



## Research Article

Andraž Teršek, Ph.D.

# On Police-Military Cooperation in Peacetime: Constitutional and Ethical-Political Memorandum

<https://10.1515/openms-2020-0114>

Received May 24, 2021; accepted Jul 01, 2021

**Abstract:** Among the more important socio-political issues that have appeared on the surface of the public agenda is the question of cooperation between the police and the army. In the article, the author analyzes this issue both in general and in the specific context of the Republic of Slovenia. He explains that the Slovenian Government did not formally declare a "state of emergency," although the Slovenian Constitution allows it, but officially declared an epidemic and used a special provision in the Defense Act that allows the Slovenian Army to take action in so-called "exceptional" social circumstances and establish police-military cooperation on the ground. The author explains the constitutional dimensions of such cooperation and its ethico-political perspective.

**Key Words:** State of Emergency, Exceptional social circumstances, Police, Army, Ethics of Politics, Constitutional Law.

Shortly after the outbreak of the official coronavirus pandemic, a controversial and elusive question about the legal conditions for *police-military cooperation in peacetime* moved to the forefront of public controversy and onto the agenda of daily politics.<sup>1</sup> Thus, in the spring of 2020, I was asked the question<sup>2</sup> of how the provision of Article 37.a of the *Defense Act*<sup>3</sup> is to be understood constitutionally and ethically-politically, and whether the actual social situation (actual external, objective social circumstances) meets the actual and legal conditions for the actual (legal and political) application of the article. I will put forward the thesis that these grounds are fulfilled. I will try to justify this thesis.

## 1 Fear

In the spring of 2020, I published an essay on the *right to be protected from fear*.<sup>4</sup> I used it as a starting point for my own understanding of the title question. At this point, however, I will not summarize what was

<sup>1</sup> See *Slovenian Army and Police with an agreement on more effective protection of the state border*. Ministry of the Interior, Police. Web page: <https://www.policija.si/medijsko-sredisce/sporocila-za-javnost/sporocila-za-javnost-gpue/106677-slovenska-vojska-in-policija-s-sporazumom-do-ucinkovitejsesa-varovanja-drzavne-meje> ; at Gov.si: <https://www.gov.si/novice/2020-11-25-slovenska-vojska-in-policija-s-sporazumom-do-ucinkovitejsesa-varovanja-drzavne-meje/>

<sup>2</sup> I was asked a question by a public official employed as a state secretary in the office of the Prime Minister of the Republic of Slovenia. I wrote the opinion pro bono at his request. Available at: <https://docplayer.si/203562247-Ustavnopravni-in-eti%C4%8Dno-politi%C4%8Dni-memorandum-o-izjemnem-dru%C5%BEbenem-stanju-in-dru%C5%BEbeni-funkciji-vojske.html>

<sup>3</sup> Defence Act (Zakon o obrambi). *Official Gazette*, No. 103/04, 95/15 and 139/20.

<sup>4</sup> Teršek, A.: The Right to Protection from Fear and Humiliation (Pravica do zaščite pred strahom in pred poniževanjem), *IUS INFO*, column, March 3, 2020; The Right To Be Protected From Fear, *The Slovenia Times*, Editorial, July 20, 2020. Available at: <https://sloveniatimes.com/the-right-to-be-protected-from-fear-2/>

\*Corresponding author: Assoc. prof. dr. Andraž Teršek, Professor of Constitutional Law, University of Primorska (Koper) & Nova University (Nova Gorica), Republic of Slovenia

written in that essay. However, I think it appropriate to set out once again how I understand the meaning of ‘fear’ in relation to the operation of agencies and institutions that have the privilege and responsibility of exercising a monopoly on the means of physical coercion.<sup>5</sup>

People were understandably and rightly frightened by the growing epidemic, which soon became a pandemic (according to WHO).<sup>6</sup> A positive aspect of this fear was the apparent willingness of the people (of the *people*, not the *nation*)<sup>7</sup> to follow the recommendations and actions of the state authorities regarding organization and lifestyle during this alarming time and *de facto* social emergency. The negative aspect of fear manifests itself in various ways: excessive fear of each other, psychosomatic diseases, mental problems, anxiety, loss of mental strength, expressed in various forms of intolerance, restlessness, aggression, hostility towards other people, etc. The latter, of course, is no longer primarily a subject for lawyers, but for sovereign representatives of other sciences, professions and sciences. But that is not what I want to discuss here. I only want to emphasize what can be considered essential: State (political) authorities must continue to do their best (reasonably, decisively, sensitively, and wholeheartedly) to ensure that the human right to protection from fear is protected as much as possible.<sup>8</sup>

## 2 Security

In my writings, I have often raised the issue (and at the same time the *problem*) of people’s “*sense of security*” when it comes to the workings and public attitudes of the police. I have been critical of practices that create a sense of threat and mistrust in people, rather than a sense of safety and trust, to the point of (legally unjustified, largely psychological) terrorising. I have repeatedly referred to such actions by the police as “*the attitude of the police state*.”<sup>9</sup> Be it the policy and practice of “*misdemeanor collection*” (using the legal policy and practice of misdemeanors as a means to fill the state budget with fines and “*naked penalties*”), the legally unjustified “*legitimization*” of individuals (asking them to identify themselves without factual and justifiable cause - i.e. when identification with personal identity card is an end in itself), without justifiable cause and the reasons stated in the *Police Tasks And Powers Act*,<sup>10</sup> and the like.<sup>11</sup> Also, of course, because of what I call “*policism*”: punishing people as an end in itself (e.g. because a

5 Comp: Jean Lep, Kaja Hacin Beyazoglu (eds.): *The Psychology of Pandemics. Individuals and society during the corona crisis (Psihologija pandemije. Posamezniki in družba v času koronske krize)*. Faculty of Arts, University of Ljubljana, November 2020. Available at: <https://e-knjige.ff.uni-lj.si/znanstvena-zalozba/catalog/download/243/347/5746-1?inline=1>

6 See WHO’s web page: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

7 I would like to address a polite critique of public officials who publicly use the word “*nation*,” not “*people*”: the Slovenian *nation* has created a state and with it a nation. The latter is formed by all people who have a legal connection with the state: citizenship and thus active and passive suffrage. Therefore, the term “*people*” is broader and inclusive, and the term “*nation*” is narrower and exclusive. Details on this in Teršek, A.: *Theory of Legitimacy and Contemporary Constitutionalism (Teorija legitimnosti in sodobno ustavnštvo)*, *Annales University Press*, Koper, 2014, pp. 392-408.

8 See Universal Declaration of Human Rights. *United Nations*. Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

9 Comp. Teršek A.: The police again acted as if it were a totalitarian police state (Policija je spet ravnala, kot bi bila to totalitarna policijska država). RTV SLO MMC, October 3, 2017. Available at: <https://www.rtvlo.si/kolumne/policija-je-spet-ravnala-kot-bi-bila-to-totalitarna-policijska-drzava/434183>. Comp. Police State. *Merriam-Webster*. Available at: <https://www.merriam-webster.com/dictionary/police%20state>

10 Police Tasks And Powers Act (Zakon o nalogah in pooblastilih policije). *Official Gazette*, No. 15/13, 23/15, 10/17, 46/19 – CC decision in 47/19.

11 I have written about this several times in articles published on the IUS INFO portal, freely available online (see: <https://www.iusinfo.si/medijsko-sredisce/kolumne/avtor/61>). I have also written on this subject in some of my books, including the book *Constitutional Democracy and the Rule of Law (Ustavna demokracija in vladavina prava)*, *UP FAMNIT*, Koper, 2009. Some time ago I published an article on this subject, in which I recorded a very positive impression with sincere satisfaction that I received in this regard during a lecture at the Police Academy and during a personal conversation with the former Director General of the Police, Mrs. Tatjana Bobnar. I received a personal promise that the constitutionally correct answers to the questions of police powers and actions in dealing with people would be additionally and emphatically included in the training processes of police officers, as well as that a special mailing on this subject would be made to police administrations. Mrs. Bobnar has kept her promise, for which I am grateful.

person drank coffee, ate a croissant or a sandwich in a public place, and the government banned it with an “*anti-corona*” ordinance - of course without any real, reasonable, but especially without any medical basis/justification). In a democracy normatively based on the rule of law, the preventive and supervisory actions of the police must be such that people - in contact with the police - are given a sense of security, human dignity is upheld, freedom of communication is possible, etc. Or, to put it another way: the social function of the police must be concern and effort to make people’s lives easier, also with the help of the police, to strengthen confidence in the authorities and institutions, to strengthen the feeling of security - security in freedom and security with freedom. The police must act to help people and strive to make people feel that way and in no case the opposite.

The same applies to the representatives of those public services that are determined by the same or a similar social function. I am thinking here above all of the security services, inspectorates, civil protection and - last but not least - the army. In other words, all those public services that have a monopoly on physical force and coercion.

### 3 Power and Authority

In a constitutional democracy, conceptually based on the “*rule of law*” and the modern concept of human rights and liberties, the distinction between power and authority is one of the essential conditions and positions of “*democratic freedom*.”<sup>12</sup> Many books have been written about this. They will not be quoted and summarized here because that would be too extensive. It should be emphasized, however, that it is essential for the quality of the functioning and enhancement of constitutional democracy that Government does not rely simply and solely on its “*power*” (in the sense that what the Government permits and allows itself, it permits and allows itself because it thinks it is simply allowed to permit and provide itself anything - only and above all because it is “*power*”), but mainly and above all because of its “*authority*” (or material/substantive *legitimacy*; what it does and allows itself, it does and allows itself not because it thinks it is simply allowed to permit and provide itself anything, but mainly and above all because it is convinced that it is legally right and ethically-politically “*as good as possible*” and “*best for all*,” thus relies on trust, responsibility, transparency, competence, persuasiveness, justification and ethical authenticity – so the power and authority of the Government is a matter of *legitimacy*, thereby, in direct opposition to arbitrariness).<sup>13</sup>

### 4 Exceptional and Extraordinary Situation

The issue of the “*state of emergency*” is directly addressed in Article 92 of the Constitution of the Republic of Slovenia.<sup>14</sup> It is sufficient to extract a key phrase from the constitutional interpretation of this provision in the Constitution: such a state is proclaimed “*only when the National Assembly cannot convene*,” and

---

<sup>12</sup> Comp. Murphy W., F.: *Constitutional Democracy: Creating and Maintaining a Just Political Order* (The Johns Hopkins Series in Constitutional Thought). Johns Hopkins University Press, 2008.

<sup>13</sup> For more details, see Teršek A.: *Theory of Legitimacy and Contemporary Constitutionalism*, p. 54 etc., where I often quote (among other things) the book works of prof. dr. P. Jambrek and V. Struk. Please note: I prefer the word “*power*” over “*authority*,” since political science literature teaches that power is connected to *institutions* and authority to *people* as individuals; here the concept of *the People* is a matter of institution. See also Teršek A.: *A Critique of Wrong Constitutional Teaching Regarding the Concept of “Sovereignty of the People” and the Prevailing Model of Constitutional Democracies in Europe*. *ECHR CASELAW.com*. June 18, 2020. Available at: <https://www.echrcaselaw.com/en/constitutional-democracy/a-critique-of-wrong-constitutional-teaching-regarding-the-concept-of-sovereignty-of-the-people-and-the-prevailing-model-of-constitutional-democracies-in-europe/>

<sup>14</sup> Article 92 reads: »(War and state of emergency) (1) A state of emergency is proclaimed when a great and general danger threatens the existence of the state. The National Assembly decides on the proclamation of war or a state of emergency, on emergency measures and their lifting on the proposal of the Government. (2) The National Assembly decides on the deployment of defense forces. (3) If the National Assembly cannot meet, the President of the Republic shall decide on the matters referred to in paragraphs 1 and 2. Decisions must be submitted to the National Assembly for approval as soon as it meets.«

even then there are “*decrees*” that can be issued in such a state with the binding force of statute and can be issued by the President of the Republic, but are “*subject to confirmation in the National Assembly when it reconvenes.*”<sup>15</sup> Upon the formal proclamation of a “*state of emergency,*” Article 16 of the Constitution<sup>16</sup> comes into force, which allows for a significant restriction of constitutional rights and freedoms, except for those which, even in such a case, may not be infringed upon and which are explicitly listed.

The legislation also regulates the “*intermediate state,*” between (1) normal and non-crisis living conditions in the country, (2) the formally declared state of emergency, (3) and the so-called “*exceptional*” conditions. This issue is addressed by the aforementioned Article 37.a of the Defense Act. It reads:

*(exceptional powers of the army)*

*If the security situation so requires, the National Assembly may decide, on the proposal of the Government, by a two-thirds majority of the deputies present, that the members of the Slovenian Armed Forces, together with the police, shall exceptionally protect the State border, in accordance with the plans and the article, also exercise the following powers: to warn; to expel; to temporarily restrict the movement of persons; to participate in the management of groups and crowds. The powers referred to in the preceding paragraph shall be exercised under the conditions prescribed for police officers.*

*They shall immediately inform the police of the powers exercised in accordance with the first paragraph of this Article.*

*In the act referred to in the first paragraph of this Article, the National Assembly shall set a time limit within which the members of the Slovenian Armed Forces may exercise the powers referred to in the first paragraph of this Article, which time limit shall be only the necessary time, but not longer than three months. The period referred to in the previous sentence may be extended again under the same conditions.*

The preceding Article 37 states:

*(Duties of the Army)*

*The duties of the Slovenian Army are:*

- *Provides for military education and training for armed combat and other forms of military defense;*
- *provides for the necessary or required operational readiness;*
- *conducts military defense in the event of an attack on the country;*
- *participates in protection and rescue in the event of natural and other disasters, in accordance with its organization and equipment;*
- *fulfills the obligations assumed by the State in international organizations and international treaties. The Slovenian Armed Forces may not be used for political or partisan activities or purposes. The Government shall decide on the participation of the Armed Forces in protection and rescue and in emergencies on the proposal of the Commander of the Civil Defense of the Republic of Slovenia, or the Chief of the General Staff on the instruction of the Minister. The Slovenian Armed Forces may cooperate with the Police in the broader protection of the State border inside the territory of the State according to plans and upon a prior decision of the Government. The members of Slovenian Armed Forces have no police powers in the performance of these tasks.*

The fourth paragraph of this article, which allows the use of the army (not only along the border, but also “*inside the state territory*” but without “*police powers,*” is at least somewhat elusive for a categorically clear explanation.

<sup>15</sup> See Avbelj M. et al.: *Commentary on the Constitution of the Republic of Slovenia (Komentar Ustave Republike Slovenije)*, New University European Faculty of Law, Nova Gorica, 2019, pp. 151-153, author prof. dr. A. M. Mavčič.

<sup>16</sup> Article 16 reads: »(Suspension and limitation of rights) (1) It shall be permissible by way of exception to suspend or restrict the human rights and fundamental freedoms set forth in this Constitution in a state of war or emergency. Human rights and fundamental freedoms may be suspended or restricted only for the duration of a state of war or emergency, but to the extent required by the situation and in such a way that the measures taken do not give rise to inequalities based solely on race, nationality or sex, language, religion, political or other opinion, property, birth, education, social status or other personal circumstances. (2) The provision of the preceding paragraph shall not authorise any temporary abrogation or limitation of the rights referred to in Articles 17, 18, 21, 27, 28, 29 and 41.« And those are The inviolability of human life, Prohibition of torture, Protection of human personality and dignity, Presumption of innocence, The principle of legality in criminal law, Legal guarantees in criminal proceedings and Freedom of conscience.

## 5 Decision of the Constitutional Court

The Constitutional Court of the Republic of Slovenia (CC) ruled on the constitutionality of Article 37.a of the *Defence Act* (D. A.) in Decision No. **U-I-28/16**, ruling that the said article is in accordance with the Constitution of the Republic of Slovenia. I will highlight the most important parts of the reasoning on this decision.

The CC first clarified the basis for the legal assessment of the regulation of title issuance:

*„Since the powers of the repressive authorities may constitute a strong interference with the human rights of individuals, they must be based on a particularly precise regulation with clear and detailed rules. The legislation must be such as to exclude the possibility of arbitrary action by the State. In addition to predictability, legislation must in particular provide for effective legal control and adequate and effective means against abuse (see Constitutional Court decision no. U-I-18/93, of 11 April 1996, Official Gazette of the Republic of Slovenia, no. 25/96, and OdIUS V , 40). If the boundary between permissible and impermissible conduct by State organs is not defined, all safeguards against arbitrary application of the law may be ineffective.“*

The CC considered these conditions to be met. In the continuation of the statement it was written:

*„The provisions of Article 37.a of the D. A. do not apply only to refugees or migrants, although the current migrant or refugee crisis was the reason for the adoption of Article 37.a of the D. A.. Members of the Slovenian Armed Forces (SAF) can therefore exercise individual police powers against all persons, subject of course to restrictions from the D. A. and to the conditions under which such powers are exercised by police officers. „*

As to the notion of “security situation,” the CC wrote that it means “*the existence of security conditions requiring the use of the SAF under Article 37.a of the D. A.*” and that it is “*a technical question.*” Its content »depends on the circumstances of the individual situation, and in their specific case, the government and then the National Assembly is responsible for its assessment.“

CC also defined the concept of “*broader protection of the state border.*” The definition of this term “*is important in determining where the protection of the State border is carried out, and consequently where SAF members may exercise individual powers under the first paragraph of Article 37.a of the D. A.*” In this regard, the CC noted that „[n]o provision contains an explicit definition of ,broader protection of the State border.“ “The following explanation offers the two most important paragraphs:

*„For the purpose of performing the functions of State border control, police officers shall have the powers prescribed by State Border Control Act -2 (ZNDM-2), the powers prescribed by other laws and the powers arising from the *acquis communautaire* (Article 5(1) of ZNDM-2). Border control is carried out within the framework of state border control (Articles 27 to 34 of the ZNDM-2). The area of border control is determined by Article 33 of the ZNDM-2. According to the first paragraph of this article, the area of border control is a part of the border crossing at which the police officer conducts border control. As a rule, the border control is carried out by a police officer in the area of the border crossing. If a person is caught during or after illegally crossing the state border, the police officer conducts border control at the place where he caught the person (Article 33(2) of ZNDM-2). According to ZNDM-2, the protection of the state border by the police is carried out both directly at the border and, to a greater extent, on the territory of the country where a person who has crossed the state border illegally is apprehended. Domestically, the police may take compensatory measures against a person in respect of whom there is a reasonable likelihood that he or she will cross the internal border, in order to establish unauthorized entry, to verify the legality of residence on the territory of the Republic of Slovenia and to prevent and detect illegal migration and cross-border crime. „*

The key sentence follows:

*“However, in exercising the powers referred to in Article 37.a of the D. A., members of the SAF do not conduct border control and countervailing measures under ZNDM-2, nor do they have powers that would correspond to border control and countervailing measures powers.”*

The essence of the CC interpretation of how the military may cooperate with the police concludes with the following paragraph:



“*Extended protection of the national border is therefore an undefined legal concept, the content of which must be determined in each specific case of activation of the SAF under Article 37.a of the D. A.. Thus, the content of the task of extended protection of the state border and the scope of performance of this task depend primarily on the security situation that requires the use of the SAF for the protection of the state border. This means that the concrete security situation determines both the territory and the area of deployment of the SAF in accordance with Art. 37.a of the D.A.. For a concrete case of activation of the SAF under Art. 37.a due to a refugee or migrant crisis, this means that the members of the SAF have to use the powers mentioned in the first paragraph of Art. 37.a and may exercise powers at the border and along the border where persons suspected of having illegally crossed the State border are apprehended, as well as at other places where activities related to the illegal crossing of refugees or migrants are carried out (reception and accommodation centers, centers for foreigners, migration routes, transport of refugees or migrants...).*”

I add the following to the interpretation of the title question and the CC decision presented.

First, if Article 37.a is potentially activated, ALL RESOURCES that are legally available to police officers MUST also be available to soldiers.

Second, without a legally formal proclamation of a *state of emergency*, the army cannot and may not independently perform duties under the laws governing the army at the time the state of emergency would be legally formally proclaimed. When the army cooperates with the police, on the basis of Article 37.a, it is not the legislation governing the deployment of the army that applies, but the legislation governing the deployment of the police.

Thirdly, the constitutional rule is that the army in its present state - if this article is activated - ONLY HELPS/ASSISTS the police, and can work together with the police and under the legislation applicable to the work of the police. This is an absolute and categorical constitutional rule.

Fourth, what I think is missing in the public policy debates about the involvement of the military in the current social situation is an examination of the question regarding GENERAL ARMY ASSISTANCE to the people, which is usually provided by civil defence or volunteers. Soldiers can also be used for this purpose: not as soldiers, but in the sense of “*volunteers provided by the state.*” Just as the military is allowed to and has helped in natural disasters, for example. So in this case there is no legal or even constitutional problem, even if the soldiers are dressed in uniforms. If they are not dressed in uniforms, the problem is less for those who would be intimidated or bothered by military uniforms as a matter of principle. Under no circumstances (it is my personal stand) should members of the military carry weapons.

Fifth, the only major problem with the title issue is the problem of HOW FAR can soldiers invade the interior of the country as soldiers acting in the role of police officers and in conjunction with police officers - under Article 37.a. But the CC decision gives an answer to this problem as well: if the task or competence addressed by the law (transport, escape, search for persons, ...) is by its nature and due to concrete facts and specific circumstances on the ground such that it is “relocated” even to places well away from the border, soldiers are allowed to offer assistance to the police after activating Article 37.a: but as if they were police officers, not as soldiers. So, according to the legislation that regulates the work of the police, not according to the legislation that regulates the work of the army.

Sixth, I was also informed of an alleged legal dilemma to be discussed in communications between the police and the military. The question is, according to Slovenian *Criminal Code*, what can a citizen do when he catches someone committing a crime, can a soldier do as well? The question seems to me too trite for serious legal discussion: of course he can and must. In other words: if a soldier perceives, at a particular place and time, that a particular person is acting criminally, he can and must act as any civilian citizen can and must act. To claim that a soldier can only “observe” the commission of a crime would clearly be unwise.

## 6 About the Police, Who Resented People Greatly

The *Defence Act*, then, is the law. The purpose of this legal solution, therefore, is not to seek a legal way to circumvent what this article establishes, and what may be substantially attributed to it by its subsequent interpretation. For example, by reference to another article of the same or of another act. For if the current legislation were to regulate the same matter differently in different places, a serious constitutional problem would arise which would have to be resolved by the Constitutional Court. The purpose of this letter is to

“think” about the lawful use of this article.

The relevant Article 37.a of the *Defense Act* is a novelty in the Slovenian legal system. It appeared at the time of the outbreak of the cattle disease. It should be understood as a “reasonable” amendment to the legislation. Reasonable because such an intermediate state of “exceptionality” can occur even if a formal “*state of emergency*” has not (yet) occurred.<sup>17</sup> However, it could also develop into a formal »state of emergency« pandemic crisis. But it did not. The uniqueness of the »exceptional« situation is its specificity. People’s private and public behavior will be reorganized and adapted in the event of such a crisis. This is done through certain recommendations, health guidelines, restrictions on certain rights and freedoms, especially freedom of movement and assembly, restrictive interference with general freedom of action, and certain prohibitions and orders, decrees. In doing so, the Government always invokes the public interest, the welfare of all people as a primary goal. However, such a social situation is legally formally called “exceptional,” but not “emergent” - because Article 16 of the Constitution has not come into force.

Article 37.a of the Act provides for the possibility of actively placing the army in such a social condition. I understand this to be the highest level of scrutiny of daily politics (governing coalition and parliamentary opposition) and public institutions. I do not want to write that daily, party politics can “win back” people’s trust in these circumstances, even though I have made a lot of criticism of the “loss of trust” in these times of crisis. Nor do I want to write that the police and the army can “win back” people’s trust, even though I have written several times in my published articles that the police lost people’s trust during the pandemic. I therefore insist that the actors involved (Government, daily politics and police) were able to secure a high level of public trust through their actions during a pandemic.

During the first wave of the pandemic, the impression was given that the police had been successful. In the second wave of the pandemic, the police showed a different face, not only unkind, but even allowed themselves to engage in such illegal, unreasonable, unethical, and immoral actions that they undid all the good and positive that they were able to create in the first wave. In fact, the police were very resented by the people during that time and rightfully so. That is why I am making the case that the mistakes, gaffes, and lapses that the police allowed and permitted themselves were so great that people will not forget or forgive them for a long time to come.

## 7 The Role of the Military During an Epidemic/Pandemic

Involving the military in public life that is not threatened by war or a similar threat directly involving physical force does not imply “*militarization*” of the state. At the same time, I understand the (Slovenian) army as an organization that, after the abolition of the “*conscription system*,” did not lose the social function of “*protecting the territory and the people*,” but even strengthened this function. Or rather, it was able to strengthen it. Not so, but especially in times of peace - in the sense of the absence of war.

I see no compelling reason to abandon military support and its cooperation with the police. I see no reason to do so on the blanket argument that any public action by the army implies a state of war, militarization, threat, and so on. On the contrary, I understand the engagement of the police and the army (together with other actors such as civil defense, activists, volunteers...) during an epidemic crisis as the reasonable use of all available mechanisms and forces to protect the population and its well-being. However, I would like to stress that the restriction of the general freedom of action, which is also a constitutional right, is obviously not the same measure for the security of people’s health (as well as life) as the restriction or even the complete deprivation of this freedom for other reasons: e.g. war, coup or rebellion. To equate all these, quite different circumstances, would be ignorant and unconstructively excessive.

I come to the final point: the state, the coalition and the opposition, the daily politics is put to the test. To the crucial test of its responsibility, its determination, its sincerity, its capacity for “statesmanship” and democracy. Or to the test of the political value and ethical significance of trust, legitimacy, maturity,

<sup>17</sup> For a general analysis of social “emergencies” and civic activism, see Mallory T., D.: *State of Emergency*. Audio CD. *Simon & Schuster Audio and Blackstone Publishing*; Unabridged edition, 2021.

cooperation, solidarity, competencies to govern the country and care for the welfare of the people. The decision on how and to what extent to organize the public action of the army and the police, or their cooperation, seems to be the ultimate test for the decision makers for the government and the opposition. Policymakers are not only faced with the challenge of whether to apply Article 37.a with the aim of reducing the burden on the police and ensuring the highest possible level of human security and control over the national territory. Above all, policymakers face the challenge of HOW they will do so?<sup>18</sup>

I return to the beginning of this memorandum. The presence of the police (whom I congratulate for their protection and surveillance work during the first wave of the epidemic, which they carried out in a manner that did not disturb citizens. This also applies to the dignity and courtesy of all persons, guards and others with similar duties, who patiently and courteously approached the people in the function of ensuring their/our safety, and with determined and loud criticism I add to this the conviction, which is by no means mine alone, that during the second wave of the pandemic, the police showed a very different, diametrically opposed face) and the army, whose public action and interaction must be organized and carried out in such a way that it does not increase stress among people, does not increase fear, and does not create a sense of threat or even an immediate threat – from (above mentioned and explained) *policism*. On the contrary, the public action of the police and (if Article 37.a is to be implemented) the army must be aimed precisely at this goal: helping people to reduce fear, to reduce layers of stress, to strengthen the feeling of security and to build trust.

This goal will not be achieved if armed and masked people in uniforms march along the border, away from the border or in the interior, on the roads and streets and increase people's sense of fear, anxiety and "captivity." Or when armed, uniformed agents of the state's coercive monopoly intimidate, harass, physically charge or psychologically abuse people. I believe because I want to believe that no one has that intention: not the politicians, not the police, not the military. I believe because I want to believe the opposite: that politicians, police, and the military are aware of their societal roles and want to pursue the primary goal fundamental to constitutional democracy, the rule of law, security, and freedom: help, security, control and relief; with a friendly face, warmth in the eyes, gentleness in the voice and the relieving effect of his actions on people. And with the promise that the military will not be present in the interior of the country, but only in the border area.

I believe because I want to believe that the Slovenian police and army can and will achieve this goal. And I believe that in order to achieve this goal, daily politics is also able to unite. That's why I say the challenge is great. Destiny. And politics must meet this challenge courageously, responsibly and wisely and above all, humanely and morally with a humanitarian and statesmanlike manner. If it is not capable of doing so, if it does not want to do so, if it pursues other goals and particular interests, then the cooperation of the police and the army would mean a new social problem, not a step towards solving the current health problem of society.

And how can one solve the »procedural problem« for the introduction of Article 37.a? This requires a two-thirds (2/3) majority of the MPs present at the Parialementary session. Can the opposition prevent the enforcement of this article? Yes it can. If there are good reasons to do so, it must be discussed constructively, because constitutional democracy must operate as a "*debating*« or »*discursive constitutional state*."<sup>19</sup> Defiance for the sake of naked defiance is not an attitude of politics, but of anti-politics. Therefore, the statutory majority required to enforce the Article 37.a measure does not seem to me to be a problem. It is right that the law should provide for such a qualified majority. It must not be a question of seeking procedural shortcuts or partisan bargaining on such issues. It must be about political maturity and democratic capacity to act. With the active participation of the President of the Republic, who is, according to the Constitution, Supreme Commander of the Defense Forces, a non-partisan institution of power, (supposably) institutionalised moral authority, and a representative of the people as a whole.

<sup>18</sup> Comp. Bruneau C., T., Matei F., C.: The Routledge Handbook of Civil-Military Relations. 1st Edition. *Routledge*, 2015.

<sup>19</sup> Comp. Sturm L.: Limitation of power. Constitutional starting points of public law (Omejitev oblasti. Ustavna izhodišča javnega prava). *Nova revija*, Libra collection, Ljubljana, 1998, p. 322, where he quotes former German Federal President Richard von Weizsacker. See also and especially Habermas J.: Between Facts and Norms. *The MIT Press*, Cambridge, Massachusetts, 1998.



## 8 Conclusion

Politics is facing a bigger challenge than the viral epidemic on which neither lawyers nor doctors agree whether it is a pandemic or epidemic. In other words, party politics faces a gradual challenge every day: in terms of democracy, political ethics and the value of trust. Unfortunately, in Slovenia, too, the parliamentary coalition, that is, the Government, has failed this test repeatedly and very much. Under their constant, daily pressure, the Slovenian police have also fallen badly on this test and slipped into the field of mistrust, criticism and great popular displeasure. *Policism* became a »new normality« but that is already a topic for another memorandum...

### Literature and Sources:

Avbelj M. et al.: Commentary on the Constitution of the Republic of Slovenia (Komentar Ustave Republike Slovenije), New University European Faculty of Law, Nova Gorica, 2019, pp. 151-153, author prof. dr. A. M. Mavčič.

Bruneau C., T., Matej F., C.: The Routledge Handbook of Civil-Military Relations. 1st Edition. *Routledge*, 2015. Defence Act (Zakon o obrambi). *Official Gazette*, No. 103/04, 95/15 and 139/20.

Gov.si: <https://www.gov.si/novice/2020-11-25-slovenska-vojska-in-policija-s-sporazumom-do-ucinkovitejsesa-varovanja-drzavne-meje/>

Habermas J.: Between Facts and Norms. *The MIT Press*, Cambridge, Massachusetts, 1998.

IUS INFO portal. Available at: <https://www.iusinfo.si/medijsko-sredisce/kolumne/avtor/61>

Jean Lep, Kaja Hacin Beyazoglu (eds.): The Psychology of Pandemics. Individuals and society during the corona crisis (Psihologija pandemije. Posamezniki in družba v času koronske krize). *Faculty of Arts, University of Ljubljana*, November 2020. Available at: <https://e-knjige.ff.uni-lj.si/znanstvena-zalozba/catalog/download/243/347/5746-1?inline=1>

Mallory T., D.: State of Emergency. Audio CD. *Simon & Schuster Audio and Blackstone Publishing*; Unabridged edition, 2021.

Murphy W., F.: Constitutional Democracy: Creating and Maintaining a Just Political Order (The Johns Hopkins Series in Constitutional Thought). Johns Hopkins University Press, 2008.

Police State. *Merriam-Webster*. Available at: <https://www.merriam-webster.com/dictionary/police%20state>  
Police Tasks And Powers Act (Zakon o nalogah in pooblastilih policije). *Official Gazette*, No. 15/13, 23/15, 10/17, 46/19 – CC decision in 47/19.

*Slovenian Army and Police with an agreement on more effective protection of the state border*. Ministry of the Interior, Police. Web page: <https://www.policija.si/medijsko-sredisce/sporocila-za-javnost/sporocila-za-javnost-gpue/106677-slovenska-vojska-in-policija-s-sporazumom-do-ucinkovitejsesa-varovanja-drzavne-meje>

Šturm L.: Limitation of power. Constitutional starting points of public law (Omejitev oblasti. Ustavna izhodišča javnega prava). *Nova revija*, Libra collection, Ljubljana, 1998.

Teršek A.: A Critique of Wrong Constitutional Teaching Regarding the Concept of “Sovereignty of the People” and the Prevailing Model of Constitutional Democracies in Europe. *ECHRCaseLaw.com*. June 18, 2020. Available at: <https://www.echrcaselaw.com/en/constitutional-democracy/a-critique-of-wrong-constitutional-teaching-regarding-the-concept-of-sovereignty-of-the-people-and-the-prevailing-model-of-constitutional-democracies-in-europe/>

Teršek A.: Constitutional Democracy and the Rule of Law (Ustavna demokracija in vladavina prava), *UP FAMNIT*, Koper, 2009.

Teršek A.: The police again acted as if it were a totalitarian police state (Policija je spet ravnala, kot bi bila to totalitarna policijska država). RTV SLO MMC, October 3, 2017. Available at: <https://www.rtv slo.si/kolumne/policija-je-spet-ravnala-kot-bi-bila-to-totalitarna-policijska-drzava/434183>

Teršek A.: The Right To Be Protected From Fear, *The Slovenia Times*, Editorial, July 20, 2020. Available at: <https://sloveniatimes.com/the-right-to-be-protected-from-fear-2/>

Teršek A.: Ustavnopравни in etično-politični memorandum o »izjemnem« družbenem stanju in družbeni funkciji vojske. March 2020. Available at: <https://docplayer.si/203562247-Ustavnopravni-in-eti%C4%8Dno-politi%C4%8Dni-memorandum-o-izjemnem-dru%C5%BEbenem-stanju-in-dru%C5%BEbeni-funkciji>

vojske.html

Teršek, A.: The Right to Protection from Fear and Humiliation (Pravica do zaščite pred strahom in pred poniževanjem), *IUS INFO*, column, March 3, 2020.

Teršek, A.: Theory of Legitimacy and Contemporary Constitutionalism (Teorija legitimnosti in sodobno ustavníštvo), *Annales University Press*, Koper, 2014, pp. 392-408.

Universal Declaration of Human Rights. *United Nations*. Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

WHO's web page: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>