

Summary of the ruling of the Constitutional Court of the Republic of Slovenia

U-I-83/20-36, 27. 8. 2020

The ruling of the Constitutional Court in case U-I-83/20-36 from 27 August 2020 deals with the question of compliance of general prohibition of movement outside the municipality, within which individuals have permanent or temporary residences, with the constitutional right to freedom of movement from Article 32 of the Constitution Act.¹

The contested measures on prohibition of freedom of movement between different municipalities were regulated by several consecutive governmental decrees, which were challenged in this case by an individual. The Constitutional Court (hereinafter: the CC) has limited constitutional review only to legal aspects that have been expressly invoked by that individual applicant in this particular case.² Many other cases related to Covid-19 measures are still pending before the CC. Thus, the CC in this particular case reviewed governmental decrees only from the standpoint of the Article 32 of the Constitution Act and not whether the provision of Article 39(1) of the Statute of Infectious Diseases which gives a mandate to the Government to restrict freedom of movement in such circumstances, is sufficiently defined in the sense that it is properly in line with the constitutional principle of legality (Article 120(2) of the Constitution Act).³ The later defines the relation between the Parliament and the Government as regards regulatory powers.

In the substantial part the CC first states that it will apply the principle of strict proportionality test.⁴ The assessment based on strict proportionality test is then divided into five structural parts: legitimate goal; proportionality of interference; appropriateness; necessity; proportionality in the narrow sense.

In the first structural part in order to confirm the constitutionality and legitimate goal of the contested measure the CC referred to (apart from constitutional provisions):

- to Article 12 of the (ICESCR) International Covenant of Economic, Social and Cultural Rights (*“the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”*);⁵
- to the ruling of the Federal Constitutional Court of Germany (1 BvR 1021720, 13. 5. 2020) in the part where German Constitutional Act recognised that the contested law properly allows in other to protect individuals whose health or life is in danger to restrict their freedom, but it also allows to restrict freedom of those who are not in danger;⁶

¹ The scope of constitutional review or the contested issue is defined in paragraphs 30-33 of the ruling.

² Under Article 30 of the Constitutional Court Act (principle of »connectedness«) in deciding on the constitutionality and legality of a regulation or general act issued for the exercise of public authority, the Constitutional Court is not bound by the proposal of a request or petition. The Constitutional Court may also review the constitutionality and legality of other provisions of the same or other regulation or general act issued for the exercise of public authority for which a review of constitutionality or legality has not been proposed, if such provisions are mutually related or if such is necessary to resolve the case.

³ Judge Špelca Mežnar in her separate dissenting opinion from 10. 9 2020, joined by Judge Katja Šugman Stubbs (paras. 26-31), highlighted that this aspect has been done differently in the case before the Austrian Constitutional Court (V 363/2020, 14. 7. 2020). The Austrian Court first reviewed the constitutionality of the statute (Covid-19 Act), which gave a legal ground for the minister to issue an act to regulate prohibition of movement and in the next step then the Austrian Constitutional court reviewed whether that act of the minister (by-law) was in line with the Constitution Act.

⁴ U-I-83/20-36, 27. 8. 2020, para. 41.

⁵ Ibid. para. 42

⁶ Ibid. para. 43. (In this sense, the CC has interpreted the ruling of the German Constitutional Court).

- in the same sense a reference was made also to the preamble of the ICESCR in order to get to introduce the term or standard of “mutually ethical behaviour of all individuals”.⁷

In the second structural part (proportionality of interference) the CC only points out that several factors need to be taken into account: the need of speediness of action of the Government; the fact that the actual infectious disease was unknown, this includes that scientific and medical researches in this field are not yet developed; the need that Government use as much as possible support of scientists in this field in order to minimise uncertainty; the Government has a wide margin of appreciation in taking decision on a particular choice between various possible measures.⁸

In the third structural part (appropriateness), the CC decided that recognising the link between some public statements of the scientists during the press conferences and the contested measures on prohibition of movement between municipalities those measures can be considered as sufficiently appropriate in the sense that they could contribute to prevention of further spread of virus. The relevant time of assessment of appropriateness is the time, when the measures have been adopted.⁹

In the fourth structural part, the CC actually conducts the necessity test. The CC checks whether the same goal could be attained with less intrusive means. Here, the CC points out to the need of speedy reaction of the Government, that Covid-19 puts danger to health and life of a high number of individuals and that health system must be protected to secure sufficient resources available to confront the health care crisis. Again, the CC refers to Article 12 of the ICESCR.¹⁰

In the fifth structural part the CC examines whether the measures are proportionate in the narrow sense. This consists of an answer to the question whether the negative consequences (burden) of interference into the right to freedom of movement is proportionate to the benefit expected for the protection of health and life of peoples. The important factors that determined a decision of the CC were several exceptions of prohibition on freedom of movement for the purposes of work and provision of essential public services. Here, the CC mentions “duties” of individuals towards the others in the community. It seems that the standard of proof that the CC is using is “reasonable probability” of positive influence of contested measure on the aforementioned protected values. Bad experiences in Italy were mentioned in this part.¹¹ The CC also took into account that measures were temporarily limited.¹²

The applicant invoked also the argument of the incompatibility of the contested measures with Articles 92¹³ and 16¹⁴ of the Constitution Act. The CC established that the state of emergency under Article 92

⁷ Ibid. para. 43. In this context Judge Dunja Jadek Pensa in her separate opinion from 9. 9. 2020 (pp. 1, 9-10) referred to the term »solidarity«.

⁸ Ibid. paras. 45-46.

⁹ Ibid. para. 47-51. tem

¹⁰ Ibid. para. 52.

¹¹ Ibid. para. 55.

¹² Ibid. para. 56.

¹³ Article 92(1) states that a state of emergency shall be declared whenever a great and general danger threatens the existence of the state. The declaration of war or state of emergency, urgent measures, and their repeal shall be decided upon by the National Assembly on the proposal of the Government.

¹⁴ Article 16 states that human rights and fundamental freedoms provided by this Constitution may exceptionally be temporarily suspended or restricted during a war and state of emergency. Human rights and fundamental freedoms may be suspended or restricted only for the duration of the war or state of emergency, but only to the extent required by such circumstances and inasmuch as the measures adopted do not create inequality

of the Constitution Act was not declared and, thus, the CC very briefly explained that protection of human rights in this case was examined through the strict test of proportionality, which is applicable in circumstances where state of emergency is not declared.¹⁵

Based on this the CC decided that measures did into disproportionately interfered in the right to freedom of movement.¹⁶ The decisions were taken by votes 5:4. All judges have written separate either dissenting or concurring opinions.

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Ljubljana, 24 October 2020

based solely on race, national origin, sex, language, religion, political, or other conviction, material standing, birth, education, social status, or any other personal circumstance.

The provision of the preceding paragraph does not allow any temporary suspension or restriction of the rights provided by Articles 17, 18, 21, 27, 28, 29, and 41.

¹⁵ Ibid. para. 62.

¹⁶ Ibid. para. 59.