereof by the authorities in power is reduced. Namely, only such precision entails a safeguard against arbitrary interferences by the executive branch of power with human rights and fundamental freedoms.

Hence, the Decision merely follows the established case law as regards the required substantive basis in the law which should prevent the executive branch of power from taking on the functions of the legislative branch, which would lead the state away from democratic regulation towards an arbitrary executive branch of power.

III

The decision finding that the ordinances are inconsistent with the Constitution due to a violation of the principle of legality says nothing about their content. In fact, the Decision at issue did not even have to address their content because implementing acts derive their existence from a law.[20] If the law is inconsistent with the Constitution, then the ordinances adopted on the basis of such a law cannot remain in force, regardless of their content. Even if such ordinances completely fulfilled all criteria that a complete law would have to require therefrom, they would still not have an independent legal life. In other words: since implementing acts derive their existence from a law, they fail without a law, even if they are

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legal acts of the representative body. In continental Europe, the institutions of a state governed by the rule of law were formed as a reaction to a police state (German *Polizeistaat*). In a police state, the centre of decision-making lies with the state administration, which operates in conformity with the interest of the state (*Staatsraison*, *raison d'état*) as the state itself perceives it [...]. Also in a state governed by the rule of law, the state administration can have competences that allow it an appropriate (relatively broad) margin of appreciation, while the condition is that all the essential criteria that enable such appreciation are determined already by a law."

[19] 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.

[20] Rupko Godec, *Upravne norme in upravni akti* [Administrative Norms and Administrative Acts], Administrative Collection, Univerza v Ljubljani, Pravna fakulteta, Inštitut za javno upravo, 1993, pp. 155–232.

otherwise perfect in terms of their content.[21] The legal logic behind this is not in any way formalistic: it is deeply substantive.

The principle of legality determined by the second paragraph of Article 120 of the Constitution contains two requirements: (1) implementing regulations and individual acts must be adopted on the basis of law, and (2) they must also be substantively within the framework of law.[22] The requirement that they be adopted on the basis of a law is primary – if they are not, one cannot even assess whether they are substantively within the framework of law. The question of whether an implementing act is adopted on the basis of law also includes an assessment of whether the statutory basis itself is precise enough to ensure that the essence of the legislative competence to regulate the substance of human rights is not transferred to the executive branch of power.

So, the Decision does not provide an answer to the question of whether the challenged ordinances were urgent, necessary, and proportionate. A positive answer to these questions could only be obtained if it was demonstrated that the law from which the ordinances derive their existence gives the latter a sufficiently clear, substantively determinate, and thus predictable substantive basis. In other words: when assessing an implementing act, the only methodologically correct path is the one where first the question of an appropriate substantive statutory basis for its adoption is assessed and only then the question of whether the act is within the framework of the law and whether it is proportionate.

Therefore, the adopted Decision exposes the severe methodological mistake of the tight majority of the Constitutional Court from the thus far only substantively adjudged case concerning the limitation of freedom of movement and gathering, namely Decision No. U-I-83/20, adopted in August of last year.[23] With that Decision, the Constitutional Court namely established that certain articles of the then assessed ordinances[24] – which were two

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[21] The question, of course, is whether they can actually be perfect without statutory criteria. In fact, if a law is empty to such a degree that it does not contain clear limitations on and directions for the executive branch of power, it is a question of which criteria could even fill in the assessment of, for instance, the proportionality of an implementing act.

[22] For more on the principle of legality, see Gregor Virant, *Načelo zakonitosti delovanja uprave in širina (ohlapnost, nedoločnost) zakonskih pooblastil* [The Principle of Legality of the Functioning of the State Administration and the Breadth (Looseness, Indeterminacy) of Statutory Authorisations], Javna uprava, Vol. 35, No. 3, 1999, pp. 467–488.

[23] Decision dated 27 August 2020 (Official Gazette RS, No. 128/20).

[24] What was at issue was Article 1 in the part concerning the prohibition of movement outside the municipality of one's permanent or temporary residence, the third paragraph of Article 3 in conjunction with the second paragraph of the same Article, the second paragraph of Article 4, and Article 7 of the Ordinance on the Temporary General Prohibition of the Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement Outside of One's Municipality (Official Gazette RS, Nos. 38/20 and 51/20), and Article 1 in the part concerning the prohibition of movement outside the municipality of one's permanent or temporary residence, the third paragraph of Article 3 in conjunction with the second paragraph of the same Article, the second and third paragraphs of Article 4, and Article 8 of the Ordinance on the Temporary General Prohibition of

almost identical ordinances that were (*inter alia*) assessed also in the case at issue – were not inconsistent with the Constitution. Hence, the majority reviewed their proportionality without first reviewing their statutory basis. This means that from Decision No. U-I-83/20 it follows that the majority directly reviewed the proportionality of ordinances as such, as if their existence did not depend on the constitutionality of the statutory norm on the basis of which they were adopted. In retrospect, now it is becoming apparent that also the ordinances that were reviewed then are inconsistent with the Constitution due to their inconsistency with the principle of legality. Indeed, the Decision adopted at the time leaves an even more bitter taste today.

The requirement that there has to exist an appropriate substantive basis in a law for the functioning of the executive branch of power (the principle of legality), and the requirement that both the statutory basis that regulates interferences with human rights and the functioning of the executive branch of power based thereon, must be in conformity with the principle of proportionality are two separate constitutional requirements. If it becomes apparent that the law limited the functioning of the executive branch of power with sufficient precision, that does not entail in and of itself that the statutory basis and the implementing act based thereon proportionately interfere with human rights. And vice versa. If the statutory basis is too loose, both the law and the implementing act based thereon are inconsistent with the Constitution even if perhaps the measures of the executive branch of power are proportionate: constitutionally, it is unacceptable that legislative duties are transferred to the executive branch of power. It is hence extremely important to strictly distinguish between these two institutes and to apply them consecutively: first the review of legality, and then the review of proportionality.[25]

In this manner, the executive branch of power can never remedy an insufficiently precise statutory basis by introducing, for instance, proportionate measures. Such a position is intolerable due to the principle of the separation of powers and the anti-authoritarian motive from which it is derived. That does not mean that the principle of proportionality does not bind the executive branch of power, but it certainly means that the proportionality of an ordinance cannot compensate for the mistakes made by the legislative branch of power. If that were

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the Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement Outside of One's Municipality (Official Gazette RS, Nos. 52/20 and 58/20).

[25] This is precisely also how the Austrian Constitutional Court (hereinafter referred to as the VfGH) acted. When reviewing implementing acts, they [i.e. the Austrians] first assessed the question of the constitutionality of the statutory basis, and only once they had established that the act was consistent with the Constitution did they address the question of whether the implementing acts were in conformity with the law. Hence, they were completely aware of the fact that the question of the conformity of the law with the Constitution is primary and that they could only analyse the implementing act after that question had been resolved. See, e.g., the decisions of the VfGH in case No. V 428/2020, dated 1 October 2020, accessible at: https://www.vfgh.gv.at/downloads/VfGH-Erkenntnis_V_428_vom_1._Oktober_2020.pdf, case No. V 429/2020, dated 1 October 2020, accessible at: https://www.vfgh.gv.at/downloads/VfGH-Erkenntnis_V_429_2020_vom_1._Oktober_2020.pdf, etc.

possible, it would mean that the principle of legality is devoid of substance, and the separation of powers unnecessary. In a democratic state we must not wish this to be so.[26]

IV

The adopted Decision naturally has some deficiencies that cannot be overlooked. Since we only decided to abrogate the ordinances due to their inconsistency with the Constitution and did not annul them, the Decision introduced a differentiation between those who violated the unconstitutional ordinances, who paid the fines based thereon, and whose cases became final, on the one hand, and those whose minor offence cases have not yet become final for various reasons, on the other.

Concurrently, the Decision introduced a distinction, which is at first sight unusual, in the legal validity of past ordinances, on the one hand, and of ordinances that will either be in force at the time of the publication of our Decision or will be adopted after its publication on the same legal basis, on the other. Due to an inconsistency with the Constitution, we abrogated the challenged ordinances, which all ceased to be in force before the Decision at issue was adopted, which means that in pending cases these ordinances must not be applied. Conversely, we allowed that the challenged statutory regulation continues to apply despite its unconstitutionality for a short period of time (i.e. until the established unconstitutionality is remedied). Such entails that thus also the adoption of new implementing acts on this unconstitutional [legal] basis is enabled; acts which we, by our Decision, ensured will be in force, despite remaining unconstitutional in their essence.

The reason for the mentioned distinction is the fact that for specific reasons (paragraph 101 of the reasoning) we were unable to abrogate the Act and by the manner of implementation determine a constitutionally consistent transitory statutory regulation that would enable new ordinances to be adopted on a constitutionally consistent legal basis. We were also unable to abrogate the Act without such a manner of implementation because the absence of any legal basis would create an even worse unconstitutional situation for the future. In fact, the epidemic is still going on and the state also has a positive obligation to protect the lives and health of people. Hence, in such manner, we “created” a distinction between ordinances that are all based on the same legal basis.

Despite this fact, there exist weighty substantive reasons for such a distinction. In fact, future ordinances can attain their purpose of protecting the health and lives of people, whereas the ordinances that in the meantime ceased to be in force are a matter of the past, as is their effect as regards protecting the health and life of people. By abrogating ordinances that are no longer in force we merely abrogated their punitive-financial effect in pending cases.[27] I see no reason why the state should have financial benefits from unconstitutional ordinances that

[26] See an interesting discussion on trends that weaken the power of this principle in Nicola Lupo, Giovanni Piccirilli, The Relocation of the Legality Principle by the European Courts’ Case Law: An Italian Perspective, European Constitutional Law Review, 2015, pp. 55–77.

[27] Had we had enough votes for abrogation, we would have also remedied the distinction between those addressees of the legal norm that have already paid fines and those have not (yet) paid them.

can no longer protect the health and life of people. At this moment, the argument against the abrogation of ordinances that in the meantime ceased to be in force can certainly not be the fact that these ordinances protected the health and life of people in the past.

As for our further decision-making, numerous questions remain open. One of them, for instance, is whether following our decision we will still assess some reproaches concerning the proportionality of the challenged ordinances. For instance, is it possible to nevertheless establish that an ordinance that was abrogated due to a violation of the principle of legality was also disproportionate?[28] It is certain that as regards new ordinances based on the unconstitutional part of Article 39 of the CDA it will not be possible to establish a violation of the principle of legality, but new questions will probably be opened with respect thereto, e.g. the principle of proportionality.[29]

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To come to a conclusion, I will repeat the words I stated in my last separate opinion concerning the temporary suspension of the prohibition of assembly and association in case No. U-I-50/21: in the case to which this separate opinion refers, the Constitutional Court *did* decide independently and with integrity, as well as logically, convincingly, wisely, and in an expert manner. It actually decided in the only possible, legally consistent, and theoretically acceptable manner, one that will not subsequently cause us to blush with shame. In fact, only such a decision is in conformity with the established case law and only such a decision can find convincing support in philosophical and theoretical findings, which are the foundational building blocks of a democratic state.

It is, however, downright lamentable that we decided so late: the decision will be published almost 15 months after the first petition was filed,[30] after the third wave of the epidemic has ended, and after tens of ordinances have already been adopted on an unconstitutional statutory basis, and fines worth several million imposed.[31] This is something the

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[28] Establishing that it was proportionate is conceptually impossible, as demonstrated above.

[29] See the last sentence of paragraph 101 of the Decision: "As a result, courts must not deny the validity of the mentioned implementing regulations as regards relations that arise following the publication of this Decision in the Official Gazette of the Republic of Slovenia *due to the unconstitutionality established in this Decision,*" [emphasis added by KŠS] from which it logically follows that it will not be possible to claim that the new ordinances violate the principle of legality, yet it will be possible to claim other violations.

[30] The petition of the first petitioner for a review of the constitutionality and legality of the Ordinance on the Temporary General Prohibition of the Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia (Official Gazette RS, No. 30/20) was filed on 24 March 2020. We decided thereon on 13 May 2021.

[31] According to reporting in the daily Dnevnik, during the second wave of the epidemic the Police issued fines worth more than five million euros, see Uroš Škerl Kramberger, *Za več kot pet milijonov evrov glob je policija zaračunala v drugem valu epidemije* [The Police Have Issued Fines Worth More than Five Million Euros during the Second Wave of the Epidemic], Dnevnik, 25 March 2021, accessible at: https://www.dnevnik.si/1042951889.

Constitutional Court should simply not have allowed itself. As judge rapporteur in these joined cases,[32] I can only assure that this delay did not happen due to a lack of incentive or effort on the side of those of us who prepared, corrected, and harmonised numerous drafts.

A part of the responsibility for this delayed decision certainly lies with [the Constitutional Court having] applied the wrong strategy to resolve COVID-19 cases. The time to establish an unconstitutionality was last year, when we were deciding on case No. U-I-83/20. Despite the incessant drawing of attention to the problem concerning the statutory basis by the minority at the time,[33] a tight majority decided that the reviewed ordinances are in conformity with the Constitution (as regards the question of proportionality) without addressing the primary question of whether the statutory basis on which they are based is in conformity with the Constitution: in such manner, not only was the strategy for decision-making on COVID-19 cases methodologically erroneous, but also valuable time was lost as a result. In fact, had we correctly approached the resolution of COVID-19 cases and first addressed the question of the statutory basis, the legislature would have gained the message that the statutory basis was constitutionally disputable already in the summer of last year and it would therefore have been able to adopt a constitutionally consistent law even before the second wave began.[34] At that time, a cleaner (and in my assessment also more correct) decision by which the Act would be abrogated and ordinances annulled would certainly be significantly more acceptable. *Alas!*

During this time, for instance, the Austrian and German legislatures adopted special COVID-19 articles or COVID-19 laws that rendered the statutory authorisations, which formerly had also been more or less blank, more precise.[35] The French legislature also did similar.[36] They adopted these decisions on their own initiative, without interference by the Constitutional Court, which is of course also what the Slovene legislature could and even should have done

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[32] The joined case No. U-I-79/20 was assigned to me as judge rapporteur on 3 December 2020.

[33] See the dissenting opinion of judge Dr Špelca Mežnar regarding Decision No. U-I-83/20.

[34] In this respect, I concur with those who criticise the work of the Constitutional Court, e.g. Šipec, Miha, *Strahopetno sodišče* [A Cowardly Court], Pravna praksa, No. 13, 2021, p. 23.

[35] See the Austrian **Federal Act on Temporary Measures for the Prevention of the Spread of COVID-19**: *Bundesgesetz betreffend vorläufige Maßnahmen zur Verhinderung der Verbreitung von COVID-19 (COVID-19-Maßnahmengesetz)*, accessible at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20011073, and the German **Federal Act on Protection from Communicable Diseases (hereinafter referred to as the IfSG)**: *Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz - IfSG)*, accessible at: https://www.gesetze-im-internet.de/ifsg/index.html#BJNR104510000BJNE004800310.

[36] By an urgent law adopted on 23 March 2020, France declared, in an expedited procedure, a public health state of emergency. The urgent law No. 2020-290 for combating the COVID-19 epidemic (*Loi d'urgence pour faire face à l'épidémie de covid-19*) amended the Public Health Act, into which a chapter on severe health threats and crises was inserted. This chapter regulated anew that a public health state of emergency (*état d'urgence sanitaire*) could be declared for the entire state or on a part of its territory if there is a threat to the health of people in view of the nature or degree of severity of the health catastrophe.

without restraint. Furthermore, the Austrian Constitutional Court in the meantime substantively decided on tens of COVID-19 cases that refer to various implementing acts. Hence, it answered the questions that arose with respect to the imposed measures.

The second part of the answer to the question of why decision-making took so long falls more in the field of the psychology of judicial decision-making. At this point, we cannot avoid the fact that we are nine individuals [adjudicating] at the Constitutional Court with our own capabilities, personality traits, and values, and as such merely humans. The reasons for postponing the decision can be sought in various (rational and irrational) fears, hesitation, doubts, as well as in the unwillingness of several judges to make compromises (who, despite their long-lasting harmonisations, voted against in the end). Making compromises is, however, necessary when addressing a topic that divides[37] not only the public but also Constitutional Court judges and that is strategically – and in these times, unfortunately, also politically – so delicate.

As judge rapporteur, I advocated for operative provisions by which we would abrogate the statutory basis (with suspensive effect, of course) and annul the ordinances adopted on such basis. This would entail that we would treat equally all people who violated the ordinances – both those who have already paid the fines and those whose cases have not yet become final for various reasons. Such a decision would appear to me to be the most correct and legally most elegant; it would not create an inequality between different offenders who violated these ordinances. In front of us is a compromise that managed to receive the required five votes. Although the decision is, in my opinion, neither optimal nor timely, I am, considering what I stated above, proud of it and thankful therefor. I am namely convinced that even such a decision nevertheless maintains in its entirety the spirit of the hitherto constitutional case law, places the principle of legality in the right place, and is concurrently not a toothless tiger.

Finally, as always, each of the judges is accountable to his or her own conscience and must accept responsibility for his or her decision, in particular since what is at is at issue is probably the most important decision of this year, and perhaps even of our [entire] term of office.

Dr Katja Šugman Stubbs, MP
Judge

Dr Rok Čeferin, MP
Judge

[37] “Polarises” would be the wrong word in this context because it would indicate that we are divided into merely two groups. This time, we were divided into at least three groups, if not more. We do know, however, that merely the art of reaching five votes leads to a decision.