

The Constitutional Court of the Republic of Croatia (CCRC)

COVID-19 related decisions, 14/9/2020

S U M M A R Y

PARLIAMENT LEGISLATION

In the procedure of constitutional review, the CCRC rejected the proposals in relation to the amendments to the Law on the Civil Protection System and the Law on the Protection of the Population from Infectious Diseases (decision No. U-I-1372/2020 et al.). The decision includes 5 dissenting opinions – 3 opposing and 2 supporting opinions; the CCRC is composed of 13 judges).

Basically, the procedure referred primarily to the (in) admissibility of the given restrictions to the fundamental (and/or constitutional) rights and freedoms of / to movement, public assembly, private life, property, work, and free enterprise.

The applicants' complaints concerned, in essence, as follows:

- (1) the applicable constitutional ground for restricting respective rights and freedoms;
- (2) the legitimacy of the aim and proportionality of the powers of the Civil Protection Headquarters (CPH) to make measures and decisions;
- (3) the power of the CCRC to decide on the constitutionality and legality of measures and decisions of the CPH;
- (4) retroactive effect of the amendments to the Law on the Protection of the Population from Infectious Diseases;
- (5) prescribing the self-isolation measure (the measure is determined for a healthy person without symptoms of the COVID-19 disease who was at risk of infection - close contacts of infected persons or persons who have recently stayed in areas with widespread transmission of the disease).

In short, here are the main conclusions of the CCRC.

- (1) It is not up to the CCRC, but exclusively to the Parliament (*Hrvatski sabor*) to assess whether the general restrictions on the rights and freedoms set out in the Article 16 of the Constitution¹ should be applied, or the Article 17 of the Constitution² should be activated

¹ Article 16 of the Constitution of the Republic of Croatia states:

Freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, the legal order, and public morals and health.

Any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in each individual case.

² Article 17 of the Constitution:

Individual constitutionally guaranteed freedoms and rights may be restricted during a state of war or any clear and present danger to the independence and unity of the Republic of Croatia or in the event of major natural disasters. Such restriction shall be decided upon by the Croatian Parliament by a two-thirds majority of all

(meaning a two-thirds majority). This refers also to the question whether the COVID-19 epidemic is a major natural disaster in the sense of the Article 17.³

(2) The powers of the CPH have the goal of unquestionable legitimacy - to protect the health and lives of citizens in order to prevent and suppress the spread of the epidemic. However, their necessity and proportionality cannot be assessed by the CCRC at the principle level. The assessment of the constitutionality and legality of decisions and measures of the CPH is to be carried out in specific cases, in separate constitutional court procedures.

(3) Certain measures and decisions of the CPH indisputably restrict fundamental human rights and freedoms. They are therefore subject to the jurisdiction of the CCRC, in terms of „other regulations“ (Art. 129 of the Constitution).

(4) It is not about retroactively establishing the powers of the CPH, nor of subsequent legalization of its decisions, but of defining the legal nature of the measures adopted before the amendment entered into force.

(5) The measure of self-isolation is a safety measure of a preventive nature, prescribed by law, with legitimate aim. Measures adopted on the basis of the Law on the Protection of the Population from Infectious Diseases are subject to sanitary inspection supervision, with the issuance of a decision (administrative act, issued at least orally) in administrative proceedings, against which an appeal is allowed, following by an administrative dispute.

MEASURES OF THE CIVIL PROTECTION HERADQUARTERS

The CCRC found that the public interest (protection of life and health of citizens) take precedence over individual rights of citizens with regard to the CPH decisions relating to mandatory wearing of face masks, and the manner of organization of public transport (decision No. U-II-3170/2020 et al.).

In the CCRC's view, the applicants had not put forward constitutionally relevant reasons with regard to the measures regarding restriction of social gatherings, work in trade, holding of sports and cultural events, holding of funerals, restriction of stay on the streets and other public places,

Members of Parliament or, if the Croatian Parliament is unable to convene, at the proposal of the Government and with the countersignature of the Prime Minister, by the President of the Republic.

The extent of such restrictions must be appropriate to the nature of the threat, and may not result in the inequality of citizens with respect to race, colour, gender, language, religion, or national or social origin.

Even in cases of clear and present danger to the existence of the state, no restrictions may be imposed upon the provisions of this Constitution stipulating the right to life, prohibition of torture, cruel or degrading treatment or punishment, and concerning the legal definitions of criminal offences and punishment, and the freedom of thought, conscience and religion.

³The key critique of this approach of the CCRC in a dissenting opinion of judge Abramović says:

Let's analyze this unusual and erroneous statement that the Parliament can "choose" between constitutional norms: if that were true, it would mean that a simple majority can decide everything that the Constitution requires a qualified, 2/3 majority. But which government would then tie the stone of opposition around its neck, when it can (?!?) pass the same regulations by a simple majority? The Constitution is not a patisserie where everyone chooses what they have the best appetite for at a given moment. If two norms compete, then one of them should definitely be, and the other should not be applied at all. By the way, constitutional norms are not "activated", they are constantly active, as well as all norms of all valid laws and regulations. The constitution and laws are in force, not in hibernation.

ban on leaving the place of residence, temporary ban on crossing the state border (decision No. U-II-1373/2020 et al.). Most of these measures are no longer in force.

On its own initiative (decision No. U-II-2379/2020), the CCRC found that the principle of proportionality was not respected in the (meanwhile lifted) ban on Sunday trading. The government gave an unconvincing explanation of this measure, said the CCRC, because the most frequent day in the business of shops in Croatia is Friday, not Sunday. The CCRC added that this measure aroused great public interest, inter alia, due to two earlier decisions of the Court repealing the legal provisions banning the operation of shops on Sunday.

Alen Rajko

president of the Administrative Court in Rijeka

12/11/2020