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CONSTITUTIONAL COURT

11120 BELGRADE
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Pursuant to Article 168(2) of the Constitution of the Republic of Serbia, the Belgrade Centre for Human Rights submits

THE INITIATIVE FOR THE REVIEW OF THE CONSTITUTIONALITY AND COMPLIANCE WITH A RATIFIED INTERNATIONAL TREATY

of Article 2 of the Decree on Misdemeanour Violations of the Interior Minister's Order Restricting and Prohibiting Movement of Individuals in the Territory of the Republic of Serbia (*Official Gazette of the Republic of Serbia*, No. 39/20)

Statement of Justification

The Decree on Misdemeanour Violations of the Interior Minister's Order Restricting and Prohibiting Movement of Individuals in the Territory of the Republic of Serbia lays down that individuals who violate the prohibitions under paragraphs 1) and 2) of the Order Restricting and Prohibiting Movement of Individuals in the Territory of the Republic of Serbia (*Official Gazette of the Republic of Serbia*, No. 34/20), shall be punished for the misdemeanour by a fine ranging from 50,000 to 150,000 RSD (Article 1).

The impugned Article 2 of this Decree sets out that misdemeanour proceedings may be initiated and completed also in the event that criminal proceedings for a criminal offence comprising elements of the misdemeanour have already been initiated against the perpetrators or are pending against them, notwithstanding the prohibition under Article 8(3) of the Misdemeanour Act (*Official Gazette of the Republic of Serbia*, Nos. 65/13, 13/16, 98/16 – Constitutional Court decision and 91/19).

The Interior Minister's Order Restricting and Prohibiting Movement of Individuals in the Territory of the Republic of Serbia lays down that, with a view to suppressing and preventing the spread of communicable disease COVID-19 and protecting the population from that disease: 1) persons over 65 in settlements with a population exceeding 5,000 and persons over 70 in settlements with a population under 5,000 shall be prohibited from movement in public areas, i. e. outside their homes, residential premises and facilities in residential buildings and outside their households (yards), except in the period from 3 am to 8 am on Sundays; 2) everyone shall be prohibited from leaving their homes, residential premises and facilities in residential buildings and their yards from 5 pm to 5 am, except on Saturdays, when the prohibition shall apply from 5 pm to 3 am, and that, exceptionally, pets may be taken out for 20-minute walks between 8 pm and 9 pm every evening, but within a 200 metre radius from their owners' temporary or habitual place of residence; 2a) movement in all parks and public areas designated for sports and recreation shall be prohibited as of 8 pm on 21 March 2020. The Order sets out that the prohibitions under its paragraphs 1) and 2) shall not apply to licenced health professionals, on-duty officers of the Ministry of the Interior, Ministry of Defence, security services and the Army of Serbia, individuals issued movement passes by the Ministry of the Interior, natural persons urgently in need of medical assistance and maximum two individuals accompanying them, as well as Serbian or foreign nationals who are members of crews of motor vehicles, ships or railway vehicles and cabin crews of aircraft used in international road, rail, water and air transportation.

Paragraph 5) of the Order further lays down that non-compliance with the prohibitions under paragraphs 1) and 2) shall be punishable as a criminal offence under the Criminal Code (*Official Gazette of the Republic of Serbia*, Nos. 85/05, 88/05 – corr., 107/05 – corr., 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19), and as a misdemeanours under the Decree on Misdemeanour Violations of the Interior Minister's Order Restricting and Prohibiting Movement of Individuals in the Territory of the Republic of Serbia.

Under Article 248 of the Criminal Code, everyone who, during an epidemic of a dangerous communicable disease, fails to comply with regulations, decisions or orders setting forth measures for the suppression or prevention of the epidemic, shall be punished by a fine or imprisonment up to three years.

Article 8(3) of the Misdemeanour Act (*Official Gazette of the Republic of Serbia*, Nos. 65/13, 13/16, 98/16 – Constitutional Court decision, 91/19 – other law and 91/19), which is

mentioned in the impugned Article 2 of the Decree on Misdemeanour Violations of the Interior Minister's Order Restricting and Prohibiting Movement of Individuals in the Territory of the Republic of Serbia, lays down that misdemeanour proceedings may not be initiated against anyone finally convicted for a criminal offence comprising elements of a misdemeanour and that any such misdemeanour proceedings, either initiated or pending, may not be continued or completed.

The above provision of the Misdemeanour Act and Article 4 of the Criminal Procedure Act (*Official Gazette of the Republic of Serbia*, Nos. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14 and 35/19) elaborate the right enshrined in Article 34(4) of the Constitution of the Republic of Serbia (legal certainty in criminal law). Under the latter provision, no one may be prosecuted or sentenced for a criminal offence for which he or she has already been finally acquitted or convicted, for which the charges have been dismissed or criminal proceedings discontinued by a final decision; court decisions may not be modified to the detriment of the defendant in proceedings initiated by the filing of an extraordinary legal remedy; and, the same prohibitions shall apply to all other proceedings conducted for any act punishable by law. This right, which is based on the *ne bis in idem* principle, is also guaranteed by the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). Under Article 4 of Protocol No. 7 to the European Convention on Human Rights, "[N]o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.". Pursuant to the European Court of Human Rights' case law, this prohibition applies to all penal proceedings (under the so-called Engel criteria - *Engel and Others v. the Netherlands*, App Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72) and final decisions delivered in such proceedings in the States Parties.

Article 202 of the Constitution of the Republic of Serbia prohibits derogation from the rights enshrined, inter alia, in Article 34 of the Constitution (legal certainty in criminal law) during a state of emergency or a state of war. Article 4 of Protocol No. 7 to the European Convention on Human Rights also lays down that no derogation from this Article shall be made pursuant to Article 15 of the Convention, i. e. in time of war or other public emergency threatening the life of the nation.

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The impugned provision of the Decree on Misdemeanour Violations of the Interior Minister's Order Restricting and Prohibiting Movement of Individuals in the Territory of the Republic of Serbia allows derogation from the prohibition under Article 8(3) of the Misdemeanour Act, i. e. it allows the conduct of misdemeanour proceedings and punishment for misdemeanours under Article 1 of the Decree of individuals finally

convicted for a criminal offence under Article 248 of the Criminal Code in the event the legal elements of that criminal offence, particularly with respect to its commission, fully comprise the elements of the misdemeanour.

The submitters of this Initiative hold that the impugned provision is not in compliance with Article 34(4) of the Constitution of the Republic of Serbia and Article 4 of Protocol No. 7 to the European Convention on Human Rights.

The Belgrade Centre for Human Rights therefore proposes to the Constitutional Court to issue a ruling initiating the review of the constitutionality of Article 2 of the Decree on Misdemeanour Violations of the Interior Minister's Order Restricting and Prohibiting Movement of Individuals in the Territory of the Republic of Serbia and its compliance with a ratified international treaty.

Belgrade,
25 March 2020

For the submitter of the Initiative

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