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CONCURRING OPINION OF JUDGE DR KATJA ŠUGMAN STUBBS REGARDING DECISION NO. U-I-445/20, U-I-473/20, DATED 16 SEPTEMBER 2021

INTRODUCTION

Since the first session, at which we discussed the constitutional issues regarding the ordinances adopted during the COVID-19 epidemic,[1] I have advocated for two positions:

1. that points 2 and 3 of the first paragraph of Article 39 of the CDA are *prima facie* insufficiently precise to such an extent that they cannot in any way entail a sufficient basis for the adoption of constitutionally consistent implementing regulations;[2]
2. that it is not possible to assess the constitutionality of individual implementing regulations (in our case, Ordinances) without also assessing their statutory basis.

The first position has since been reaffirmed in our decisions on several occasions,[3] and it is also reiterated (from the perspective of the second right) in the underlying reasons for the decision regarding which I am writing this separate opinion.[4] Much more interesting is the second question, which is answered in Part B – III of the Decision. Since in the case regarding which I am writing this dissenting opinion this was the most disputable point among the judges (who were potentially prepared to support the operative provisions of the Decision), I would like to elaborate on my understanding of this issue in the present opinion. I also find this question interesting from a theoretical perspective, as it opens a new field, one that the Constitutional Court has thus far not yet encountered.

The key question can also be paraphrased as follows: Can the Constitutional Court directly assess the conformity with the Constitution of a specific implementing regulation without also taking into account the constitutionality of the statutory basis of this implementing regulation?[5]

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[1] These issues were raised for the first time in case No. U-I-83/20.

[2] In thinking along these lines, I was guided in particular by the analogy with the Constitutional Court's leading decision concerning the review of the provisions on detention, namely Decision No. U-I-18/93. See also K. Šugman, *Kazenskoprocesna doktrina v luči odločb Ustavnega sodišča* [Criminal Procedure Doctrine in Light of Decisions of the Constitutional Court], Collection of Legal Research Papers, Vol. 63 (2003), pp. 469–502.

[3] See, e.g., Decision of the Constitutional Court No. U-I-79/20.

[4] See para. 32 of the reasoning of the Decision.

[5] In this part of the discussion, I partially refer to my concurring separate opinion in case No. U-I-79/20.

THE HIERARCHY OF THE LEGAL ORDER AND ITS CONNECTION WITH THE PRINCIPLE OF THE SEPARATION OF POWERS

According to the theory of the hierarchy of law, legal acts are classified into three levels: constitutional, statutory, and implementing [i.e. sub-statutory].[6] These levels are regulated in a hierarchical manner; therefore, the rule is that lower acts must be in conformity with higher acts. Not only must implementing regulations be in conformity with laws (and the Constitution), they also derive their existence from laws,[7] which means that they can only be adopted on the basis and within the framework of laws. This dependence of implementing regulations on their source, i.e. laws, is so strong that when a law is inconsistent with the Constitution, the implementing regulation adopted on the basis of that law is automatically inconsistent as well. Such an act does not and cannot exist in the legal order.

Thus, the Constitutional Court has on numerous occasions abrogated implementing regulations because it established that the statutory basis was inconsistent with the Constitution due to the imprecision of the former.[8] These instances generally concerned

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[6] M. Pavčnik, *Teorija prava: Prispevek k razumevanju prava* [Theory of Law: A Contribution to Understanding Law], Cankarjeva založba, Ljubljana 1997.

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

[8] See, e.g., Decision No. U-I-287/95, dated 14 November 1996, by which the Constitutional Court (*inter alia*) abrogated part of the second paragraph of Article 48 of the Securities Market Act because "the legislature gave the Agency *mutatis mutandis* the power to determine the conditions for withdrawing the licence of stock brokers to conduct transactions in 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 regulations." By Decision No. U-I-123/92, dated 18 November 1993, the Constitutional Court abrogated 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. By Decision No. U-I-16/98, dated 5 July 2001, the Constitutional Court abrogated 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 determines the criteria for setting the timetable of the working hours of shops. See also Decision No. U-I-58/98, dated 14 January 1999, by which the Constitutional Court found Article 33 of the Road Transport Act to be inconsistent with the Constitution and abrogated the rules based thereon, because the challenged article provided that the ministry [responsible for transport] grants permits in accordance with the criteria, procedure, and manner determined by the rules adopted by the minister responsible for transport. By Decision No. U-I-60/06, U-I-214/06, U-I-228/06, dated 7 December 2006, the Constitutional Court found the fourth paragraph of Article 30 of the State Prosecution Service Act to be inconsistent with the Constitution. That Article determined 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

significantly less invasive interferences with human rights than the so-called COVID-19 ordinances, or were even not such interferences at all.

This logic may seem formalistic at first sight, but it is not. It is deeply substantive and represents the very essence of a democratic state governed by the rule of law. At this point, the hierarchy of the legal order is intertwined with the principle of the separation of powers (the second sentence of the second paragraph of Article 3 of the Constitution), on which the idea of a modern state governed by the rule of law is constructed. To prevent arbitrariness and the centralisation of power in a particular branch of government, each branch has specifically determined and limited powers. The legislative branch of powers (the National Assembly) is the only one with the power to adopt laws (Articles 86 through 89 of the Constitution), while **other state authorities are not allowed to amend or independently regulate the statutory subject matter.**[9] On the basis of the second paragraph of Article 120 of the Constitution, administrative authorities perform their work independently, but under clearly determined conditions: within the framework and on the basis of the Constitution and laws (the second paragraph of Article 120 of the Constitution).

This limitation, which determines that the actions of administrative authorities are bound by the constitutional and statutory basis, is called the principle of legality.[10] The hierarchical nature of the legal order is thus tightly intertwined with other fundamental constitutional principles, such as the principle of democracy (Article 1 of the Constitution), the principle of the rule of law (Article 2 of the Constitution), and, as stated, the principle of the separation of powers (the second sentence of the second paragraph of Article 3 of the Constitution).

CAN THE CONSTITUTIONAL COURT REVIEW AN IMPLEMENTING REGULATION WITHOUT ALSO TAKING INTO ACCOUNT ITS STATUTORY BASIS?

The principle of legality 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. The very content of these two postulates makes it logically impossible to review an implementing regulation without also taking into account the review of the law. How will we be able to assess whether a particular ordinance is in conformity with the Constitution if we do not include the above criteria in our assessment? Any assessment of the

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state prosecutors or assistants to state prosecutors. See also Decision No. U-I-390/02, dated 16 June 2005, by which the Constitutional Court established that Article 57 of the Health Care and Health Insurance Act is inconsistent with the Constitution and abrogated the order based thereon. The law 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.

[9] Decision of the Constitutional Court No. U-I-73/94, para. 19 of the reasoning.

[10] For more on the principle of legality, see G. 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, No. 3, 1999, pp. 467–488.

constitutionality of an implementing regulation must necessarily include an assessment of at least one of the above questions.[11] Both inherently cover the **content of the law**: whether a particular implementing regulation is adopted on the basis of the law and whether it is adopted within the substantive framework of the law. Conceptually, it is not possible to assess constitutionality without taking into account the statutory basis and the legal framework.

At the same time, our consideration is further complicated by the fact that one of the criteria for assessing whether implementing regulations are adopted **on the basis** of a law is the **precision of the statutory basis**. If the law is not sufficiently precise, it is not even possible to assess whether an implementing regulation is substantively within the scope of the law. The statutory basis must namely contain sufficiently clear criteria on the basis of which the executive branch of power can adopt implementing regulations within the framework of the law. If these frameworks are not sufficiently clear, then it may well happen that the executive branch of power regulates the content of human rights in an originary manner and independently.[12] This is contrary to the idea of a democratic state. Thus, any review of the constitutionality of an implementing regulation must necessarily also include an examination of the precision of the statutory basis. And again: it is hence imperative that it takes into account the law as well. How, then, can it even be argued that the constitutionality of an implementing regulation can be reviewed directly, without reviewing its statutory basis?

It could be argued that the Constitution itself contains the criteria that the law must or should contain. For some of the criteria, this may be true. For example, the Constitution requires all regulations, (including implementing regulations,) to be proportionate. However, it is impossible to imagine that the Constitutional Court would review the constitutionality of an implementing regulation directly on the basis of the Constitution, because the Constitution cannot contain all the more specific substantive criteria (also crucial for the assessment of proportionality) that a law would have to provide. It clearly follows from the constitutional case law that the intention of the legislature and the value criteria for implementing the law must be clearly expressed in the law or undoubtedly evident therefrom.[13] The law must fundamentally by itself regulate the content that is to be the subject of the implementing regulation, and determine the framework and guidelines for regulating the content in more detail by the

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[11] If an unconstitutionality is established, the review may, understandably, stop already at the first criterion, but otherwise a decision must be adopted regarding both of them.

[12] The executive branch of power needs sufficiently clear and precise statutory regulation of those questions whose regulation falls within the exclusive competence of the legislature, i.e. questions that are key, fundamental, and central to the specific legal system but that are also not so important as to be regulated already by the Constitution. The executive branch of power must not regulate these questions in an originary manner. See, e.g., Decision of the Constitutional Court No. U-I-73/94, paras. 17–19 of the reasoning, Order of the Constitutional Court No. U-I-113/04, dated 7 February 2007 (Official Gazette RS, No. 16/07, and OdlUS XVI, 16), para. 13 of the reasoning, and Decision of the Constitutional Court No. U-I-84/09, para. 8 of the reasoning. See also M. Pavčnik, *Teorija prava, Prispevek k razumevanju prava* [Theory of Law: A Contribution to Understanding Law], 5th revised edition, GV Založba, Ljubljana 2015, p. 249.

[13] Decision of the Constitutional Court No. U-I-50/00, para. 6 of the reasoning.

implementing regulation.[14] All of this, which is also a substantive criterion for assessing proportionality, is certainly not directly derivable from the Constitution.

The debate could, understandably, be further extended to the question of what are the criteria that can (perhaps) be applied directly under the Constitution to directly review an implementing regulation. Even if such criteria may exist (without also covering the law), it is certainly not possible to carry out a comprehensive analysis of a certain implementing regulation on the basis thereof. As mentioned above, the key content, framework, and guidelines for the more detailed regulation of an implementing regulation must be prescribed precisely, in a law. If the law is not taken into account when assessing the constitutionality of an implementing regulation, then these criteria cannot be included in the assessment of the implementing regulation. Such an analysis (even if some of the direct criteria for assessing an implementing regulation were derived from the Constitution) is therefore **certainly so incomplete that without a further analysis of the law it can never lead to the conclusion that a certain implementing regulation is in conformity with the Constitution**. How could it, if we have not assessed certain criteria?

Therefore, if there exist directly applicable constitutional criteria for assessing implementing regulations, they certainly do not allow for a comprehensive assessment of an implementing regulation. On the basis of such criteria (if they exist) it is therefore impossible to conclude that a certain implementing regulation is in conformity with the Constitution. The only theoretical possibility would be to find that, on the basis of these criteria alone, the implementing regulation is inconsistent with the Constitution.[15] It can therefore be established that it is not possible to carry out a detailed assessment of the constitutionality of an implementing regulation without taking into account its statutory basis. In fact, if a law is deficient or flawed to such a degree that it does not contain clear limits and guidance for the executive branch of power, then we simply cannot directly review the implementing regulation adopted on its basis.

CAN A "PERFECT" IMPLEMENTING REGULATION COMPENSATE FOR THE SHORTCOMINGS OF THE STATUTORY BASIS?

I have demonstrated above why without statutory content it is not possible to assess an implementing regulation. This raises a further question: can an implementing regulation, despite the shortcomings of the statutory regulation, fully meet all the criteria that a law that is

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[14] Whenever the legislature authorises the executive branch of power to adopt an implementing regulation, it must first by itself regulate the foundations of the content that is to be the subject of the implementing regulation, and determine the framework and guidelines for regulating the content in more detail by the implementing regulation. Decisions of the Constitutional Court No. U-I-16/98, dated 5 July 2001 (Official Gazette RS, No. 62/01, and OdlUS X, 144), para. 18 of the reasoning, and Nos. 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), para. 126 of the reasoning.

[15] Such claims have also been made in our discussions. Such a finding could entail a sort of preliminary assessment of the implementing regulation.

completely in conformity with the Constitution should require therefrom (leaving aside the question of how this could even be established in the absence of the statutory basis)? The answer to this question in our system must surely be: no. Such an act cannot exist independently if the statutory basis is deficient. In other words: since implementing regulations derive their existence from a law, they fail without a law, even if they are (or could be) otherwise perfect in terms of their content. The reason for this is clear: the executive branch of power cannot compensate for the failures of the legislative branch of power, especially when it comes to interfering with fundamental human rights. If it could do so, it would be regulating in an originary manner a field that is reserved by the Constitution exclusively to the legislative branch of power.

The analogy with the so-called Schumann formula is more than obviously not applicable with respect to this question. The Constitutional Court is sometimes uses the Schumann formula when it examines constitutional complaints and ascertains whether courts (or administrative authorities) interpreted the law in a constitutionally consistent manner. In doing so, it helps itself by playing a mind game in which it imagines a certain disputable position as the content of a law and asks itself whether, were it written in a law, the position of the court would be inconsistent with the Constitution. The view that emerged in our discussions was that perhaps we could imagine the content of an implementing regulation as the content of a law and assess it, by analogy with Schumann's formula, as the content of a law. An analogy was hence established between a position in a judicial decision and the content of an implementing regulation. In both instances, we would first imagine that the content of the law is at issue, and then ascertain whether such statutory content would pass the test of constitutionality.

This analogy is not applicable for several reasons, the most crucial of which is precisely the hierarchy of the legal order. I have explained above why even a substantively perfect implementing regulation cannot compensate for the damage it does to the principles of democracy, the separation of powers, and the rule of law. Regardless of the content of provisions, the executive branch of power simply must not circumvent the requirement that the fundamental criteria for limiting human rights are determined by law. If it did, it would be regulating the matter in an originary manner, which is not allowed in our system. Therefore, if the Constitutional Court directly examines the constitutionality of an implementing regulation, using the Schumann formula, pretending that it is the content of a law, it becomes complicit in a violation of the separation of powers: in an interference of the executive branch with the legislative branch of power. Hence, it accepts that, in ordinary circumstances, the Government can prescribe interferences with human rights through "perfect" ordinances. This is completely unacceptable.

Understandably, the analogy between the arguments of a court decision and the content of an implementing regulation is not tenable either. That is precisely why the Schumann formula is used exclusively in the assessment of constitutional complaints and not in the assessment of the constitutionality of general acts. Both the nature of the authorities adopting judgments or regulations and their powers are incomparable. Courts have the task to interpret and substantively fill in the law, whereas the conduct of the executive branch of power, as shown above, is merely an executive concretisation of clearly determined statutory powers.

CONCLUSION

On the basis of all this, two things are completely clear.

Firstly: in a legal order there cannot exist a constitutionally consistent implementing regulation – even if substantively perfect (whatever that means) – if its statutory basis is inconsistent with the Constitution. This would mean that the executive branch of power determined that which should be in the law. Such conduct would be even more unacceptable with respect to implementing regulations that interfere with human rights, because in such an instance not only is the principle of legality violated, but also the principles of democracy, the rule of law, and the separation of powers. Virtually all so-called COVID-19 ordinances are such. Allowing such subject-matter to be regulated by implementing regulations without respect to the statutory basis or without a statutory basis would *de facto* mean that the executive branch regulates interferences with fundamental human rights by implementing regulations. In normal circumstances, a democratic state would not allow this, even if the executive branch of power (the Government) were to do so in a substantively complete and proportionate way, because such regulation is only allowed to be made by democratically elected representatives who serve in the National Assembly.[16]

Secondly: The Constitutional Court should never make an assessment that a certain implementing regulation is in conformity with the Constitution without taking into account the statutory basis of that implementing regulation. As shown above, in the absence of a review of the law, the key criteria by which the conformity with the Constitution of a particular implementing regulation should be comprehensively assessed are absent as well. Unfortunately, the Constitutional Court has already made this mistake once, in Decision No. U-I-83/20. By that Decision, the Court found that certain articles of the ordinances[17] under review at the time were not inconsistent with the Constitution, without examining their statutory

[16] All comparisons with US presidential decrees with the force of law are therefore irrelevant: the US presidential system has a completely different system of checks and balances; therefore their solutions cannot be transposed into our legal system.

[17] 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 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).

basis. More precisely, the majority at the time delved into assessing their proportionality without carrying out the assessment of the constitutionality of their statutory basis.

It is precisely this slip of the majority at the time that shows how theoretically and methodologically erroneous the approach was at the time. In fact, in a later case No. U-I-79/20, the same Court found that the statutory basis on which also the ordinances under review at the time were adopted was unconstitutional. Hence, conceptually, Decision No. U-I-83/20 was erroneous, because the ordinances, which were adopted on an unconstitutional basis (which was later reviewed), could not have been in conformity with the Constitution at that time. As we know: implementing regulations must share the fate of the law on the basis of which they were adopted. Hence, it is completely clear that the first decision was erroneous, particularly because the majority insisted on not reviewing the constitutionality of the statutory basis of the ordinances under review.

It is therefore extremely important that the Constitutional Court, in the case regarding which I am writing this separate opinion, also considered the question of legality of its own motion, because otherwise it would not have been able to assess the implementing regulation in a methodologically correct manner. The position expressed in paragraph 30 of the reasoning of the Decision is therefore decisive for future assessments, namely: It is only sensible to carry out a review of the conformity of measures adopted by implementing regulations with the substantive provision of the Constitution if they are based on a sufficient statutory basis. Namely, a measure adopted by an implementing regulation that interferes with an individual human right and is not based on a sufficient statutory basis cannot be in conformity with the Constitution. This means, however, that at least in instances when manifest doubt arises as to the conformity of a statutory regulation and the implementing regulation based thereon with the principle of legality, the Constitutional Court, in view of the nature of the matter, cannot avoid such a review, even if the petition does not provide any arguments for such an assessment.

Only such an approach is consistent, logically coherent, and in line with theoretical foundations of constitutional law. And only such an approach will ensure that the system of constitutional review will no longer be characterised by such contradictory decisions as were Decision No. U-I-83/20 and the underlying Decision No. U-I-79/20, which sets a strong precedent in reviewing so-called COVID-19 ordinances.

Dr Katja Šugman Stubbs
Judge