

CONSTITUTIONALITY DURING TIMES OF CRISIS: ANTI-PANDEMIC MEASURES AND THEIR EFFECT ON THE RULE OF LAW IN CROATIA

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Abstract: *The Croatian constitution-maker's dedication to the concept of a social state begets the state's duty to care for public health. This duty is especially salient amid the SARS-CoV-2 virus pandemic. One would be well-advised to be watchful of the dangers that periods of crisis pose for the viability of liberal democracies: in Croatia, protective measures against the COVID-19 disease have been entrusted to the national Civil Protection Command in an initially illegal way. This was later on retroactively convalidated by legislative "patchwork" solutions. It is to be expected that the issue of such measures' constitutionality will in the foreseeable future present itself on the Constitutional Court's docket. This paper focuses on one of the most contentious measures - that of a ban on Sunday trade, particularly its implications for the economic constitutional rights such as the right of ownership and entrepreneurial freedom. Furthermore, the authors' analysis of several Constitutional Court's decisions from the time of the previous economic crisis will endeavor to anticipate the Court's decisions in upcoming cases.*

Keywords: *COVID-19, Crisis measures, State of emergency, Right of ownership, Croatian Constitutional Court.*

1. INTRODUCTION

Given that the contemporary social state goes beyond a mere guarantee of an existential minimum and instead encompasses the preconditions for the free participation in social and political processes whose realization greatly hinges on the accessibility, universality and affordability of education, healthcare etc., the social state citizen is an "actual participant of the democratic process, freed from singlemindedness and coercion, and ensured against privation" (Kuzelj, 2019: pp. 65-66). It is, therefore, justifiable to talk about the state's obligation to provide healthcare and guard the public health. In constitutionalizing the social state concept (Art. 1. par. 1), the Constitution of the Republic of Croatia (henceforth: CRC) indubitably positions the Republic of Croatia (henceforth: RC) among the socially sensitive constitutions of contemporary European democracies, guaranteeing to all the right to healthcare (Art. 59) and a healthy life (Art. 70. par. 1), while simultaneously imposing a general duty to accord – within the scope of individual powers and activities – particular attention to human health (Art. 70. par. 3). These provisions should be interpreted to grant the authorities the powers and duties aimed at public health protection – a fact especially salient in the present conditions of the COVID-19 pandemic.

It is self-understood that anti-epidemic measures, while tailored to the protection of the constitutional right to health, also limit certain other constitutional rights and freedoms to a degree. It's precisely the emergency situations that bring to the limelight the dual (and not just a little paradoxical) nature of law as a product of political conceptions that simultaneously also serves

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as a great limiter of discretionary decision-making by precisely those political bodies that create and/or influence it in the first place. In this sense, Gardašević (2003, p. 88) stresses the importance of “determining the role of law as an order guaranteeing fundamental rights” and of its success in limiting the capacity of political bodies to enforce arbitrary policies. For him, this is the very essence of the rule of law and legal state.

Croatian constitution-makers left the balancing of conflicting constitutional guarantees to the legislator, on a case-by-case basis, with Art.16.par.2 mandating respect for the principle of proportionality. Bearing in mind the pregnancy of times of emergency, there is a differentiation between the venues of limitation of fundamental rights according to the circumstances that give rise to them. Fundamental rights may be limited in regular circumstances (Art. 16. par. 1), relying on the need to protect public health, as well as by use of a stricter procedure in emergency situations (Art. 17). The CRC does not refer to “regular” or “exigent” circumstances *verbatim*, but defines the latter as times of war, an imminent threat to the independence and unity of the state, and natural disasters (Art. 17. par. 1). The meaning of the former, on the other hand, is deduced by use of the *argumentum a contrario* principle.

The fact that there was no proclamation of a natural disaster in the RC during the COVID-19 pandemic, or that (significant) limitations to fundamental rights and freedoms weren't adopted pursuant to the stricter Art. 17 parliamentary procedure demanding a 2/3 parliamentary majority is worrisome. Moreover, the majority of such limiting measures weren't introduced by use of a statute, but through the decisions of the national Civil Protection Command (henceforth: the Command), a body that was initially not even legally authorized to adopt such measures. Hoping to prevent an imminent find of formal unconstitutionality, the ruling majority tried to offset the danger by a retroactive convalidation of such measures (see *infra*), reflecting the crisis of constitutionalism plaguing the modern concept of liberal democracy. This chronic crisis of constitutionality in the RC was diagnosed in 2019 (Smerdel, 2019: p. 19): “We consider a constitutional crisis to be, first and foremost, a state where the usual understanding of constitutional norms cannot resolve even a slightly serious conflicting situation, usually between branches of government”. Bearing this in mind, as well as the fact that a constitution cannot be the guarantor of its own realization but instead requires active citizen involvement in the defense of constitutionally guaranteed rights and freedoms, the authors must conclude the following: for the RC, a wise saying attributed to Benjamin Franklin (see Brockell, 2019) has never been more applicable than it is today. Croatians have “[a] republic, if [they] can keep it”.

The following section will therefore accentuate some of the most controversial questions of the Command's public health protective measures. Special attention will be paid to the economic impact of the analysed measures, especially regarding the ban on Sunday trade. In anticipation of the Constitutional Court's (henceforth: the CC) decision the authors will also provide a short overview of decisions issued during the previous 2008 economic crisis, and use those lessons to try to foresee the reasoning expected to be used in prospective cases. We must however, stress the particularities of the 2020 pandemic in relation to the 2008 recession, given that the latter's measures influenced the realization of individual socio-economic rights, while the former impact not only on those but basic civil liberties as well.

2. EFFECT OF CRISIS MEASURES ON THE RULE OF LAW IN CROATIA

At the beginning of Croatia's independence, the CC (1992) established that there is no constitutional mandate requiring a special proclamation of a state of emergency. A state of emergency is a matter of facts, independently of whether the ruling elite wants to recognize this and subordinate itself to a much stricter constitutional standard (a 2/3 parliamentary majority for any ensuing limitations of fundamental rights). An insistence on the principle of normalcy (Scheinin, 2020), i.e. of navigating the crisis by use of the usual means available in domestic legal orders (Tzevelekos, 2020) can be dangerous, since the measures adopted „are not expressly quarantined to exceptional situations“ (Greene, 2020) and may underperform in their adherence to terms of necessity, proportionality, temporality and commitment to human rights (Scheinin, 2020).

Amid the COVID-19 pandemic, the Croatian government decided not to recognize a *de facto* state of emergency, in spite of the Constitution's Art. 17 that expressly recognizes a state of „natural disaster“ as one such emergency. This was done notwithstanding the fact that Art. 17 actually also incorporates a principle of proportionality that is lesser in stricture than the one used by Art. 16, which rules the „business as usual“ (ordinary) legislative process. The practical implications of this move are that the measures adopted – and expected to be subjected to the scrutiny of the CC - must pass a strict proportionality mandate, that is be necessary and not just „appropriate“ to the emergency at hand (Art. 17). This is a test the authors hold will be hard to satisfy regarding one of the most contentious measures adopted during the pandemic – that of a ban of Sunday trade, curtailing both the right to work as well as the right of ownership and entrepreneurial freedom.

The measure was one of the latecomers among the package adopted by the Command – an *ad hoc* body composed of 27 various government and public administration bodies' representatives, most notably from the Ministry of Health, the Croatian Institute of Public Health (CIPH) and Ministry of the Interior. Legally speaking, the majority of measures adopted were indisputably in the purview of the Minister of Health under the condition that an epidemic is proclaimed pursuant to the Act on the Protection of the Population from Infectious Diseases (APPID) - which it was on 11 March 2020. On 18 March 2020, the new Art. 22a of the Civil Protection System Act bridged the gap separating it from APPID, enabling civil protection units to be employed in governing the pandemic situation. The system of civil protection thus became *the* transmission mechanism to enforce the decisions made by the Minister of Health. The only problem? The Minister was not the one making the decisions but rather the Command, whose member the Minister *wasn't*. This stunning omission by the government sidelined the existing legal framework, threatening slippage into a “*de facto* dictatorship” and marking a “suspension of democracy”, as noted by the CC's justice Abramović (2020). Therefore, all decisions made by the unauthorized Command should have been deemed null and void (as they were adopted *sine* legal basis). Their unconstitutionality was, however, hastily attempted to be redeemed on 17 April 2020 by a retroactively applicable (Gardašević, 2020) amendment of APPID (Art. 18 of the amending Act), adopted in emergency parliamentary proceedings. The constitutionality of this retroactivity itself is very much in dispute, given the fact that the Parliament violated its own Standing Orders which specify (in Art. 193) that the Parliament should first have voted on the question of retroactivity and only after that could have proceeded with the final vote on the amendment. As those Orders supersede ordinary laws, this clearly presents an issue of formal unconstitutionality. At this time, there are – unsurprisingly – at least 27 applications before the CC, including by two of the CC's very own justices, claiming unlawful violation of fundamental rights (giving rise to potential damages claims).

The same amendment of the APPID also gave birth to another curious legislative maneuver that removed the Minister of Health as the fulcrum of the decision-making process regarding epidemiologically-mandated measures. After Art. 10 of the amending act transferred that power over to the Command, the Minister's role became reduced to that of the person proclaiming the epidemic. Other than that, he became merely one among the predominantly political members of the Command and not even as a *bona fide* member, but a co-opted, discretionarily associated one (see the relevant Regulation in the Official Gazette Nos. 126/19 and 17/20, and the Decision on Appointment of Authority members in the Official Gazette No. 20/2020 - *not* including the Minister among the Authority members). A little more than two months before the early parliamentary elections (scheduled for 5 July) this body then appeared to fuse the “good with the useful”, using the veil of the “relaxation of pandemic-fighting measures” in order to buttress popular support for the right-wing ruling coalition by banning Sunday trade. *Nota bene*, the four most prominent members of the Authority – Ministers of the Interior and Health, head of the CIPH, and head of Croatia's central infectious disease hospital, are all members or known supporters of the ruling party.

This Decision from 24 April 2020 joined the package whereby other Sunday activities like congregating for religious purposes (from 2 May) and various services (e.g. restaurants, coffee bars, beauty salons etc. – from 11 May) were, conversely, once again allowed. The question whether such a schedule of easing the pandemic-fighting measures was acceptable under the Constitution's Article 16 became crucial. It is to be remembered that the Article in question requires a particularly stringent proportionality test in limiting fundamental freedoms – that of necessity or, alternatively, use of the “least restrictive measure”. It is indisputable that the protection of public health is one of the constitutional goods enumerated in Article 16, and is therefore presumed to be a valid reason for limiting various rights such as the right to work, right of ownership and entrepreneurial freedom. However, the outcome of the “necessity” analysis hinges on the symmetrical nature of the Command's decisions. Their respective inter-balance is the litmus paper revealing whether they are synergistic, or rather arbitrary and violative of the constitutional Art. 3 and its mandate to respect the rule of law. One would be within their rights to ask how precisely Sunday trade is detrimental to the epidemiological situation in the country whereas mass gatherings in places of worship, coffee shops and hairdressing salons are not. It is well one thing to say that “public health” is a viable constitutional goal overriding some aspects of particular fundamental rights. But it is quite another to cast it as a vehicle legitimizing any and all discretionary choices of a pseudo-legislative body answerable directly to the Government that sidesteps a capable Parliament and ignores a constitutional mandate that requires stricture of parliamentary decision-making in the state of emergency that is *praeter*-constitutionally refused to be recognized.

Adoption of “out of step” measures that seem tailored to the appeasement of the conservative electorate cast significant doubt as to their constitutionality. This is especially so when we consider the fact that the 24 April decision achieved a goal until now inaccessible to the Parliament itself. Namely, the CC has already had two chances (in 2003 and 2009) to pronounce on the constitutionality of Sunday trade bans. It made it very clear that such a violation of entrepreneurial freedom cannot be justified by an idea of an unencumbered, family-centered Sunday for the employees, as Croatia is a secular state. It furthermore stressed the “*propriam turpitudinem nemo allegans*” rule, meaning that the State could not cite workers' lack of protection against a violation of their rights to a paid Sunday's work (and a day off at other times of the week) as the reason behind the ban (as the State *itself* is the one tasked with upholding the law across its territory). In a comprehensive analysis, Staničić (2020) called the conditions for constitutionality for a (parliamentary-imposed) Sunday trade ban „exceedingly difficult, if not even impossible“. In this newest, third Sunday trade ban, the discrim-

inatory element is most salient. It will be the task of the CC to determine whether there were any epidemiologically-relevant reasons to distinguish between various subsets of the same class of entrepreneurs (seeing as services such as newsstands, gas stations and bakeries were exempt from the ban) or among the trade vs. service activities, regarding their respective conduciveness to the spread of the epidemic. The authors posit that there were none, just as they posit that the qualitative synergy of these classifications with the free conducting of religious gatherings makes a strong case for the unconstitutionality of the analyzed measures. This is further corroborated by the fact that the Command relinquished the ban from 31 May onwards, after only 5 Sundays, following a popular backlash against the loss of jobs predicted to come about due to the ban. Paraphrasing Milton Friedman's famous observation and acknowledging that nothing is more permanent than a temporary fix, the authors await the Court pronouncement(s) with bated breath, keeping the hope that "the damage to democracy [will not – authors] be greater than the damage caused by any virus" (Abramović, 2020).

The authors must therefore next look to the decisions of the CC on the constitutionality of particular (emergency) measures adopted during the previous 2008 economic crisis, so that we could use those recent experiences to try and predict its reasoning in the upcoming cases. Specifically, the decision on the constitutionality of the so called "crisis tax" is one of the most controversial Court's decisions in the past 30 years. Measures that were contrary, or at the very least dubitable from the viewpoint of the constitutional concept of a social state (Art. 1. par. 1), social justice and equality as the highest values of the constitutional order (Art. 3), equality before the law (Art. 14) and constitutional principles of taxation (Art. 51) were deemed constitutional (Bačić, 2013: p. 195 *et seq.*; Cindori, Kuzelj, 2018: p. 490 *et seq.*). Among other things, the CC (2009, § 16) favored the particular importance of the crisis tax for the stability of public revenues at the expense of absolute equality and equity in its collection, defining "the qualified public interest" as overriding the inequalities created by the legislation among its addressees. The decision stressed the temporal limitations of the crisis tax and its sunset clause, leading one to conclude that it was this which gave rise to the claim that "a special tax ... can in its present form be temporarily supported in the Republic of Croatia's legal order". The question then becomes how the CC was able to verify this qualified public interest if not by lending faith to the Government's explanatory memorandum, given the collision of such a legislative solution with the fundamental constitutional postulates. The very purpose of constitutional review becomes moot in a situation where the Government's explanations are taken at face value. The arbitrariness of the Government's actions was additionally accentuated by the fact that the crisis tax had no major impact on the national deficit and that it was abolished before the deadline stipulated in the sunset clause, in spite of the fact that the economic crisis outlasted the mandate of the Government itself (Cindori, Kuzelj, 2018: pp. 494-495). In this sense, Bačić (2013: p. 196) stresses the need for a "radical critique of that law, with the belief that judges should sooner defend the permanent goals of the Constitution than the fickle and short-term political measures of temporary governments". Finally, in spite of leaving the crisis tax in force, there was no beneficial impact on the economy and there was "an impression of offloading the whole burden of the crisis on the citizens, while neglecting particular irregularities ... lead to a deepening mistrust towards the Constitutional Court's task as the keeper of the Constitution" (Cindori, Kuzelj, 2018: p. 497).

Finally, this paper will look at two more recent cases regarding the constitutionality of the so called "legislation on privileges" of state and public service employees. The CC (2015a: § 45; 2015b: § 29) stressed that it could not deny that the applicant's objection towards the Government's demeanor during the collective negotiation process was well founded. The issue of Government's procedural (un)fairness was underlined in connection to actions that went against the principle of collective bargaining, specifically to the unacceptability of having negotiations on employees' material rights

and benefits almost immediately followed up by a law derogating them without any previous re-negotiation of the collective agreement (CC, 2015a: § 45.1.). In a second decision (CC, 2015b: § 29.1.), the Court acknowledged that the course of collective bargaining preceding the enactment of the disputed legislation was marred by a series of shortcomings, most visibly demonstrated by the fact that the Government did not even plan for the budgetary means required by the assumed obligations, in spite of the applicable collective agreements. In both these decisions, the CC (2015a: § 46; 2015b: § 31) found discrepancies in the Government's actions deviating from the full respect for democratic procedure. But, assessing the issue in its entirety as well as within the context of the measure's adoption and prolongation of validity, the CC concluded that those particular cases did not cross the threshold of legalizing arbitrariness (i.e. unlimited political power). It remains unclear on what basis the CC judged the legitimacy of "veering away from a full respect for democratic procedure" and what does this "less-than-full" respect for such procedure mean for the fundamental rights guarantees. Finally, in assessing the proportionality of the disputed measures the CC (2015a: § 66-67; 2015b: § 44) once again stressed the conditions of economic crisis where such measures were adopted, their characteristics giving rise to their extraordinary nature and the limited nature of their application. It articulated the belief that a renewal of those measures could put into question the realization of the principle of proportionality and turn into an issue of respect for the rule of law, certainty and predictability. Everything considered, there is a clear tendency for the CC to tolerate crisis measures which are suspect from the viewpoint of constitutionality, as long as they are extraordinary and of limited duration.

3. CONCLUSION

At times of crisis, we must bear in mind how fragile liberal democracies are in the face of exigent measures adopted in circumstances of emergency and danger that can serve to conceal the particular interests of the ruling elites. In relation to the last great economic crisis from 2008, the COVID-19 pandemic is special due to its impact not only on socio-economic but also civil rights and liberties. The RC, a country founded on lasting adherence to the virtues of democracy and social welfare, is faced not only with a pandemic but also with an attempt by the ruling coalition to further its political interests. In this sense, the Sunday trade ban stands out as highly interesting. The authors must express their hope that the CC will not follow its earlier precedent in the upcoming cases, and that it will break from the belief that a "partial deviation" from respect for democratic procedure could be justified by the measures' extraordinary character and limited duration. It is therefore fitting that we should remind of Art. 5. par. 2 CRC whereby everyone is under the obligation to uphold the Constitution and respect the legal order of the RC, applying to the legislator as well as other authorities (the Command included). If those should be unable to stand by the constitutional principles, their actions certainly cannot be in a "qualified public interest".

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