Public Authority

Scope and effects of the Judgement of the CC declaring the Royal Decree declaring the state of alarm partially unconstitutional

The Judgement of the Constitutional Court of 14 July 2021 has declared certain provisions of Royal Decree 463/2020 unconstitutional. We analyse the scope and legal consequences in this note.

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The Constitutional Court's Judgement of 14 July 2021 (Pedro González Tervijano, judge delivering opinion of the court) has partially upheld the appeal for unconstitutionality filed by the Vox parliamentary group against certain provisions of Royal Decree 463/2020 of 14 March, declaring the state of alarm to manage the health crisis caused by COVID-19 and other regulatory acts of the state of the alarm, with the following scope:

a) Three sections of Article 7 regarding "limiting the freedom of movement of individuals" have been declared null and unconstitutional in the drafting resulting from the amendments implemented by subsequent royal decrees. Specifically, the provisions annulled are: Section 1, which establishes the only reasons for which movement in public areas was allowed; Section 4, which applied the same limits to the movement of private vehicles on public roads; and Section 5, which authorises the Minister of the Interior to prohibit travelling on highways or sections thereof and to restrict access of certain vehicles for reasons of public health, safety or fluidity of traffic.

b) With regard to Article 10 on "containment measures in commercial activity, cultural facilities, establishments and recreational activities, hotel and restaurant activities and other additional activities", the authorisation granted to the Minister of Health contained

in Section 6 is declared null and unconstitutional insofar as it permits the Minister to "amend" or "extend" the restrictions of the provision, declaring these two terms null and unconstitutional.

Although the judgement, (and what surrounds it: the moment at which it was issued, the leaking of divisions and criticisms at the court, leaking of drafts, etc.) may incite it, the purpose of this analysis is not to criticise it, but only to present its legal arguments and its possible impact for all those whose legitimate interests or rights have been affected by the provisions of Royal Decree 463/2020, which have now been declared unconstitutional.

- *The legal arguments of the Judgement*

  As noted, firstly, the Judgement declares unconstitutional the measures that limit the freedom of movement contained in Sections 1, 3 and 5 of Article 7 of the Royal Decree. The Judgement argues in this regard that inherent to the constitutional freedom of movement is its unrestricted application and practice in "public spaces", regardless of the purposes that the right holder may determine, and without the need to give a reason to the authorities for their presence in such spaces. The CC understands that the annulled provisions *cancel* this freedom, given that they limit the purposes that may justify movement in such areas and authorises the Ministry of the Interior to close them off.

  As a result, the judgement criticises that under the validity of the annulled provisions, the freedom of movement is not established as a rule, but rather as an exception; an exception that is duly limiting: both due to its purpose (limited to certain events, although it does not appear to be set *numerus clausus*) as well as due to limiting the circumstances in which it may be carried out ("individually" with exceptions).

  Based on this, the CC concludes that the Royal Decree therefore establishes a restriction of the right which "at the same time, applies generally to its subjects, and is highly intensive with regard to its content, which, undoubtedly exceeds what the law allows to "limit" for the state of alarm ("movement or remaining... at certain times and places").

  And with that, the Judgement presents its *ratio decidendi*, with a very brief summary: in the CC's view, the provisions do not restrict or limit the right to move freely, but "suspend it *ad radice*, generally, for all 'individuals' and by any means". Corollary to this, as it concerns a suspension and not a mere restriction of the affected rights, in accordance with Organic Law 4/1981 and Article 55 and 116 of the Spanish Constitution, the Government is prohibited from ordering it via the declaration of the state of alarm.

  The CC also considers that Section 1 of Article 7 of the Royal Decree affects the fundamental right of Art. 19.1 of the Constitution to "freely choose one's own residence", meaning that, only allowing returning to one's habitual place of residence prevents the exercise of the constitutional right to freely determine the place in which one wishes to set their habitual residence.

  The second declaration of unconstitutionality contained in the Judgement refers to Section 6 of Article 10 of the Royal Degree, which authorises the "Minister of Health to amend, extend or restrict the measures, places, establishments and activities listed in the preceding sections, for justified reasons of public health, with the scope they specifically determine".

The Judgement declares unconstitutional and void the words "amend, extend or" as it understands that "the effects of the declaration of a state of alarm must be contained in the decree that establishes them" and that, while it allows that the measures originally included in it to be amended, this modification may only be performed by the Government itself, which must render account to the Spanish Parliament for the decrees adopted during the state of alarm (Art 8.2). This rendering of accounts to the Spanish Parliament is qualified as a "guarantee of political order which in may no way be dispensed with".

This declaration of unconstitutionality of the regulatory authorisation contained in the Royal Decree Law is derived from the order of all those adopted by the Ministry of Health that intensified or extended the limits established in it lacking the necessary authorisation.

- *The legal consequences of the Judgement*

  Despite declaring these provisions of the Royal Decree unconstitutional, the Judgement acknowledges the proportionality of the measures adopted that coincide with those applied in neighbouring European countries. The Constitutional Court states that "the drastic impact on the freedom of movement as a result of Article 7 (numbers 1 and 3) of Royal Decree 463/2020 was aimed at preserving, defending and restoring life and health", which were "in a situation of extreme risk".

  Thus, the Judgement limits itself to concluding that the extraordinary restrictions on the freedom of movement throughout the national territory imposed by Article 8 (Sections 1, 3 and 5) of the Royal Decree, although they are aimed at protecting constitutionally relevant values and interests and are in line with the measures recommended by the World Health Organization, exceed the scope of the state of alarm as acknowledged in the Constitution and Organic Law 4/1981. Without judging intentions, the CC exercised restraint, and insisted on redirecting all reproaches it establishes to formal categories without questioning their good will from a substantive (as we refer to it) point of view.

  Regarding these circumstances, the Judgement adjusts the effects of the declaration of nullity resulting from the declaration of unconstitutionality in the following terms:

  a) It declares not only the procedures concluded with a final judgement or the actions decided via final administrative actions are not liable to be reviewed, but *"nor are other legal situations caused by applying the annulled provisions"*.

  This is justified by the fact that the partial unconstitutionality of the Royal Decree is not derived from the material content of the measures adopted, whose need, suitability and proportionality are accepted, but the legal instrument via which they were implemented. To which was added that, given that the suspension affected the general population, "it is not justified that single claims for review be attended to based exclusively on unconstitutionality when there are no other elements of unlawfulness" for the sake of the constitutional principles of legal certainty and equality.

  b) Conversely, the court declared the possibility of reviewing the criminal procedures or contentious-administrative procedures referring to a sanctioning procedure in which, as a result of the nullity of the rule applied, results in a reduction of the penalty or the sanction or an exclusion, exemption or limitation

of liability, pursuant to Art. 40.1 *in fine* of the Organic Law of the Constitutional Court. This is how the principle of legality on punitive action of Article 25.1 of the Constitution establishes it.

c) Lastly, it is declared that the unconstitutionality considered in the Judgement "is not an authorisation to base claims of financial liability of the public administrations, without prejudice to Art. 3.2 of Organic Law 4/1981 of 1 June on states of alarm, emergency and siege".

These rulings of the Judgement are completely atypical, both with regard to the impossibility to review legal situations derived from the acts that have not been ruled final, as well as regarding that Article 32 of Act 40/2015 of the Legal Rules of the Public Sector is exempted, which allows, under certain circumstances, to claim financial liability derived from the damage s that are "a result of a legally binding rule declared unconstitutional". Its implications and dilemmas are beyond the limits of this preliminary analysis, but will need to be discussed -at great length- in the future.