

Report on Developments in the Case Law of the Constitutional Court of the Republic of Slovenia in relation to Covid-19 extraordinary measures

Boštjan Zalar (23 May 2020)

On 30 March 2020, a by-law entered into force, which temporarily and generally prohibited freedom of movement and peaceful assembly and public meetings of people in public spaces and freedom of movement across different municipalities in the Republic of Slovenia (hereinafter: the Covid-19 Government Decree).¹

In Slovenia, the “*state of emergency*” under Article 92 of the Constitution Acts was not declared. As a consequence, the relevant statutory provisions that the Covid-19 Government Decree was based on are those in the Infectious Diseases Act (hereinafter: the IDA), which is an act of the Parliament. The IDA grants the Minister of Health the authority to pass certain extraordinary measures during an epidemic (Article 37) and to combat the spread of infectious diseases in general (Article 39). Measures include the temporary regulation of certain aspects of the healthcare system through decrees (Article 37) and limitations to freedom of movement and assembly, as well as limitations to goods that may be sold freely on the market (Article 39). The Covid-19 Government Decree was not passed by the Minister of Health, but by the Government itself.²

An individual who asked to remain anonymous throughout the procedure filed a petition for the review of the constitutionality of the Covid-19 Act to the Constitutional Court and he/she also asked that the Constitutional Court (hereinafter: the CC) to grant interim measure and to stay execution of the contested Covid-19 Government Decree until the final ruling of the CC. The CC decided to grant anonymity to the applicant. Two out of seven judges of the CC disagreed on this point. The reasons for which the CC granted anonymity to the applicant are transparent only in the joint separate opinion of three judges.

In the petition, the applicant argued and that measures under Covid-19 Government Decree interfere with his/her freedoms beyond limits set in the IDA and in the Constitution Act

¹ Official Gazette of the Republic of Slovenia, 38/20 and 51/20.

² Some commentators argued that this is one of major illegalities in the whole process of drafting Covid-19 extraordinary measures - along with the fact that the Government even established a special body the “Crisis Headquarters” or “Crisis Unit” with the aim to coordinate all responses to the Covid-19 challenges without having legal basis for the creation of such a body. With this, the Government actually by-passed Article 20 of the Government of the Republic of Slovenia Act, which fully regulates the procedure to be followed in emergencies, defines the public bodies to be involved in tackling the crisis, defines the relations between them, and maintains a clear line of accountability (see, for example: Kukavica, Jaka, (*Rule of Law*) in the Time of Covid-19: *Warnings from Slovenia*, 25. 3. 2020, Werfassungsgsblog on Constitutional Matters). On 24 March 2020, the Government of Slovenia disbanded the Crisis Headquarters.

(freedom of movement – Article 32 of the Constitution Act and the right to peaceful assembly and public meeting – Article 42 of the Constitution Act).

It needs to be noted that the Covid-19 Government Decree regulated several exceptions from imposed restrictions and among them there is an exception for workers who work in different municipality that they live.

The applicant also argued that Article 3 of the contested Covid-19 Government Decree, which gives authority to the mayor of municipality to further regulate exceptions from general rules of restrictions, is not in line with the Constitution Act.

As regards the motivation of a legal interest for a petition, the applicant mentioned that he/she is a citizen of Slovenia, having a permanent residence permit in Slovenia, that he/she works in Slovenia and that violation of rules under Covid-19 Government Decree are considered to be misdemeanour, so that those measures affect his/her daily life.³ In his separate opinion, one judge argued that the CC should reject the petition, because of the lack of direct legal interests and that the applicant should first exhaust legal remedies before regular courts.

So far, the CC only decided about the request for interim measure to stop the execution of the contested Covid-19 Government Decree until the final ruling is given in this case.⁴ The CC had its session on 16 April 2020, while the contested Covid-19 Government Decree was in force only until 18 April 2020. That is why in his separate opinion one judge argued that a decision on interim measure cannot be effective and should not be granted.

However, the majority decided to partially grant the request for interim measure. The interim measure, which was decided by the CC, relates only to Article 7 of the Covid-19 Government Decree. This provision states that prohibitions in the Covid-19 Government Decree are in force as long as the Government does not establish and publish its decision in the Official Gazette that measures are not necessary (any more). By its interim measure, the CC suspended the execution of this provision and regulated the manner by which the decision of the CC should be implemented.⁵ The CC decided that the Government must immediately after a decision of the CC will be delivered to the Government, check whether measures in place are still necessary for the fulfilment of goals and must be accordingly adjusted, prolonged or ended, that the Government must inform the public on its decision and that this must be done based on expert opinions.⁶ The CC added that this decision has a “principled meaning”.⁷

Therefore, the CC decided to accept the petition for constitutional review by 8 votes against 1.

³ Under Constitutional Court Act anyone who demonstrates legal interest may lodge a petition that the procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority be initiated. Legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority whose review has been requested by the petitioner directly interferes with his rights, legal interests, or legal position (Article 24(1) and(2)).

⁴ Article 39(1) of the Constitution Court Act states that until a final decision, the Constitutional Court may suspend in whole or in part the implementation of a law, other regulation, or general act issued for the exercise of public authority if difficult to remedy harmful consequences could result from the implementation thereof.

⁵ Under Article 39(3) of the Constitution Act if the Constitutional Court suspends the implementation of a regulation or general act issued for the exercise of public authority, it may at the same time decide in what manner the decision is to be implemented.

⁶ Decision of the CC in case U-I-83/20-10, 16 April 2020, paras. 26, 28.

⁷ Ibid. para. 29.

Decision to suspend execution of Article 7 of the Covid-19 Government Decree was taken by 7 votes against 2.

The rest of the request for interim measure was rejected by 6 votes against 3.

The decision on the manner by which an interim measure is to be implemented was taken by 7 votes against 2.

It is perhaps relevant to note that in 7 days after the session of the CC on 16 April 2020, 75 new petitions for constitutional reviews of Covid-19 legislation have been lodged to the CC.

