

## Research Article

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# On the Legality and Constitutionality of the Measures by which the Slovenian Government Restricted Constitutional Rights and Freedoms Before and After the 2020 Coronavirus Pandemic: Part 1<sup>1</sup>

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**Abstract:** The authors analyse the constitutionality of the Ordinance and the constitutionality of restrictions of constitutional rights and freedoms imposed by the Slovenian Government. They systematically and consistently present arguments on the unlawfulness and unconstitutionality of the Ordinance and the constitutional nature of restrictions of constitutional rights and freedoms by the Government (part 1). The decision of the Slovenian Constitutional Court on the legality and constitutionality of measures is critically commented. In the following one of the authors presents analysis and arguments regarding the new ordinances and measures taken by the Slovenian Government after the official end of the pandemic (part 2).

**Keywords:** Slovenian Constitutional Court, 2020 Pandemic, Legality and Constitutionality of Measures

## 1 Introduction

*“We absolutely should be sceptical of governments who declare states of emergency. Hungary is showing us this right now. However, if there is one lesson to take from Schmitt, it is the dangers of permanent transformative emergency powers, rather than temporary, defensive ones.”<sup>2</sup>*

The article offers a constitutional analysis of the measures introduced by the Slovenian Government during the officially declared Coronavirus COVID-19 pandemic. With the measures, the Government restricted the exercise of some constitutional rights and freedoms guaranteed by international law, in particular the right to freedom of movement, the right to private and family life, the right to protection of personal dignity and security, the right to protection from fear and humiliation, and the right to universal freedom of action.<sup>3</sup>

1 The article is a revised, modified, and updated version of the article *Ustavnopravna analiza omejitve ustavnih pravic v času pandemije 2020* [Constitutional Analysis of the Restriction of Constitutional Rights During the 2020 Pandemic] published by Andraž Teršek and Jure Dragan in Slovenian scientific journal *Javna uprava [Public Administration]*, No. 12/2020.

2 Alan Greene: States should Declare a State of Emergency using Article 15 ECHR to Confront the Coronavirus Pandemic. Strasbourg Observers, 1 April 2020.

3 In particular, we refer to the Universal Declaration of Human Rights and the European Convention on Human Rights with Protocols to the Convention. Regarding the first, on the basis of Article 21(6) of the Government of the Republic of Slovenia Act (Official Gazette of the

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In part one, we will first highlight the issues on the intersection of law and medicine—the legal issues addressing medically significant topics and simultaneously medical issues with a legal context and legal effects, above all the problem of the mental health of the nation, the problem of suicide and the problem of fear.

In the central part of the article, we will provide the reasons why it is legitimate and substantiated—with the power of argument—to voice strong hesitation about the legality and constitutionality of the measures in force during the officially declared pandemic. At the core are the arguments why the Government Ordinance, which will be presented in detail below, was in accordance neither with the Constitution of the Republic of Slovenia<sup>4</sup> nor the international instruments for the protection of fundamental human rights and freedoms.

In this capacity, our perspective on the constitutional aspects and dimensions of the legal issues discussed will be presented, which can also be described as a legal problem. With an analytical and theoretical approach, we will set forth the primary arguments that can lead to the Ordinance and the Government measures to be denounced as illegal and unconstitutional, or at least controversial from the perspective of legality and constitutionality. Simultaneously, we underscore from the outset that our analysis was penned and revised even before the Constitutional Court of the Republic of Slovenia adopted the final decision on the constitutionality of the analysed Ordinance and the Government's measures during the pandemic. The Constitutional Court ruled that the Government's measures were not unconstitutional.<sup>5</sup> The commentary on this decision adopted by five votes to four is recorded separately in part two of the constitutional analysis of extraordinary measures of the Government.

The analysis is supported by relevant constitutional law literature, constitutional theory, constitutional case-law, international legal instruments, press and online sources, as well as some public announcements of top political officials during the pandemic, which could be found on the platforms such as Twitter, Facebook, and Instagram, and, of course, also in the media.

Immediately prior to the pandemic, the previous Government of the Republic of Slovenia resigned. No early elections were held, but a new coalition of political parties emerged, enabling a formation of a new government. The new Government was faced with an unprecedented, unique, and significant challenge. It had to move quickly and decisively. Such action by the Government was, at the time it took office, a “coercive necessity.” We are well aware of this as we are aware that in such circumstances, mistakes made in good faith and “by force of circumstances” can also occur. We understandingly forgive such mistakes. However, we find the constitutional issues arising from the circumstances of the official pandemic and conditioned by these circumstances, as well as the actions of the Government during the pandemic and after the official announcement of its end, which had and still have legal foundations and effects, interesting enough. It is essential that they are also discussed theoretically, academically, in terms of a legal analysis of their legality and constitutionality. But definitely in good faith, *bona fide*, and with the best of intentions.

This is the fundamental goal and purpose of part one of this constitutional analysis. We take it (and we also invite readers to do so) as a mental and constitutional argumentation challenge. The legal issues addressed by this article seem to be significant from a constitutional perspective, given the fact that representatives of medical science and an international organisation such as the WHO warned the domestic and international public that perhaps we experienced only the so-called first wave of the Coronavirus COVID-19 pandemic, which could be followed by the so-called second wave in the autumn or winter of 2020/2021.<sup>6</sup>

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Republic of Slovenia, No. 24/05 – officially consolidated text, 109/08, 38/10 – ZUKN, 8/12, 21/13, 47/13 – ZDU-1G, 65/14 and 55/17) and Article 77 of the Foreign Affairs Act (Official Gazette of the Republic of Slovenia, No. 113/03 – official consolidated text, 20/06 – ZNOMCMO, 76/08, 108/09, 80/10 – ZUTD and 31/15), the Government of the Republic of Slovenia adopted at its 175<sup>th</sup> regular session on 5 April 2018 Decision on the publication of the text of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations at its third session in Paris on 10 December 1948, translation into Slovenian reads Splošna deklaracija človekovih pravic (Official Gazette of the Republic of Slovenia, No. 24/2018 of 13 April 2018). As for the latter, the Act was adopted ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2, and its protocols Nos. 1, 4, 6, 7, 9, 10 and 11 (Official Gazette of the Republic of Slovenia, No. 33/94, dated 13 June 1994).

<sup>4</sup> Constitution of the Republic of Slovenia. Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99 and 75/16 – UZ70a.

<sup>5</sup> See decision of the Constitutional Court of Slovenia, No. U-I-83/20 of 28 August 2020. Available at <<https://www.us-rs.si/odlocba-ustavnega-sodisca-st-u-i-83-20-z-dne-27-8-2020/>> (1.10.2020)

<sup>6</sup> See VOA News, available at <<https://www.voanews.com/covid-19-pandemic/world-still-amidst-1st-wave-coronavirus-outbreak-who-warns>> (27.6.2020); WHO. COVID-19, available at <[https://www.who.int/health-topics/coronavirus#tab=tab\\_1](https://www.who.int/health-topics/coronavirus#tab=tab_1)> (15. 8. 2020); Slovenia & Coronavirus: Plans for 2<sup>nd</sup> Wave Discussed, Croatia May Lose Safe Country Status, Slovenian Press Agency, 29 June 2020, available at <<https://www.total>>

The analysis consists of two separate parts, which represent the whole. In part two of the analysis, the author first critically comments on the decision of the Constitutional Court of the Republic of Slovenia, No. U-I-83/20. He goes on to highlight additional issues of legality and constitutionality concerning the Government action taken after the official end of the pandemic. He also highlights the problem of hypothetical severe infringements upon fundamental rights and freedoms, which may occur in the short term if some planned and announced changes in legislation are actually adopted and implemented. He is thinking mainly of the constitutional aspects of compulsory vaccination and compulsory vaccines, as well as other announced changes in legislation concerning the right to health, the right to health care, the right to protection of privacy, home, family life, personal data, schooling and education, and also the right to freedom of movement. Therefore, on the one hand, a case is highlighted that the ECtHR could have decided on, but as of August 2020 has not yet done so, and on the other hand, the legal problem of existing and announced Slovenian legislation concerning compulsory vaccination and human rights of patients. The common denominator of all the issues listed above is a constitutional assessment and constitutional review of the Government activities and measures, which base their legitimacy and justification in the argument of “protection of the health of the general public” and in the function of preventing new epidemics and pandemics, or in the function of effectively dealing with new epidemics or pandemics if they occur in the future.

All these issues must be legally regulated in a constitutionally correct manner and above all, without undue interference with fundamental rights and freedoms. Therefore, they must also be subject to judicial and constitutional review and assessment. As representatives of the legal profession, we add our share to the civil control over the Government’s activities and each (any) public authority with this analysis. We understand this to be an integral part of our ethical and professional responsibility to and for the society, before people and to people.

Our analysis is an original constitutional law work. It does not include the actual arguments (factual content) with which the petitioner challenged the relevant Government Ordinance and the restrictive measures imposed by it, nor the arguments with which the Court ruled, that the Ordinance and the measures imposed were not unconstitutional.

## 2 Factual Circumstances

### 2.1 The Seriousness of Mental Health Problem in Europe

Mental health is considered to be one of the most significant and most serious health problems in Europe, especially (according to official statistics) for the last decade.<sup>7</sup> It is a severe problem in Slovenia also, putting our homeland near the top, and in some recent years, even on the top of the list of the EU Member States with the highest rate of suicides *per capita*.<sup>8</sup> It is a matter of reason and logic to conclude the problem of mental health increased during the official

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slovenia-news.com/politics/6518-slovenia-coronavirus-plans-for-2nd-wave-discussed-croatia-may-lose-safe-country-status> (20.8.2020); Nick Trigg: Coronavirus: What’s the evidence Europe is having a “second wave”? BBC News, 29 July 2020, available at <<https://www.bbc.com/news/health-53579731>> (20.8.2020); James Gallagher: Coronavirus: What is a second wave and is one coming? BBC News, 24 June 2020, available at <<https://www.bbc.com/news/health-53113785>> (20.8.2020); Euronews: Europe’s second wave? Country-by-country breakdown of resurging COVID-19 cases, available at <<https://www.euronews.com/2020/08/06/is-europe-having-a-covid-19-second-wave-country-by-country-breakdown>> (20.8.2020).

<sup>7</sup> See, for example: The European Mental Health Action Plan 2013–2020, WHO, Regional office for Europe, Copenhagen, Denmark, 2015, available at: <[https://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0020/280604/WHO-Europe-Mental-Health-Action-Plan-2013-2020.pdf](https://www.euro.who.int/__data/assets/pdf_file/0020/280604/WHO-Europe-Mental-Health-Action-Plan-2013-2020.pdf)> (10.8.2020); The State of Mental Health in the European Union, Health & Consumer Protection Directorate – General, European Commission, 2004–2012, available at <[https://ec.europa.eu/health/ph\\_projects/2001/monitoring/fp\\_monitoring\\_2001\\_frep\\_06\\_en.pdf](https://ec.europa.eu/health/ph_projects/2001/monitoring/fp_monitoring_2001_frep_06_en.pdf)> (15.8.2020).

<sup>8</sup> Cf. Brigite Ferlič Žgajnar: Število samomorov spet v porastu [Thu Suicides are on the Rise Again], Delo, 7 June 2018 available at <<https://www.delo.si/novice/slovenija/stevilo-samomorov-spet-v-porastu-68491.html>> (15.8.2020); Število samomorov v Sloveniji upada, še vedno smo nad evropskim povprečjem [The number of suicides in Slovenia is declining, we are still above the European average], Dnevnik, 4 September 2019. Available at <<https://www.dnevnik.si/1042897126>> (1.6.2020). See also the webpage of the Slovenian National Institute for Public Health: <<https://www.nijz.si/sl/oznake/samomor>> (5.5.2020).

pandemic and also during the post-pandemic period. Also, the assumption it will increase even further seems to be a matter of reasonableness and logic.<sup>9</sup>

During the pandemic, living conditions were hard to bear and damaging for people suffering from depression, depressive disorders, or other mental health issues, especially since constitutional rights to freedom of movement and socialising were restricted. In Slovenia, the Government Ordinance prohibited movement across the municipal borders without special and officially confirmed reasons. Socialising was limited, in most of EU Member States relatively strictly. In Slovenia, even sitting on benches in parks, streets, and even in the natural parks, also on the edge of the woods was prohibited. Even though “the state of emergency” was not officially declared in all of the EU Member States (the Slovenian Constitution explicitly determines, by Article 92, the conditions for such declaration and those conditions were not fulfilled), the exceptional circumstances of public life affected as if it has been declared. Slovenian citizens were living in the *de facto* quarantine.<sup>10</sup>

## 2.2 The Problem of Fear

It soon became apparent people all over Europe were frightened. And they seem to be even more scared as days, weeks and months passed by.<sup>11</sup> For most of the time, politicians were the ones addressing the public. They took up most of the space and time in the media. According to the daily TV media programs in some EU Member States a little more, in others a little less. Medical doctors, other medical staff or medical scientists were, such was the impression, in the second or third plan. Not only the politicians, even the WHO was using words, such as “combating the Coronavirus.”<sup>12</sup> As if it was the wartime.

In most EU Member States and most of the time (again, such was the impression due to the daily TV media programmes and the Government PR-conferences), the public was addressed with pure statistics: how many people have been tested for COVID-19, how many of those were positive and how many people died daily—presumably just from the virus. The broader context was rarely offered to the public: information about the age of the infected, comorbidity, possible terminal illnesses, etc. This resulted in individuals, especially the elderly, were even more frightened.

The fear will not vanish with the officially proclaimed end of the Coronavirus pandemic (such proclamation came first in Slovenia, and then Austria and Hungary followed). It is a legitimate concern such fear will become a new epidemic. In the EU Member States who already declared the end of the pandemic, some citizens are still wearing masks when walking down the streets, driving cars, even exercising in nature (same goes for Slovenia). Even though the pandemic officially ended, even though the WHO did not advise that masks should be worn from the start of the pandemic, and even though medical experts and other professionals strongly oppose wearing masks (but the latter did not respond until after the official end of the pandemic). There are no reasonable indicators it will not be the same or

<sup>9</sup> During the pandemic, a website was made available to the public where useful information and addresses could be obtained to prevent suicides: Postaja za razumevanje samomora [Station for understanding suicide], available at <<http://zivziv.si/mediji-samomor-covid/>> (12.8.2020).

<sup>10</sup> Living conditions were most strict in Belgium, France, Germany, Hungary, Italy, Poland, and Spain. See: States of emergency in response to the coronavirus crisis: Situation in certain Member States, available at <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2020\)649408](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)649408)> (1.8.2020).

<sup>11</sup> In Slovenia, another problem became obvious: hostile disposition towards each other was on the rise. Too many individuals behaved as they were the police, the surveillance agents towards each other, taking photographs and video recordings of their neighbours and strangers, presumably violating the Government Ordinance not to stand too close to each other when having a conversation, not to socialise in groups of more than five people, not to cross the municipal borders on foot, on bikes and with cars, not to sit down on benches in parks, not to throw balls in basketball playgrounds, etc. Too many of them were sending such material to the police. Slovenia almost became a police state: not because of the police (who did a good job during the pandemic), but because of the so-called “puritanical” character of too many individuals. See Andraž Teršek: Protestniki na kolesih; v izrednih razmerah očitno vznikajo tudi pravni paradoksi [Protesters on Bikes; Legal Paradoxes Obviously Arise Also in Emergencies], Reporter, 29 April 2020, available at <<https://reporter.si/clanek/kolumnisti/protestniki-na-kolesih-v-izrednih-razmerah-ocitno-vznikajo-tudi-pravni-paradoksi-774755>> (20.8.2020); Miha Mazzini: Zagrenjena psiha teh nesrečnikov hoče vse stlačiti v blato [The Bitter Psyche of These Unfortunates Wants to Push Everybody into the Mud], SiolNET, 2 April 2020, available at <<https://siol.net/siol-plus/kolumne/miha-mazzini-zagrenjena-psiha-teh-nesrecnikov-hoce-vse-stlaciti-v-blato-522218>> (5.8.2020).

<sup>12</sup> See: WHO Campaigns/Connecting the world to combat coronavirus, available at <<https://www.who.int/campaigns/connecting-the-world-to-combat-coronavirus>> (22.8.2020).

even worse in other Member States where pandemic will officially end much later. People are scared and will remain to be scared.<sup>13</sup>

This is not merely a medical and political question. This is also a critical legal, constitutional question. For this reason, and this reason alone, all the measures, ordinances and deeds of the daily politics, government coalitions and public institutions must be addressed, evaluated, and explained in detail from the legal and constitutional perspective.<sup>14</sup>

## 2.3 The Right to be Protected from Fear

Every single individual, every member of the society, every human being has the right to be protected from fear—by the State. It is a fundamental human right,<sup>15</sup> also in its connection to the right for the protection of health, clean environment, natural heritage, and human dignity.<sup>16</sup> To be protected from fear, to be protected from mental health damages and to be protected from social reasons for committing suicide are issues which come hand in hand with the positive obligations of the state regarding fundamental human rights, enumerated in the ECHR, and fundamental constitutional rights and liberties, listed in national constitutions (also stipulated by the Slovenian Constitution).<sup>17</sup> Again and again, this right should be explicitly recognised, addressed, and emphasised as a fundamental human right inside the scope of the EU legal order. Not despite, but precisely because of the experience of the 2020 Coronavirus pandemic.<sup>18</sup>

We, therefore, stress once again at this point: all these sub-questions should be considered as a whole, as components of a whole that reflects, on the one hand, the political techniques and legal approaches with which the state (legitimate, urgent, necessary) deals with the facts and circumstances arising from the social (global, not just regional and national) exceptional situation caused by the 2020 pandemic, but also the urgency, not just the legitimacy and appropriateness, of analysing, assessing and judging these techniques and approaches in terms of their legal correctness and constitutional admissibility.

## 3 The Beginnings of Constitutionally Interesting and Significant Actions

At the time of validity of the *Ordinance on the Temporary General Prohibition of Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement Outside Municipalities* (hereinafter: The Ordinance)<sup>19</sup> adopted by the Government, questions about its constitutionality were raised daily in the public (in public media, on online forums, on Twitter, on the social network Facebook and elsewhere). The issue was commented on by the general public, journalists, etc. However, the representatives of the legal profession, with perhaps an inadvertently overlooked exception, were unusually silent. Such “response” is not incomprehensible, but it is still the least unusual.

<sup>13</sup> See Andraž Teršek: Legal and political priorities regarding the problem of mental health and suicide after the 2020 coronavirus pandemic, *Javno zdravje*, Vol. 6, No. 1-4/2020, available at <[https://www.nijz.si/sites/www.nijz.si/files/uploaded/tersek\\_a\\_jz\\_2020\\_06.pdf](https://www.nijz.si/sites/www.nijz.si/files/uploaded/tersek_a_jz_2020_06.pdf)> (21.8.2020).

<sup>14</sup> See Andraž Teršek: Pravica do zaščite pred strahom in pred poniževanjem [The Right to Protection from Fear and Humiliation]. *IUS INFO*, 6 March 2020, available at <<https://www.iusinfo.si/medijsko-sredisce/kolumne/258783>> (16.8.2020); Andraž Teršek: The Right to Be Protected from Fear. Editorial, *The Slovenia Times*, 20 July 2020, available at <<http://www.sloveniatimes.com/the-right-to-be-protected-from-fear>> (22.8.2020).

<sup>15</sup> Let us just remind ourselves of the Universal Declaration of Human Rights, the Atlantic Charter and the Philadelphia Declaration, which marked the end of World War II and announced a new world social order. And in particular of the European Social Charter. All these international legal documents address the right to be protected from fear as a fundamental human right.

<sup>16</sup> For a detailed explanation of this constitutional rights see Matej Avbelj (ed.): *Komentar Ustave Republike Slovenije. Del 1: Človekove pravice in temeljne svoboščine* [Commentary of the Constitution of the Republic of Slovenia. Part 1: Human Rights and Basic Freedoms]. Evropska pravna fakulteta, Nova univerza, Nova Gorica 2019.

<sup>17</sup> See Alastair Mowbray: *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*. Cambridge University Press, Cambridge 2010; Andraž Teršek: *Teorija legitimnosti in sodobno ustavnštvo* [Theory of Legitimacy and Modern Constitutionalism]. Univerzitetna založba Annales, Univerza na Primorskem, Koper 2014, pp. 312–322.

<sup>18</sup> See A. Teršek, op. cit. (2020, fn. 12).

<sup>19</sup> Published in the Official Gazette of the Republic of Slovenia, Nos. 38/20 and 51/20.



In April, partly in May, the authors were informed that several petitions for the constitutional review of this Ordinance had been submitted to the Constitutional Court. One of these petitions was accepted by the Constitutional Court for a meritorious hearing.<sup>20</sup>

The Constitutional Court was not unanimous regarding the acceptance of the initiative for a meritorious hearing. The judges did not have a single position on the initial question of the petitioner's fulfilment of his or her legal interest. However, the majority acknowledged the petitioner had demonstrated the legal interest in bringing proceedings.<sup>21</sup>

## 4 The Issue of “Legal Interest” for Lodging a Petition for the Review of Constitutionality of the Ordinance

At the core of the analysis and assessment of legality and constitutionality is the Ordinance adopted by the Government of the Republic of Slovenia mentioned above.

A petition for the review of the constitutionality and legality of the challenged Ordinance can be submitted based on Article 24 of the Constitutional Court Act (ZUstS),<sup>22</sup> which stipulates that a petition may be lodged by anyone who demonstrates legal interest. Legal interest is deemed to be demonstrated if a regulation directly interferes with the petitioner's rights, legal interests, or legal position.<sup>23</sup> The demonstration of legal interest, which is the precondition for lodging a petition, is already determined by the Constitution of the Republic of Slovenia, namely in Article 162(2).

Legal interest is, therefore, a constitutional concept and subject to many interpretations, also divergent.<sup>24</sup> In its case-law, the Constitutional Court altered or gradually built up the substance of this legal concept. Without hesitation, we can express that the concept “shrank”.<sup>25</sup> The legal interest must be legal, direct, and concrete. The latter specifically implies the requirement that the challenged regulation must directly interfere with the legal position of the petitioner, which means that a possible grant of the petition would lead to a change in his or her legal position.<sup>26</sup>

Notwithstanding the tightening of the Constitutional Court case-law regarding the interpretation of the “immediacy and concreteness of the legal interest”,<sup>27</sup> regarding the concrete case of the Ordinance under consideration, the decision of the Constitutional Court, No. U-I-192/16 of 7 February 2018 is important.<sup>28</sup> In this case, the Constitutional Court departed from its previous case-law, according to which the petitioners were required to, despite the direct effect of regulations on their legal position, first “surrender to the violation” of a particular legal regulation, later “use all legal remedies” (including constitutional appeal), and only then lodge a petition to review the constitutionality and legality of a particular regulation.<sup>29</sup> In para. 19 of the reasoning of the said decision, the Constitutional Court wrote in this regard:

<sup>20</sup> Case No. U-I-83/20-10. At the same time, it is legitimate to ask the question: why did the Constitutional Court accept this very initiative and not any other?

<sup>21</sup> Ibidem. Regarding the question of whether the “anonymised” petitioner, which was accepted for consideration, meets the criteria for legal interest, a partly dissenting and partly concurring separate opinion was written by judges Šugman Stubbs, Mežnar and Čeferin, and dissenting opinions were written by judges Šorli and Jaklič. Available at: <<https://www.us-rs.si/zacasno-zadrzanje-izvrsevanja-7-clena-odloka-o-zacasni-splosni-prepovedi-gibanja-in-zbiranja-ljudi-n/>> (25.4.2020).

<sup>22</sup> Official Journal of the Republic of Slovenia, Nos. 64/07, 109/12 and 23/20.

<sup>23</sup> Article 24(2) of the Constitutional Court Act.

<sup>24</sup> Cf. Jernej Letnar Čerňič: Vprašljiva praksa Ustavnega sodišča? IUS INFO, opinion piece, 30 October 2014.

<sup>25</sup> For more details, see, for example, Ciril Ribičič: Človekove pravice in ustavna demokracija. Beletina. Ljubljana 2010.

<sup>26</sup> Cf. Decision of the Constitutional Court of the Republic of Slovenia, No. U-I-15/00 of 31 January 2002.

<sup>27</sup> By its decision in case U-I-74/03 of 23 October 2003, the Constitutional Court decided to reject the petition for the review of a statutory regulation establishing a minor offence with a fine, as the petitioner would demonstrate a legal interest only when found liable for the commission of the minor offence. See para. 5 of the reasoning.

<sup>28</sup> Official Journal of the Republic of Slovenia, No. 15/2018 and OdlUS XXIII, 2.

<sup>29</sup> An interesting fact: the Constitutional Court “arbitrarily” created a case-law according to which it is “necessary” in cases of appeals against a decision on **minor offence** to “skip” the Supreme Court of the Republic of Slovenia and lodge a constitutional appeal within the statutory time limit, see the explanation in the article by Jurij Toplak and Andraž Teršek: The right to obtain sufficient information about available legal remedies and the ECHR. ECHRASELAW.com, available at <<https://www.echrcaselaw.com/en/echr-decisions/by-article/article-6/the-right-to-obtain-sufficient-information-about-available-legal-remedies-and-the-echr/>> (25.5.2020).

“[...] In the present case, the Constitutional Court departs from its position in the above cases. Namely, the petitioners cannot be expected to provoke a court dispute by concluding contracts that are contrary to regulations in terms of the essential component (price). In view of this, the legal interest in reviewing the constitutionality of the challenged legal regulation has been demonstrated.”

In our opinion, to demonstrate a legal interest in challenging the constitutionality of the Ordinance, it is not necessary to deliberately violate the challenged Ordinance: solely for the reason of satisfying the restrictive interpretation of the criterion of “immediacy and concreteness” of legal interest. This would seem absurd to us and also contrary to the constitutional principle of “the rule of law as a (substantive) rule of law” from Article 2 of the Constitution, since “reasonableness” is a quality that the concept of “the rule of law” includes by definition.

The challenged Ordinance in its own *primary disposition* directly commanded, forbade, or allowed admissible conduct, and therefore already without an individual and concrete “act of authority” directly affected the legal position of citizens. For instance, it prohibited a car trip in which a person would cross municipal boundaries, or a trip to another municipality for a person to walk in nature, or a trip to another municipality for any person to visit friends or relatives, or even sitting on benches in the park and on the edge of forests, shopping in another municipality, even though the person in the municipality in which he or she resides has access to a shop with the same or substantially similar products, etc. Infringement of the challenged Ordinance (*secondary hypothesis*) would lead to activation of *secondary disposition*, which already means direct sanctioning of such conduct as “illegal”.

A potential interpretation of the legal interest by which it would be required from the petitioner to expose himself or herself to the violation of the Government regulation (albeit allegedly unconstitutional), and simultaneously it would be required from the person to make an effort to challenge an individual and concrete decision of the authorities before regular courts enduring the uncertainty regarding the later final court decision, would be objected to by the authors referring to the “ineffectiveness” of such a remedy.

Namely, such right is stipulated by Article 25 of the Constitution.<sup>30</sup> We find it constitutionally unacceptable to assume that a person should only then, in the event of an unfavourable outcome of the court proceedings, try to challenge the sanction with extraordinary legal remedies and allege a violation of constitutional rights and fundamental freedoms in a constitutional complaint. This would require a long-term activity of the individual, which would prevent the “effectiveness” of legal remedies available to the person. This would be an excessive demand, which would be in conflict with the Constitution and with the demand for effective protection of the rights of individuals.<sup>31</sup>

Therefore, we defend the belief that the Constitutional Court should establish a “demonstration of legal interest” for every inhabitant of Slovenia whose particular fundamental rights and freedoms had been restricted by the Ordinance.

## 5 The Issue of the Timeliness of the Petition

Submissions for constitutional review must always justify the timeliness of the petition. Article 24(3) of the Constitutional Court Act stipulates that in instances in which regulations or general acts issued for the exercise of public authority have direct effects and interfere with the rights, legal interests, or legal position of the petitioner, a petition may be lodged within one year after such act enters into force or within one year after the day the petitioner learns of the occurrence of harmful consequences.

The challenged Government Ordinance entered into force on 30 March 2020, which means that less than a year has passed since it entered into force. The day of entry into force of the challenged Ordinance is also the day when any hypothetical petitioner found out about the occurrence of harmful consequences of the Ordinance. Therefore, the timeliness of lodging the petition for a constitutional review of the Ordinance cannot be questioned.

<sup>30</sup> Article 25 of the Constitution of the Republic of Slovenia (Right to a Legal Remedy): “Everyone shall be guaranteed the right to appeal or to any other legal remedy against the decisions of courts and other state authorities, local community authorities, and bearers of public authority by which his rights, duties, or legal interests are determined.” Where by theoretical and constitutional interpretation such means should be “effective”. See Matej Avbelj (ed.): *Komentar Ustave Republike Slovenije*. Nova univerza, Evropska pravna fakulteta. Ljubljana 2019, pp. 237ff.

<sup>31</sup> Similarly argued the Constitutional Court judge Jadek Pensa, in concurring separate opinion to the decision of the Constitutional Court No. U-I-192/16 of 7 February 2018.

Pursuant to Article 162 of the Constitution and Article 24 of the Constitutional Court Act, it is possible to lodge a petition for every citizen and resident of Slovenia to initiate proceedings to review the constitutionality and legality of the Ordinance.<sup>32</sup> Namely, the Constitutional Court is also competent to decide on the conformity of executive regulations with the Constitution and laws,<sup>33</sup> and the initiative for the process can be lodged by “anyone who shows a legal interest”.<sup>34</sup> By claiming that the challenged Ordinance is inconsistent with the Constitution, as well as (and this moment is essential from the perspective of the “legality” of the Ordinance) with the Communicable Diseases Act (ZNB).<sup>35</sup>

## 6 Fundamental Arguments on the Illegality and Unconstitutionality of the Ordinance and the Measures Based Thereupon

In this section, we will present, analyse and substantiate the primary arguments in favour of the thesis on the unconstitutionality and illegality of the Ordinance in question.

### 6.1 A Concise Description of the Background to the Adoption of the Challenged Ordinance

In December 2019, the first case of human infectious disease COVID-19 caused by the SARS-CoV-2 virus was officially identified in Wuhan, China.<sup>36</sup> The virus then, according to official reports, began to spread rapidly across the planet. The first case in Europe was recorded on 24 January 2020, in France,<sup>37</sup> the first official case in Slovenia was confirmed on 4 March 2020.<sup>38</sup>

Ever since the discovery of the first infected case in Slovenia, the Government has focused its activities on taking measures to prevent the further spread of the disease. We believe this was the right course of action, including intensive, urgent, and responsible action. However, it was not legally and constitutionally flawless.

The Government took its measures in the form of orders, ordinances, and decrees.<sup>39</sup> In other words, bylaws. This is where the legal problem arises.

A day after the World Health Organization (WHO) declared a pandemic,<sup>40</sup> the Minister of Health adopted the Order on the Declaration of the COVID-19 Epidemic in the Territory of the Republic of Slovenia. From 12 March 2020, 6 pm, onwards, an epidemic of the infectious disease SARS-CoV-2 (COVID-19) was declared in the entire territory of Slovenia.

By a 13 March 2020 Decision on the Application of Measures as enumerated in the Communicable Diseases Act, in the case of the COVID-19 pandemic, the Government decided that special measures should be applied envisioned by the Communicable Diseases Act for plague or viral haemorrhagic fever by pathogens (Ebola, dengue, Lassa, Marburg). General measures are set out in more detail in Article 9, and special measures are listed in Article 10 of the Communicable Diseases Act.

<sup>32</sup> The Ordinance was published in the Official Gazette of the Republic of Slovenia, Nos. 38/20 and 51/20.

<sup>33</sup> See Article 21(3)(1) of the Constitutional Court Act.

<sup>34</sup> See Article 24 of the Constitutional Court Act.

<sup>35</sup> Official Gazette of the Republic of Slovenia, No. 33/06.

<sup>36</sup> World Health Organization, Novel Coronavirus (2019-nCoV), Situation report – 1, 21 January 2020, <[https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10\\_4](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10_4)> (14.4.2020).

<sup>37</sup> 2019-nCoV outbreak: first cases confirmed in Europe, <<http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/01/2019-ncov-outbreak-first-cases-confirmed-in-europe>> (14.4.2020).

<sup>38</sup> Prvi potrjeni primer okužbe pri nas: okuženi prišel iz Maroka prek Italije [First Confirmed Case of Infection Here: The Infected Arrived from Morocco via Italy], <<https://www.rtvsl.si/zdravje/novi-koronavirus/prvi-potrjeni-primer-okuzbe-pri-nas-okuzeni-prisel-iz-maroka-prek-italije/516153>> (14.4.2020).

<sup>39</sup> In the time since the outbreak of the infectious disease, the Government in Slovenia has changed. Thus, the 14<sup>th</sup> government officially took office on 13 March 2020, when a vote was held on the list of candidates for ministers.

<sup>40</sup> In his address to the media on 11 March 2020, the WHO Director-General said, *inter alia*: “We have made the assessment that COVID-19 can be characterized as a pandemic.” Available at <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>> (14.4.2020).



Subsequently, the Government began to adopt by-laws implementing the general and special measures mentioned above. The aim of some of the measures taken was to phase out public life. For example:

- Ordinance on the Restriction of Public Transport of Passengers in the Republic of Slovenia;<sup>41</sup>
- Ordinance on the Provisional Prohibition on the Offering and Sale of Goods and Services to Consumers in the Republic of Slovenia;<sup>42</sup>
- Ordinance Temporarily Prohibiting Gatherings of People in Educational Institutions and Universities and Independent Higher Education Institutions;<sup>43</sup>

In addition to these measures, some other measures were taken as well. The common denominator of all the measures was the fact they were adopted based on Article 39 of the Communicable Diseases Act, which regulates the so-called other special measures.<sup>44</sup>

Among other things, on 29 March 2020, the Government, also based on Article 39 of the Communicable Diseases Act, adopted, *inter alia*, Ordinance on the Temporary General Prohibition of Movement and Public Gathering in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement Outside the Municipality.<sup>45</sup> The Ordinance, which was challenged before the Constitutional Court, is, in fact, a continuation of the (otherwise legitimate) Government measures for the restriction of movement. Initially, a prohibition of gatherings at certain sporting and other outdoor events was envisaged,<sup>46</sup> then a measure banning gatherings at indoor events followed.<sup>47</sup> After that, the Ordinance on the Temporary Prohibition of the Gathering of People at Public Meetings at Public Events and Other Events in Public Places in the Republic of Slovenia<sup>48</sup> and then the Ordinance subject of the legal analysis in this article were adopted.

Within the framework of our assertion basis, with which we critically assess the constitutionality and legality of the challenged Ordinance, we do not delve into the assessment of whether measures envisaged and implemented to prevent the spread of infectious virus and disease were appropriate or professionally justified. Our intention is reflected by the constitutional analysis of whether the measures adopted in the Ordinance are *prima facie* in accordance with the Constitution and the Communicable Diseases Act. We are aware, and we also emphasise that the Constitutional Court is not competent to assess whether the measures taken were professionally appropriate and necessary to prevent the spread of the disease and to “fight” the COVID-19 pandemic. Therefore, we underline that we do not challenge the need for action and its urgency *per se*. The determination of public health policies is also not within the competence of the Constitutional Court. Public health issues are the sole responsibility of the relevant health institutions and global and national health professionals and workers. Therefore, this aspect is not subject of our analysis.

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<sup>41</sup> Official Gazette of the Republic of Slovenia, No. 24/20

<sup>42</sup> Official Gazette of the Republic of Slovenia, Nos. 25/20, 29/20, 32/20, 37/20, 42/20, 44/20, 47/20 and 53/20.

<sup>43</sup> Official Journal of the Republic of Slovenia, Nos. 25/20 in 29/20.

<sup>44</sup> Article 39 of the Communicable Diseases Act:

“When the measures stipulated by this Act cannot prevent certain communicable diseases from entering the Republic of Slovenia and spreading it, the minister responsible for health shall also order the following measures:

1. Prescribe the conditions for travel to and from the country where a possibility exists of contracting a dangerous communicable disease;
2. Prohibit or restrict the movement of the population in infected or directly endangered areas;
3. Prohibit the gathering of people in schools, cinemas, public places and other public places until the risk of the spread of a communicable disease has ceased;
4. Restrict or prohibit the movement of certain types of goods and products.

The minister responsible for health must immediately inform the Government of the Republic of Slovenia, the National Assembly of the Republic of Slovenia and the public about the measures referred to in the preceding paragraph.”

<sup>45</sup> Official Gazette of the RS, Nos. 38/20 and 51/20.

<sup>46</sup> Ordinance on the Prohibition of Gathering at Certain Sports and Other Events in Public Places in the Open Air (Official Gazette of the Republic of Slovenia, Nos. 17/20 and 30/20).

<sup>47</sup> Order on the Prohibition of Public Gatherings at Public Events in Enclosed Public Places (Official Gazette of the Republic of Slovenia, Nos. 18/20 and 30/20).

<sup>48</sup> Ordinance on the Temporary Prohibition of the Gathering of People at Public Meetings at the Public Places, Surfaces and Other Areas in the Republic of Slovenia (Official Gazette of the Republic of Slovenia, Nos. 30/20 and 38/20).

## 6.2 The Issue of the Competence to Adopt Legal Acts and the Legality of Legal acts which May Restrict Constitutional Rights and Freedoms

We maintain that no convincing legal basis had existed for such a strict and extensive prohibition on movement, for such a drastic infringement on freedom of movement, including freedom of association, privacy, family life, general freedom of action and personal dignity. The Communicable Diseases Act does not envisage the possibility of a total ban on the movement and association of people throughout the country. On the contrary, the subject of the Act are only areas that the medical profession (our logical conclusion is: the National Institute of Public Health) defines as “high-risk”. In this sense, the actual “quarantine” must also be assessed, which is then used to effectively prevent the spread of the disease outside such “risky” or “contaminated” area. Therefore, it is legitimate to ask the question whether a measure concerning the entire territory of the state is in itself lawful and in this sense also in accordance with the Constitution (with the principle of the rule of law from its Article 2)?

As has been already noted, the very legality of the Ordinance is questionable. Namely, the Communicable Diseases Act speaks about the “minister responsible for health” as a person who adopts such a measure by an executive act. The Government subsequently changed this provision of the Communicable Diseases Act, and replaced the word “minister” with the word “government”. The question, therefore, arises as to whether such conduct is lawful and constitutionally acceptable. We maintain that such conduct is not lawful and constitutionally correct.

At the time the Government issued the challenged Ordinance, on the other hand, the National Institute of Public Health, which is competent for such issues, did not propose such a measure to the Government. The Institute director, who was removed from office after that, even publicly expressed doubts on the adequacy of such measure stipulated by the challenged Ordinance and asserted that the measure was not the result of instructions and proposals given to the Government of the Republic of Slovenia by the Institute.<sup>49</sup> This fact further strengthens the legitimacy of doubts about the legality and constitutionally proper conduct by the Government.

The reason is substantiated. Namely, in the Slovenian constitutional order, it is considered that constitutional rights and freedoms may be infringed upon only by law, but not by by-laws, except in the case of declaring a “state of emergency”, which is regulated by Article 92 of the Constitution.<sup>50</sup> However, such a state was not declared.

Article 2(3) of Protocol No. 4 to the European Convention on Human Rights (ECHR) stipulates that the exercise of the right to freedom of movement may be restricted only in a certain area, which must be regulated by law and must be founded on legitimate public interest. Otherwise, the state—this seems to be an obvious legal condition—must declare a “state of emergency”, legally-formally and explicitly must declare the existence of an “emergency situation” to meet the conditions within the meaning of Article 16 of the ECHR. This supranational legal condition, which is stipulated by the ECHR, cannot be simply ignored.<sup>51</sup>

<sup>49</sup> Staš Zgonik: Direktor NIJZ meni, da vladna zaostritev ukrepov za zajezitev epidemije ni bila potrebna [The director of the National Institute of Public Health Believes that the Government did not Need to Tighten Measures to Curb the Epidemic]. In: Mladina, 31 March 2020, available at <<https://www.mladina.si/197247/direktor-nijz-meni-da-vladna-zaostritev-ukrepov-za-zajezitev-epidemije-ni-bila-potrebna>> (31.3.2020).

<sup>50</sup> Article 92 of the Constitution (War and State of Emergency): “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.

The National Assembly decides on the use of the defence forces.

In the event that the National Assembly is unable to convene, the President of the Republic shall decide on matters from the first and second paragraphs of this article. Such decisions must be submitted for confirmation to the National Assembly immediately upon its next convening.”

<sup>51</sup> Interesting essays were authored on how the European Court of Human Rights (ECtHR) would assess the declaration of a “state of emergency” in individual European countries; Kanstantsin Dzehtsiarou: COVID-19 and the European Convention on Human Rights, Strasbourg Observers, 27 March 2020, available at <<https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/>> (25.5.2020); Alan Greene: States should Declare a State of Emergency using Article 15 ECHR to Confront the Coronavirus Pandemic, Strasbourg Observers, 1 April 2020, available at <<https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>> (15.3.2020). The latter author warns against declaring a state of emergency. He wrote, *inter alia*: “We absolutely should be sceptical of governments who declare states of emergency. Hungary is showing us this right now. However, if there is one lesson to take from Schmitt, it is the dangers of permanent transformative emergency powers, rather than temporary, defensive ones.”

The Constitution explicitly regulates this issue in Article 15 (Exercise and Limitation of Rights):

“Human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution.

The manner in which human rights and fundamental freedoms are exercised may be regulated **by law** whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom.” (Emphasis added).<sup>52</sup>

Therefore, it is legitimate and factually justified to ask the question, is it constitutionally permissible for the government to interfere so strongly in the exercise of constitutional rights and freedoms in the manner described above and with an executive act? We believe the answer to this question is negative.

It should be stressed that the provision of Article 16 of the Constitution, which regulates the possibility of declaring a state of emergency and states constitutional rights, which must remain inviolable even in such a case, does not include “freedom of movement” from Article 32 of the Constitution, as well as the “right to assembly and association” from Article 42 of the Constitution. But even for these rights, it explicitly states that they may be “restricted by law”, if necessary, “to prevent the spread of a communicable disease” and to “protect public order”.

### 6.3 Reasons for Alleging the Inconsistency of the Ordinance with the Constitution and the Communicable Diseases Act

The core substantive constitutional law issue, in this case, is the substantive compliance of the challenged Ordinance with the Constitution: whether the Slovenian Government restricted the fundamental rights and freedoms guaranteed by the Constitution “in accordance with the law” by adopting the Ordinance, as well as whether it exceeded its powers as stipulated by law and the Constitution?

Let us recall the constitutional principle of legality, which is set in Articles 2, 3, 15, 120 and 153 of the Constitution, as well as Articles 16 (Temporary Suspension and Restriction of Rights), 32 (Freedom of Movement), 35 (Protection of the Rights to Privacy and Personality Rights) and 42 (Right of Assembly and Association), in conjunction with Article 32 (Freedom of Movement). It is also worth mentioning Protocol No. 4 to the ECHR,<sup>53</sup> then Articles 8 (Right to Respect for Private and Family Life) and 11 (Freedom of Assembly and Association) of the ECHR, as well as Article 12 of the International Covenant on Civil and Political Rights<sup>54</sup> and Article 12 of the Universal Declaration of Human Rights. Already the Universal Declaration of Human Rights sets a fundamental criterion of modern constitutional rights<sup>55</sup> in Article 13, which stipulates that everyone has the right to freedom of movement and residence within the borders of each state. Everyone also has the right to leave any country, including his own, and to return to his country.

The right to freedom of movement is also expressly recognised in Article 45 of the 2000 Charter of the Fundamental Rights of the European Union, as amended in 2007, which, under Article 6 of the Treaty of Lisbon,<sup>56</sup> has the same legal force as the Treaty itself.

According to the express provision of Article 15 of the Constitution, human rights and fundamental freedoms shall be limited only by the rights of others and in such cases as are provided by this Constitution.<sup>57</sup> In its case-law, the Constitutional Court mentions three possible ways of interfering with human rights:

<sup>52</sup> In its decisions, the Constitutional Court repeated and confirmed this “golden” constitutional rule so many times that the citation of such a vast Constitutional Court case-law on the issue here would be superfluous.

<sup>53</sup> Act on ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2, and its protocols Nos. 1, 4, 6, 7, 9, 10 and 11, Official Gazette of the Republic of Slovenia, No. 33/94.

<sup>54</sup> Act on Notification of Succession Concerning United Nations Conventions and Conventions Adopted by the International Atomic Energy Agency, Official Gazette of the Republic of Slovenia – International Treaties, Nos. 9/92, 9/93, 5/99, 9/08, 13/11, 9/13 and 5/17.

<sup>55</sup> Decision on the publication of the text of the Universal Declaration of Human Rights, Official Gazette of the Republic of Slovenia – International Treaties, No. 3/18.

<sup>56</sup> Act on Ratification of the Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, Official Gazette of the Republic of Slovenia – International Treaties, No. 10/08.

<sup>57</sup> See Article 15(3) of the Constitution.

1. When the Constitution expressly authorises the legislator to restrict a right to a certain extent;<sup>58</sup>
2. In the cases of the temporary revocation and restriction of rights in a state of war and emergency;<sup>59</sup>
3. In the case of a conflict of human rights, or conflict of human rights with an overriding public interest, according to the principle of proportionality.<sup>60</sup>

In Article 153(3), the Constitution also stipulates that regulations and other general acts must be in conformity with the Constitution and laws. This reflects the hierarchical harmonisation of regulations, in the light of constitutionality and legality. The Constitution provides for the principle of legality in Article 120, in which it stipulates that administrative authorities shall perform their work within the framework and based on the Constitution and laws; such meaning can also be derived from Article 3, which stipulates that power is vested in the people, consistent with the principle of the separation of legislative, executive, and judicial powers.

The challenged Ordinance, which in Article 1 **generally** restricted the right of movement of **all** people in public places and areas, **banned** access to public places and areas, and **prohibited movement outside the municipality of permanent or temporary residence** in Slovenia, could be, therefore, assessed as unconstitutional merely because the Government issued the challenged Ordinance contrary to the provisions of the Communicable Diseases Act.

Legal doctrine interprets the principle of legality as a requirement to eliminate internal legal antinomies on the one hand and as a requirement to maintain a balance between the executive and the legislative branches on the other. Therefore, from the perspective of constitutional democracy, the operation of the executive branch of government must be based on laws and the Constitution.<sup>61</sup> The described principle and doctrine have been repeatedly confirmed by the Constitutional Court case-law.<sup>62</sup> When it comes to determining rights or obligations, as in the present case, the Constitution even expressly stipulates in Article 87 that this is reserved only to the National Assembly, i.e. the legislative branch of power.

And here a new legal issue arises. The Communicable Diseases Act does not stipulate that the minister responsible for health or the Government may issue an ordinance, which could in any way and to an unlimited extent restrict the right of the people of Slovenia to freedom of movement. This constitutional issue is important, and we should not just ignore it, push it aside. The legally and constitutionally challenged Ordinance was adopted by the Government, which, however, did not have the authority in law for its normative activity—specifically in this case. In the Ordinance, the Government refers to Articles 2 and 20(8) of the Government of the Republic of Slovenia Act<sup>63</sup> and to points 2 and 3 of Article 39(1) of the Communicable Diseases Act. Neither the Government of the Republic of Slovenia Act nor the Communicable Diseases Act expressly authorise the Government to adopt an ordinance detailing the content of the relevant law. Therefore, it is legitimate to ask whether the Government may have acted outside the framework allowed by law and the Constitution? We believe the answer is positive.

The Government referred to Articles 2 and 20 of the Government of the Republic of Slovenia Act. And it is undoubtedly true that administrative authorities do not need a special authority for further regulation of legal matters, but of course, taking into account the substantive nexus to the law. In this specific case, the Communicable Diseases Act expressly delegated the authority to adopt measures under Article 39 of the Act to the minister responsible for health. This has created at least (very leniently) a minor legal issue, but not an insignificant one.

The National Assembly adopted on 2 April 2020 Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy (ZIUZEOP),<sup>64</sup> by which, among other things, it amended Article 39 of the Communicable Diseases Act and designated the Government as the competent authority for the adoption of measures instead of the minister responsible for health. However, the challenged Ordinance was

<sup>58</sup> See also Article 32(2) of the Constitution.

<sup>59</sup> See Article 16 of the Constitution.

<sup>60</sup> This is the so-called strict proportionality test. Cf. Decision of the Constitutional Court of the Republic of Slovenia U-I-18/02 of 24 October 2003, para. 25 of the reasoning.

<sup>61</sup> No need exists to cite vast literature on this issue here. In any case, this emphasis is among the mainstays of the Slovenian constitutional order, which is confirmed by both previous decisions of the Constitutional Court and the 2019 Commentary of the Constitution of the Republic of Slovenia.

<sup>62</sup> Cf. decisions of the Constitutional Court of the Republic of Slovenia Nos. U-I-1/92, U-I-115/92, U-I-73/94, etc.

<sup>63</sup> Official Gazette of the Republic of Slovenia, Nos. 24/05 – official consolidated text, 109/08, 38/10 – ZUKN, 8/12, 21/13, 47/13 – ZDU-1G, 65/14 and 55/17 – ZVRS.

<sup>64</sup> Official Gazette of the Republic of Slovenia, No. 49/20.

adopted at a time when the Government did not yet have this power. ZIUZEOP entered into force on 11 April 2020, and the Ordinance was adopted on 29 March 2020.<sup>65</sup> Therefore, a legal question arises: can laws, in this case, have retroactive effect?<sup>66</sup> The Constitutional Court should adjudicate on such issues. These issues are not trivial. Our thesis, however, is that—from a theoretical perspective—this is not permissible.

Ordinances, as a form of a bylaws, and adopted by the Government are envisaged only to regulate specific issues or certain measures of general relevance, for which it is determined by an act or decree that they shall be regulated by the Government.<sup>67</sup> However, at the time of the adoption of the Ordinance, the Communicable Diseases Act did not contain such a provision.

The legal issue is also interesting because of the “substantive” problem. The Communicable Diseases Act identifies infectious diseases and prescribes measures for their prevention and control. Article 3 of the Communicable Diseases Act stipulates that general and special measures are used for the prevention and control of diseases, and these are broken down in more detail in Articles 9 and 10. Among the special measures, Article 10(1)(9) of the Communicable Diseases Act also includes “other special measures”, which are regulated in Articles 37 to 42 of the Communicable Diseases Act. Article 39 of the Communicable Diseases Act authorised the minister responsible for health to take other special measures for the prevention of the infectious disease spread, if measures under the Communicable Diseases Act cannot prevent their spread. Communicable Diseases Act, among other things, in points 2 and 3 of Article 39(1) also envisages “a measure prohibiting or restricting the movement of the population in infected or directly affected areas” and “a measure prohibiting the gathering of people in schools, cinemas, public places and other public places until the danger of spreading a contagious disease ceases.” The provision is clear and comprehensible. Given the content of the Ordinance, it is, therefore, legitimate to ask whether the Government tried to break down the content of the restriction of the right to free movement, which the law allegedly allows, according to the above points 2 and 3 of Article 39(1) of the Communicable Diseases Act? Regardless of the pursued (and legitimate) purpose and background of the case (we reiterate that we do not comment on the reasonableness and adequacy of the adopted solutions in preventing the spread of infectious disease COVID-19 and that the Constitutional Court would probably not rule on this issue), the Government not only broke down in more detail the content of the restrictions imposed by the Communicable Diseases Act, but also *de facto* and *de iure* restricted the right to free movement, the right to association and the right to privacy. Therefore, it is legitimate to pose the question, did it do so in a way that is beyond the scope of the content of the criteria as enumerated by the Communicable Diseases Act? Our thesis is affirmative.

Article 10 of the Ordinance provides:

“Due to the containment and control of the COVID-19 epidemic, this Ordinance prohibits the movement and gathering of people in public places and areas in the Republic of Slovenia, prohibits access to public places and areas in the Republic of Slovenia and prohibits movement outside the municipality of permanent or temporary residence, unless otherwise provided by this Ordinance.”

Substantially, the Ordinance represented a general restriction on the movement of all inhabitants in the Republic of Slovenia. Except for the exhaustively enumerated exceptional cases in Articles 3, 4 and 5 of the Ordinance, a person in the Republic of Slovenia was not allowed to leave the municipality in which he or she has a temporary or permanent residence (residents of Slovenia were allowed to choose from residing at their permanent or temporary address during the quarantine).<sup>68</sup> However, the Communicable Diseases Act does not envisage such restrictions on the right to freedom of movement as stipulated by the challenged Ordinance. According to the principle of subsidiarity and proportionality, the Communicable Diseases Act authorised the minister to ban or restrict the movement of the population in infected or directly affected areas. It is legitimate to ask the question whether it was (constitutionally) legally permissible and legal to determine the entire territory of Slovenia as “such an area”? We maintain that it was not.

<sup>65</sup> As the petitioner challenges the challenged Ordinance in its entirety, his or her assessment of constitutionality and legality is, therefore, not affected by the fact that the Government has been the competent authority for adopting measures under Article 39 of the Communicable Diseases Act since 11 April 2020 (when ZIUZEOP entered into force).

<sup>66</sup> See Article 155 of the Constitution.

<sup>67</sup> See Article 21(3) of the Government of the Republic of Slovenia Act.

<sup>68</sup> Article 4 of the challenged Ordinance stipulates that a person may be accommodated either at a temporary or permanent address and may not change it or move between residences during the declared epidemic.



The Communicable Diseases Act provides for such a measure as a subsidiary option, which should be used restrictively and only if the goal cannot be achieved by measures already envisaged by the Act. The question arises as to whether the entire territory of Slovenia should be officially declared an “affected area” before the adoption of the Ordinance. We maintain that the answer to this question is affirmative.

Perhaps it could be argued that this is just “a game of formalities”, legal formalities. Or “bare theorising”. Perhaps. However, the question is not insignificant. Theorising is not an end in itself. If not for other reasons, then because of the effects that the decision of the Constitutional Court on this issue would have for the future and for legal predictability in all the substantially similar cases that might arise in the future. Theorising is in the function of legal certainty and predictability, it is not a bare leisure activity of theorists.

In any case, our thesis can be theoretically challenged by arguing that the Communicable Diseases Act does not equate the declaration of an epidemic and the designation of an “infected or affected area” with a “pandemic”. In the case of Coronavirus COVID-19, officially (also according to the WHO) it was a pandemic, not just an epidemic. Therefore, perhaps the Government could maintain that a pandemic automatically covers the entire territory of a country as an affected area. Perhaps. It is certainly worth a lucid constitutional consideration. However, convincing justifications are also needed.

The Ordinance limited the possibility of free movement exclusively to the home municipality, with strictly defined exceptions. Without special reasons, checked in the field by the law enforcement officers, municipal wardens and civil protection, movement around Slovenia was not legally allowed. Thus, no movement into nature, away from people, was allowed. With such a total ban, however, it is legitimate to question its reasonableness, and especially its “necessity”. A total ban on movement outside the boundaries of the municipality of residence has even caused effects that are diametrically opposed to the desired effects—to reduce the chances of infection and the extent of the pandemic. It could be logically concluded if all inhabitants of an individual municipality, large or tiny, are allowed to move only within the boundaries of “their” municipality, but not outside of its boundaries, although their movement would be aimed at finding peace, solitude, and distance from other people, the possibility of intimacy between people, contact between people and transmission of infection is greater, not lesser.<sup>69</sup>

Thus, a possible and legitimate objection by the Government that an epidemic is not the same as a “pandemic” because the latter is a broader and, therefore, (hypothetically) automatically territorially comprehensive phenomenon inevitably collides with the “argument of reasonableness and necessity” of unconditional and complete prohibition: reasonableness has become constitutionally the least questionable.

In Articles 3(4) and 4(3) of the Ordinance, the Government also prescribed that the right to free movement, depending on the specific needs of the community, may be determined or restricted by the mayor of a particular self-governing local community. A legitimate question arises on the legality and constitutionality of such a broad power of executive restriction of constitutional rights. The Ordinance thus opens the possibility of legally indefinite, disproportionate, and original restrictions on human rights and fundamental freedoms, even by regulations adopted at the municipal level. We maintain that such a possibility is illegal and unconstitutional.

The Government has publicly maintained that the legislative process would have taken too long, as indicated by the statement of the Minister of the Interior Aleš Hojs published on 8 April 2020, on his official Twitter account,<sup>70</sup> responding to a piece of the news portal *dnevnik.si*.<sup>71</sup> The objection is legitimate. And yet: a government is a government because it has a majority in the parliament. From this perspective, such an objection loses a large, perhaps decisive edge.

<sup>69</sup> However, the issue of people’s fear or intimidation must also be considered. Andraž Teršek, co-author of the article, argues that the protection of people from fear is also a fundamental human and constitutional right (based at least on Article 34 of the Constitution – Right to Personal Dignity and Safety). See *Država se mora truditi zaščititi ljudi tudi pred tesnobo in strahom, zlasti tistim »nevidnim«* [The State Must also Strive to Protect People from Anxiety and Fear, Especially the “Invisible” One], IUS INFO, opinion piece, 15 May 2020; and *Pravica do zaščite pred strahom in pred poniževanjem* [The Right to Protection from Fear and Humiliation], IUS INFO, opinion piece, 6 March 2020. Both available at <<https://www.iusinfo.si/medijsko-sredisce/kolumne/avtor/61>> (20.8.2020).

<sup>70</sup> The message is available at: <<https://publish.twitter.com/?query=https%3A%2F%2Ftwitter.com%2Faleshojs%2Fstatus%2F1247964302356754434&widget=Tweet>> (14.4.2020).

<sup>71</sup> See *Ministrov odlok o prepovedi gibanja je protiusstaven* [The Minister’s Decree Prohibiting Movement is Unconstitutional]. Available at <<https://www.dnevnik.si/1042926637>> (14.4.2020).

## 6.4 “In Accordance with the Law” Rule Revisited

The ECtHR has repeatedly interpreted the phrase “in accordance with the law” in its case-law, always stressing that it is not just a requirement for a legal measure to have “some” legal basis, but that it must have a legal basis of appropriate legal quality.<sup>72</sup> However, the legal quality concerns, in particular, the accessibility of the substantive legal basis to all those addressees concerned by the measure to enable them to adapt their activities to the measure and to allow them predictability as to the legal effects of their actions.

In this respect, we argue that the Ordinance, in our opinion, is (was) not unconstitutional merely from the perspective of the principle of legality and disproportionate interference with human rights and fundamental freedoms, but was also fraught with excessive ambiguity and indeterminacy. The latter is confirmed by several ambiguities that have arisen regarding the substantive interpretation of restrictions on rights and freedoms. This is directly confirmed, *inter alia*, by the fact that the Government set up a separate tab on the website of the Ministry of the Interior titled *Frequently asked questions and answers regarding the Ordinance on the Temporary Restriction of the Gathering of People in Public Spaces and Areas in the Republic of Slovenia*,<sup>73</sup> where the Government and the Ministry of the Interior “promptly” provided substantive interpretation of the challenged Ordinance.

This fact reinforces the legitimacy of the thesis that the Ordinance would be unconstitutional also due to the constitutional requirement for clarity and definiteness of law as encompassed by Article 2 of the Constitution. The content of the restriction of rights must be clearly and definitively (!) evident from **the law**, not from the executive ordinance, which, in an original way, restricts the fundamental human rights and freedoms guaranteed by international law and the Constitution. If the ambiguity and vagueness of a regulation are so great that it must be interpreted daily or explained by the Government representatives and the Ministry on their website, it is difficult to refute the thesis of its unconstitutionality.

## 7 Conclusion

We maintain that the Ordinance was (in essence) illegal and unconstitutional. Therefore, we expected the decision of the Constitutional Court to be the same. We thus expected the Constitutional Court to rule the Ordinance to be illegal and unconstitutional, and the measures introduced to be subsequently unconstitutional because they constituted an excessive and disproportionate interference with constitutional rights and fundamental freedoms. We expected the Constitutional Court to decide that the Government of the Republic of Slovenia pursued a legitimate aim in the public interest, but failed to substantiate the adequacy of measures, the proportionality of infringements on constitutional rights and fundamental freedoms, or the necessity of measures to achieve a legitimate aim. As well as the fact that the Government of the Republic of Slovenia failed to convincingly substantiate the undoubted professional justification of the measures.

Simultaneously, we are convinced that the Constitutional Court, in this case, should also assess the constitutionality of the Communicable Diseases Act (ZNB). We believe the Act to be substantively and conceptually ambiguous and deficient. In particular, we are referring to the provisions of the Communicable Diseases Act mentioned above, regarding the issue of epidemics and special measures at the time of the official declaration of an epidemic or a pandemic (the terms are not interchangeable). We believe, the Constitutional Court should first assess whether the current substance of the Communicable Diseases Act is constitutionally acceptable at all, and then assess the constitutionality of an executive legal act, which the Government justified by referring to the provisions of the Communicable Diseases Act.

<sup>72</sup> Cf. the ECtHR judgments in *Khlyustov v. Russia*, Application No. 28975/05, para. 68 of the reasoning; *Centro Europa 7 Srl in Di Stefano*, No. 38433/09, para. 143 of the reasoning; etc.

<sup>73</sup> Tab entitled “Frequently asked questions and answers regarding the Ordinance on the temporary restriction of the gathering of people in public spaces and areas in the Republic of Slovenia”, <<https://www.gov.si/novice/2020-03-30-najpogostejša-vprasanja-in-odgovori-glede-odloka-o-zacasni-splosni-prepovedi-gibanja-in-zbiranja-ljudi-na-javnih-cities-in-slovenia/>> (14.4.2020).

# On the Legality and Constitutionality of the Measures by which the Slovenian Government Restricted Constitutional Rights and Freedoms Before and After the 2020 Coronavirus Pandemic: Part 2, With Supplement

Andraž Teršek

## 1 Commentary on the Decision of the Constitutional Court of the Republic of Slovenia No. U-I-83/20

I just read a media report about a US federal judge who declared measures restricting the exercise of fundamental constitutional rights and freedoms, similar to those in force in Slovenia during the officially declared pandemic, to be unconstitutional and accompanied it with a message to the authorities:

“Good intentions and exceptional circumstances do not yet release the authorities from respect for legality and constitutionality when taking measures restricting fundamental rights and freedoms.”

Likely, the case will soon be brought before the US Supreme Court. However, the Slovenian Constitutional Court has been slow in deciding on the issue, albeit quicker than the US judiciary. The public announcement of the Constitutional Court Decision No. U-I-83/20 distracted me from reading the American cases in detail first. The Slovenian Constitutional Court did precisely the opposite what the US judges want to prevent.

### 1.1 On the Majority (5:4) Decision

I expected such a majority decision of the Constitutional Court. Likewise, I expected which judge would tip the balance in favour of the majority. It was the president of the Court, undoubtedly. For me, there are almost no surprises as far as the important decisions of the Slovenian Constitutional Court are concerned. Mostly, no significant ones. I know most of the constitutional court judges very well, their mode of reasoning and their characters. Besides that, many people like to keep me informed about interesting information regarding the constitutional judges, even if the messages go through several communicators and mediators. The information is not always perfect, but it is usually accurate.

The decision is fatal and historic.

In general, the reasoning of the constitutional court majority decision is read as a report on the official positions of the Government, or as a summary of these positions, which is more than unfortunate. In the reasoning, an attempt is made to make it look convincing and well thought out, constitutionally considered. But it misses this goal. However, it succeeds in explaining something else, even if I can only speculate whether this was done in a well-considered way and with concentrated caution: it avoids defining all (!) the most controversial issues, which in several places form decisive overlaps between constitutional, daily-political, and social questions and the medical aspects of the case. But it is precisely these intersections that are at the heart of the matter. In addition to the issues addressed directly and expressly, these overlaps also include indirect and parallel issues—legal, medical and political—which form an inseparable whole with core issues on the existence of a legitimate objective of restricting certain constitutional rights and freedoms, about the proportionality of restrictions in a narrower and broader sense related to the legitimate objective, about the application of the proportionality test and the suitability of the means used to achieve the legitimate objective, and in particular about the proven existence of the “necessity” of state action (the Ordinance and measures contained therein). The common thread is expressed, as always, in the implicit question of “appropriateness” in the constitutional review, in the question of the inclusion of an objective, honest and straightforward “reason” in the thinking of these measures, considering all known facts and circumstances. Especially when one ponders upon the “substantiating

persuasiveness” and “professional persuasiveness” of the arguments of the Government. Finally, this results clearly, understandably, and convincingly from the divergent opinions of the minority in relation to the majority decision.

First, however, on the reasons for the final and binding majority decision.

After reading paragraph 28 of the reasoning, it becomes clear that the majority decision will comprise of numerous conceptual and descriptive variations and, above all, many bare summaries of the official Government positions and insufficient constitutional argumentation. I concluded the reading with such an impression, a strong one. The indecisiveness of the majority in using the terms “epidemic” and “pandemic” is only disturbing. But it is not insignificant. Nor is the sentence in the explanatory statement, which apprises the reader that “the pandemic is ongoing”, even though it officially ended. Because it was branded as “war against the virus” and because the authorities like to win “wars”, it was symbolically accompanied by a military scene: the flight of military aircraft over the capital Ljubljana.

The problem of “retroactivity”—which arose when the Communicable Diseases Act delegated the power to decide on the existence of the epidemic, the definition of threatened areas in the country and the definition of measures to the Minister of Health and his prior, also logically necessary, consultation with the National Institute of Public Health and the Slovenian medical profession/community, even though the measures were adopted by the Government—was dealt with swiftly and dryly. The Government subsequently initiated a change in of the relevant provisions of the Communicable Diseases Act by reducing the powers of the Minister and delegating extensive powers to the Government. This is more disturbing. Basically, the Constitutional Court majority is satisfied with the fact that the provisions of the Communicable Diseases Act and their substance are now as they are, and that the intermediate point at which these provisions and their substance were amended is practically eliminated in one sentence as an insufficient issue of constitutional significance or as not constituting a constitutional problem. For most. Very unconvincing.

This issue, which is a problem, is constitutionally significant precisely because the Government subsequently amended this part of the Communicable Diseases Act. If it had not been changed and the content of the Act had remained unchanged, the problem would have been, at least in my opinion, less significant. By amending the provision in the Communicable Diseases Act dealing with the possibility of declaring an epidemic and defining areas at risk, while the Government was entrusted with the definition of special health measures, the Government subsequently provided the legal basis for its actions, which have previously directly concerned the Minister and—with logical substantive and institutional necessity—the National Institute of Public Health as the central decision-maker—and not the Government, its commissions or professional working-groups.

At that time, I expected that an argument would follow on the substantive quality and constitutional integrity of the provisions of the Communicable Diseases Act as such. However, the majority decided that they did not need to question or defend the constitutional integrity of the Act itself, since without this, they could have decided on the constitutionality and legality of executive acts. All the more regrettable and no longer merely distracting.

The last sentence in paragraph 34 of the reasoning is probably significant, but it is too incomprehensible to be commented on convincingly. So, I will not quote it. The majority focused on Articles 8(1) and 39(1) of the Communicable Diseases Act. As for the Constitution, it referred to Article 32(1) (Freedom of Movement) as the core of the issue. Between the sentences, a special sequence suddenly appears, in which the words “epidemic” and “pandemic” are used interchangeably, also occurring together as “epidemic or pandemic”, and the description “nationally declared epidemic” is the most commonly used.

Suddenly the words about “mutual ethical obligations of citizens” appear in the reasoning. This phrase, which introduces the notion and concept of “ethics” in the majority decision, predicts the core argument by which the majority affirmed the legitimacy of the goal pursued by the Government. Too unfortunate. However, the question of “ethics” is essential in this matter. But for another reason. More on this in the concluding part of the article.

This is followed by the content in which the majority points to the existence of a “serious infectious disease” and summarises the official positions of the Government and its PR. By referring exclusively to the Government official positions presented at press conferences and published on the Government website, the majority concluded that all measures were “medically/professionally justified”. The majority attributed the status of the general opinion of the medical profession, i.e. the Slovenian, European, and worldwide medical community, to the Government PR and the so-called professional commission, on whose behalf one person, a medical doctor, acts at all times. The majority established this official Government PR, press-releases and medical evaluations formed exclusively inside the Government expert-commission (Slovenian public is not aware of the members of this body) and working-group (the identity of its members is also unknown) as a matter of “professional justification” of the measures. Although this

argument always revolves around the name of the representative of the Government expert-group (one medical doctor), which appears in the reasoning only slightly less frequently than the word Constitution. Even if this person does not officially bear the title of the Government spokesperson because this official title is held by another person who is an official Government spokesperson, this person does, in fact, continually appear in public as the Government press co-representative. Simultaneously, and this is very important, as a person who speaks on behalf of the entire Slovenian health community, including the European health community, and, therefore, on behalf of the two university clinical centres, the National Institute of Public Health, all other health care institutions and institutes and all Slovenian medical doctors. Or at least more than just a qualified majority of the entire medical community. Therefore, also on behalf of the allegedly unanimous Slovenian immunologists. It behaves as if it is merely conveying messages to the public that are about a “consensus” in the medical science and the profession. From this, the majority concluded that the “pressing need” for action and measures was proven: all of them, and precisely as they were during the pandemic.

Really? I was overwhelmed with anxiety. The majority decision interpretation undermined my constitutional patience.

After the break, I continued with paragraph 47 of the reasoning. In this paragraph and the following paragraph of the reasoning, the majority defined “direct, physical contact between people” as a proven, justified, and immediate danger of the spread of a “serious infectious disease”. However, it did not distinguish between “contact between people” and “freedom of movement of people” without contact with other people. The majority did not address the logic of freedom of movement precisely because of the withdrawal of people, turning away from the possibility of direct contact with other people, getting away from people—into forests, nature. The problem of “contacts”, physical contacts, the proximity between one person and another that is so slight that the “virus” can move from one person to another, or their children can shed with another person, is automatically equivalent to the question of “freedom of movement”. Not a single sentence addressed the essential difference between the issues of “contacts” and “movement”—away from contacts, into forest, nature, solitude...\*

In paragraph 49, the majority writes there should be “no speculation” on this matter, i.e. on issues of the danger, the seriousness of the danger, the immediacy of the danger, medical and scientific justification and the noble aims of the authorities. It does this by excluding the “risk of speculation” by referring only to the Government official positions and the statements of the head of the group of experts that already mentioned a single medical doctor acting as the *de facto* Government press co-representative. Such argumentation seems to the majority to be “reasonable”.

In paragraph 50, the majority which could not decide whether it was an epidemic, a pandemic or an epidemic throughout the entire state territory, but which previously decided that the pandemic was still ongoing, used the expression “epidemic or pandemic”. For the majority, these terms are synonymous. At this point, the majority used the “experiences of other countries” argument. These “other countries” are only Italy. Period. The paragraph concludes with the statement that the Government had justified “transparent reasons” for the measures.

In paragraph 51 of the reasoning, again the majority used the term “epidemic throughout Slovenia”. This is suddenly followed by a sentence mentioning areas with a higher number of infections and thus a higher risk of transmitting a serious infectious disease. However, the majority did not apply these terms to the provisions of the Communicable Diseases Act, the substance of the Ordinance, the content and scope of the restrictive measures or the scope for interpretation of the constitutional right to free movement and unrestricted freedom of conduct. Nor did it affect the scope for interpretation of the right to health and a healthy living environment. In short, the majority merely used these terms without explaining clearly and specifically why it used them, why it used them correctly at this point and what precisely the majority wanted to communicate with these words. The conclusion is that the measures were “appropriate”.

In paragraph 52, the majority found that the measures had been also “necessary”. In paragraph 54, it determined that they were “necessary” to prevent actual contact between people, without justifying how “actual contact between people” could be synonymous with “freedom of movement” that follows the purpose of moving away from people. Therefore, the majority did not explain why it is more difficult to transmit the virus from one person to another when all people from a particular municipality are in the public areas of that municipality at the same time, and easier when all people from the same municipality are not in the same municipality when they are away from home. The majority did not express anything about this at all. Therefore, it concluded in paragraph 55 of the reasoning that the “seriousness of the interference” with constitutional rights was “commensurate” with the “aim” and “benefit” of the measures.



This is followed by a sentence of brilliance: “In exceptional cases” (note: when the movement was allowed, but under the strict criteria for allowing exceptions, such as having to travel to workplace, or needing to go to the store to buy necessary goods since there was no such store in one’s own municipality, “there was no restriction on the freedom of movement.” I read that sentence five times. Brilliant.

Then follows a sentence in which the concept of “ethics” creeps in again: the weight of the restrictive measures is tempered by the importance of the ethical duties we have towards each other. Again, I read it several times. I am not certain I understood it. But, as it is written, it was intended to mean that it was the ethical obligation of every individual towards other people not to leave their municipality in a state of extraordinary social circumstances and to move only to public areas of their own municipality where other residents, all inhabitants of the same municipality move to, because a retreat into another municipality and away from people living in the same municipality would have constituted a violation of the ethical obligation towards other people from one’s own municipality and towards people from other municipalities, none of which was officially designated a particularly dangerous area, and even if the municipality from which one comes does not have the status of a particularly vulnerable municipality because the whole area is at epidemic risk, which means that it is a pandemic, which is synonymous with an epidemic, which means an epidemic and a pandemic, which means an epidemic in the entire state without first identifying individual areas as particularly vulnerable, and this will not happen if all the inhabitants of the same municipality move only within the boundaries of their municipality. Something like this, I guess.

Then the majority found out that it was an “unknown epidemic” and that the measures could have been even stricter given the situation in Italy. And because they were not even stricter, they were reasonable.

In paragraph 58 of the reasoning, the majority affirmed that “the infected areas were scattered throughout the country”. Therefore, it was appropriate, proportionate, and reasonable, but at the same time necessary, to prohibit movement outside the municipal boundaries. Why?

In paragraph 61, the majority concluded that the measures were “clear” because their substance and purpose were straightforward. It described the explanations of the measures offered to the general public during the official pandemic (epidemic?) on the website of the Ministry of the Interior on a daily basis not as a problem of their “clarity”, but as “welcome”—because they were intended for the “predominantly legally ignorant/uneducated public”.

This is followed by the majority “statement” that the measures were not only founded on the official positions of the Government and its PR but had a “broader context”. What this broader context had been, the majority did not say.

Paragraphs 62 and 63 introduce the final majority decision. The beginning of the final argument. According to Article 15(2) of the Constitution (“The law may prescribe the manner of exercising human rights and fundamental freedoms when so provided by the Constitution, or if this is necessary due to the very nature of an individual right or freedom.”), the measures were not only “proportional” but... such measures could be introduced by the Government “even under normal circumstances”. I repeat: such measures could be introduced by the Government under normal circumstances. Because, of course, the Constitution does not require the Government to declare “state of emergency” (Article 16 of the Constitution) for such measures, which (only) affect the free movement of persons, and at the same time, Article 32 of the Constitution is not subject to the exceptions of Article 16 of the Constitution.

By this decision of the Slovenian Constitutional Court, the genie is out of the bottle for good.

The majority reasoning concludes by stating that, in making this assessment, the majority did not need to assess the legal basis for the measures, i.e. the constitutionality of the Communicable Diseases Act.

## 1.2 Dissenting opinions (4:5)

I leave aside the concurring dissenting opinions, mostly out of leniency. But I will allow myself to say: as usual, one of these opinions, written by the president of the Constitutional Court, is characterised by modesty, or rather by the simplicity of its arguments and by the absence of anything constitutionally tangible or at least partially convincing, although it spans several pages.

In his understandable and convincing dissenting opinion written very leniently and politely, judge Accetto emphasised that both the Government and the majority had completely neglected all other issues concerning “public health” and the adverse effects of such measures on the general health of the population. The judge essentially emphasises that the measures introduced by the Government were in no way “professionally justified” and were neither

proposed nor confirmed by the medical community nor by the National Institute of Public Health. In particular, he drew attention to the problem of the dangerous nature of this decision, which informs the Government and the public that in exceptional cases, when it is necessary to act quickly, almost anything is permissible for the Government. He stressed that the National Institute of Public Health is not an “end” but a “means” of the Government policy. And he concludes that the majority forgot to assess and distinguish between “forms of restriction of freedom of movement”.

Judge Mežnar, in her dissenting opinion, immediately turned to a critical question: the Constitutional Court should have also evaluated the legal basis, i.e. the provisions of the Communicable Diseases Act, and not just the measures enforced by the ordinances. She emphasised that the majority decision confirmed the position that the law gives the Government “only the power” to act and not to restrict its actions. Judge Mežnar also stressed that in the Slovenian constitutional system, the legislator is the one who prescribes the rights, obligations and their limitations, which are regulated by laws, and not the Government, which would regulate them by bylaws. She concluded, in common sense, that these precisely assessed measures did not in fact “contribute to the restriction of contacts” because they were not necessary for that purpose—such restrictions were already imposed by other measures, less severe. She noted that the Government had in no way justified the “necessity of the measures”. She recalled the decision of the Austrian Constitutional Court explaining to the Government that the executive branch may regulate executive matters only within the limits of the law and may only adopt such restrictive measures in specific and particularly vulnerable areas. Judge Mežnar accused the majority of “cowardice” and describes the actions of the Government as “professional unfoundedness”.

The brilliant dissenting opinion of judge Čeferin nailed the majority decision to the pillar of shame. It resembles a wise, educated, and experienced teacher rebuking and underestimating the unworthy product of an underage student. The judge stressed that the majority decision created a “dangerous precedent”. He clarified succinctly that the majority most apparently applied the proportionality test in such a way that it was able to confirm the predicted result. He stressed that the Government had not justified the challenged measures as being appropriate, proportionate, necessary, or “professionally justified”. In this case, he asked, was it the “medical community” recommending and confirming the measures? He also provided an answer: it was neither the Slovenian medical community nor the National Institute of Public Health! Judge Čeferin politely and calmly, but resolutely and without hesitation, recalled the fact of the swift political changes in the position of the director of the National Institute of Public Health and did not forget to mention that previous director Eržen had been replaced as the director of the Institute precisely because he had opposed the Government measures and had publicly declared that they had not been following the National Institute of Public Health recommendations. The medical profession had either rejected the measures to restrict freedom of movement or had not taken a position on them, but had not agreed with them in any way, the judge emphasised. It is common sense to write that the prohibition of movement increased the health risk at best. Judge Čeferin wrote a logical and rhetorical question: if the virus is present everywhere in Slovenia, why the prohibition of crossing the municipal borders? He accused the majority of the decision of “misleading” and lack of “facts” that would have justified the final decision. He also criticised the Communicable Diseases Act, stressing that it was a sub-normative act giving the Government too much room for manoeuvre. Judge Čeferin even describes it as an “unconstitutional executive clause”.

### 1.3 Conclusion

The decision in question is undoubtedly the most important decision of the Constitutional Court in its current composition. Even more, I see it as a fateful decision. Unlike the US federal judge mentioned above, who, concerning the legality and constitutionality of interference with the constitutional rights and freedoms, described restrictive measures of the executive branch as unconstitutional, stressing that legal measures invoked in special social circumstances must still fulfil the criteria of their legality in constitutionality, the majority of the Slovenian Constitutional Court gave the executive branch a *carte blanche* to restrict constitutional rights and freedoms substantially by ordinances and decrees, if only the Government indicates a “direct and immediate health threat” and only based on official positions of the Government and its *de facto* press representatives, whether they have a daily-political or professional title.

I maintain that with this Constitutional Court decision, the protection of constitutionality and legality in the social, constitutional democracy of the foundational model, the Slovenian people have lost the protection of the supreme institutional protector of the constitutional order and their rights and freedoms—against daily party politics.

Emphasising that this case did not involve difficult constitutional issues, or the problem of different interpretations of elusive constitutional concepts and doctrines, or different beliefs on borderline or controversial constitutional issues. It is about reason and common sense. At the core of the matter is determination, freedom of principle, fearlessness, upright ethical stance and personal integrity, which must be hallmarks of the public office of a constitutional judge. The minority that lost the vote maintained such qualities. The minority that lost the vote joined that (large and growing) section of the thinking public that dares to know and recognise the pitfalls of seduction, manipulation, deception, and populism when these pretend to work categorically and exclusively for the common good and the well-being of the people. The minority tied itself to public opinion, which relies on reason, on the power of argument, evidence, broader context, rather than naked statistics that raise more questions than they provide answers. The minority of judges relied on logic, constitutionally convincing good faith and proven sincerity.

## 2 The Issue of Legality and Constitutionality of the Measures after the Official End of the Pandemic

### 2.1 Another Ordinance and *Prima Facie* Illegal and Unconstitutional Sanctions

I feel strongly obliged to point to another aspect or fact that has become obvious in Slovenia, which merges and culminates in the problem of fear on the one hand and the problem of legal errors in the Government action on the other, concerning the—claimed and presumable—protection of people from the Coronavirus and a possible new pandemic. Or, in other words, it is a problem of the people's obedience, their respect for the Government's actions and demands on the one hand and the legal shortcomings of these actions and demands on the other. Also, it could be a problem of manipulating people. In this section, I will substantiate these claims.

The Decree on Temporary Measures to Reduce the Risk of Infection and the Spread of the SARS-CoV-2 Virus,<sup>74</sup> which entered into force on 25 June 2020, stipulates that the prevention of the recurrence of the infectious disease COVID-19 shall be provisionally determined by the compulsory wearing of a protective mask or other forms of protection of the mouth and nose area of the face in a closed public space and the compulsory disinfection of the hands.

The Government adopted the Decree mentioned above on the basis of Article 4(1) of the Communicable Diseases Act. This is not only about the so-called “general regulation”, according to which everyone has the right to protection against infectious diseases and nosocomial infections, but at the same time the obligation to protect their own health and the health of others against these diseases. It is also what we call a “psychological ploy”. Why? Provisions of Chapter II of the Communicable Diseases Act, which provide the possible legal bases for various measures for the prevention and control of infectious diseases and which are legally decisive also provide sanctions for violations of such legal obligation. According to Communicable Diseases Act, a fine is prescribed only for non-compliance with the provisions based on Chapter II of the Act. However, the mask-wearing obligation prescribed by the Decree is only termed as an “obligation”, since it was not issued on the basis of these provisions of the Communicable Diseases Act, but on the section of the Act which does not prescribe any sanctions. Therefore, an individual who fails to comply with the obligation to wear masks in enclosed public places as laid down in the Decree cannot be punished for a minor offence at all. In legal terminology, it is, therefore, the so-called incomplete legal norm (*lex imperfecta*). A violation of this norm is not sanctioned. Thus, the inspection body cannot impose sanctions on the infringer.<sup>75</sup>

Such an interpretation is also consistent with the Constitutional Court decision, No. U-I-181/93 of 20 January 1994.

However, the Slovenian public was not aware of this. Not even journalists knew about it. And most security officers, supervisors and law enforcement officers have not been aware of this fact. Therefore, people have been punished for minor offences when they were caught wearing no mask in a closed public space or even for the improper wearing of

<sup>74</sup> Official Gazette of the Republic of Slovenia, No. 90/20.

<sup>75</sup> Andraž Teršek published this legal interpretation on his website, available at <<https://andraz-tersek.si/spostujem-ukrepe-uporabljam-masko-razkuzujem-si-roke/>> (22.8.2020). Slovenian Ombudsperson also published a legal opinion on the issue with the same conclusion, available at <<http://www.varuh-rs.si/sporocila-za-javnost/novica/stalisce-varuha-do-predpisanega-obveznega-nosenja-mask-v-zaprtih-javnih-prostorih/>> (22.8.2020).

protective masks—under the nose. And people paid these fines without knowing and without having been publicly warned by the media, the Ombudsperson or the parliamentary opposition that the imposition of these fines has no valid legal basis at all: the fines were and still are imposed on the basis of those provisions of the Communicable Diseases Act, which do not provide for sanctions. And this raises a major legal problem—an evasion of the law, an illegal shortcut to punish people, and thus an abuse of the rights and powers by officials/civil servants: fines are not imposed on people by reference to the Communicable Diseases Act and the Government Decree, but rather to the Minor Offences Act (for the alleged “breach of public order”) or to the Police Tasks And Powers Act, namely “for disregarding the orders and instructions of a civil servant/official”. These “orders and instructions” are, of course, *de facto* orders to wear the mask and put it on the face properly. In this way, the punitive purpose is achieved, which the Communicable Diseases Act and the Decree do not allow. And this is an example of abuse of rights by the civil servants and officials and consequently of the illegal and unconstitutional practice by civil servants, officials, law enforcement officers, and public wardens.

This practice continues.

### 3 On What Awaits Us in the Short-Term Future

It has become apparent in the EU and the Council of Europe Member States, but particularly in Slovenia, that a large, giant wave or snowball has broken loose, rolling through and increasingly threatening and crushing fundamental human rights and freedoms. That is why we express our concern about where all this political development at the expense of fundamental human rights is leading, what it will bring and where or how it will end. The EU and the Council of Europe Member States are introducing measures that are strong and grossly infringing on people’s fundamental rights, increasingly, and doing so in the name and the so-called function of “measures to prevent a pandemic and to deal with the effects of the first wave of the pandemic.”<sup>76</sup>

I express my *bona fide* concern that such rhetoric could increasingly become a mantra and a pretext for establishing increasing control over people (if we only mention the ideas already introduced in some EU Member States, about tracking mobile phones, introducing new compulsory vaccines, promoting proposals for strict sanctions imposed on those who refuse to be vaccinated themselves or their children, the prohibition of enrolment in kindergartens, schools or even faculties for unvaccinated people, etc.), for more frequent, more prominent and more serious violations of fundamental human rights and freedoms.

Increasingly, it seems that fundamental rights and freedoms that were fought for in the past, and the run-up to the 2020 pandemic, will have to be fought for again. Even for the “minimal standards.” Effectively and decisively. And it seems that only the ECtHR can enable this fight and stop the strength and power with which the governments of the EU Member States are increasingly undermining the fundamental postulates of democracy, the rule of law and fundamental human rights.

I believe, as my colleagues and I expounded in part one of the constitutional analysis of the Government measures, that all these legal issues are interesting and at the same time prominent. We can hope that the announced legislative changes of the Communicable Diseases Act, the issues of compulsory vaccines, discrimination, segregation and social isolation of persons who do not want to be vaccinated or do not want to expose their children to compulsory vaccination, the legalised possibilities of gross state interference with the right to privacy, constitutional protection of home and family life, the right to private property, including personal data of citizens, will not be accepted.

One cannot disregard the fact that the Government dared to face the pandemic. It is also undeniable that, according to official statistics and comparisons with other countries, Slovenia has not been hit hard by the pandemic. However, it will be possible to judge if this was indeed the case only retrospectively, after elapse of sufficient time and detailed analyses of events and the situation will allow access to reliable and indisputable findings. I believe a successful fight against a pandemic, which means, above all, the successful protection of human lives, is a more important issue than

<sup>76</sup> Cf. Sklep o uporabi ukrepov, ki jih določa Zakon o nalezljivih boleznih, pri nalezljivi bolezni COVID-19 [Decision on the Application of the Measures Provided for in the Communicable Diseases Act to Infectious Disease COVID-19]. Official Gazette of the Republic of Slovenia, No. 79/20, available at (in Slovenian): <<http://www.pisrs.si/Pis.web/pregledPredpisa?id=SKLE12101>> (25.8.2020).

intellectual play with constitutional analysis and argumentation. On the other hand, these are far from a mere leisure activity and theoretically fun things to do. On the contrary, these are interesting and generally important constitutional issues. Therefore, it is right that some of these issues have been given a precedent-setting and legally binding decision by the Constitutional Court. Unfortunately, I remain convinced that the Constitutional Court decision analysed above raises new and legitimate concerns that the short-term future will not bring confirmation and consolidation of the already achieved level of legal protection of fundamental human and constitutional rights and freedoms, but new threats to these rights and freedoms, which will make it necessary to fight for them resolutely, painstakingly and for a long time. Also, for the right to health and health care.

## 4 A Supplement: The Unimplemented Constitutional Court Decision and the Compulsory Vaccines Problem

In its decision No. U-I-127/01 in late 2004, the Slovenian Constitutional Court reviewed the constitutionality of certain provisions of the Communicable Diseases Act and decided that vaccination against infectious diseases is in itself a preventive health measure serving the legitimate objective of protecting the right to health of others and the health of the community as a whole. According to the Court, it is, therefore, in the best public interest and such measures taken by the State serve a legitimate objective. The Constitutional Court agreed with the State's argument that such a measure contributes to the maintenance of the health of the individual while protecting the health of the population as a whole. Therefore, since compulsory vaccination is understood as collective protection of the population against infectious diseases, it is not possible, by merely invoking one's constitutional right to health and the right to refuse treatment, to take a flat-rate basis to refuse vaccination or to claim that other people are effectively ensuring their protection against the spread of infectious diseases by having themselves vaccinated. The Constitutional Court also decided that the benefits of compulsory vaccination for the health of the individual and the population as a whole outweigh the possibility and severity of possible negative consequences (the so-called side effects) for the individual resulting from this interference with his or her constitutional right to health.

The Constitutional Court took a position that the decision as to which infectious diseases pose such a threat to individual and public health that they can justify compulsory vaccination should be left to the medical profession or epidemiologists, but (and this is a strong and indispensable but) on a case-by-case basis if compulsory vaccination is rejected. Therefore, the doubt and rejection of compulsory vaccination cannot be denied *a priori*, generally, categorically and absolutely as a legitimate interest in freedom as such. The effective procedures for medical assessment of whether valid medical reasons exist for refusing compulsory vaccination in a particular case must also be made available. It is also necessary for the State to provide systematically regulated procedures for the legal protection of the rights of people who suffer damage to their health due to a demonstrable causal link between the damage caused and compulsory vaccination. In other words, it is necessary to provide systematically effective and objective legal procedures for an accurate and convincing assessment of whether the reason for the subsequent damage to a person's health is due to compulsory vaccination.

This part of the Constitutional Court decisions has been neglected too often. This is our firm assessment; the State still did not respond to this positive constitutional obligation<sup>77</sup> and still did not provide such properly and effectively institutionalised medical and legal procedures. To be more precise, the statutory regulated formal procedures exist to object the compulsory vaccination and to claim health damages as a result (side effects) of the compulsory vaccination. But such procedures are not undoubtedly objective, so they are not efficient as a legal remedy (even though the right

<sup>77</sup> According to this constitutional doctrine, it is not enough for the state not to interfere with fundamental rights and freedoms (the so-called negative aspect / nature of rights). The state must also do everything that can be reasonably expected of it and demanded that these rights be effectively protected and exercised in practice (the so-called positive aspect / nature of rights). In the Slovenian Constitution, the *sedes materiae* for this doctrine is Article 5, its first sentence: "The state protects human rights and fundamental freedoms on its territory", and in combination with the first sentence of Article 15: "Human rights and fundamental freedoms are exercised directly on the basis of the Constitution." See Matej Avbelj (ed.): Komentar Ustave Republike Slovenije [Commentary on the Constitution of the Republic of Slovenia]. Evropska pravna fakulteta, Nova univerza, Nova Gorica 2019; Andraž Teršek: Teorija legitimnosti in sodobno ustavništvo [Theory of Legitimacy and Modern Constitutionalism]. Univerzitetna založba Annales, Koper 2014, pp. 312–322.



to an efficient legal remedy is a constitutional right). Not in substance. A patient objects the vaccination, the medical doctors demand it; a patient then claims a damage to his or her health, the medical doctors (most usually the same ones) deny the causal link (causality); the patient files a complaint, the medical doctors (the closest colleagues of the first ones) reject it as unfounded; a patient files a lawsuit, the court calls the expert witness, usually the same medical doctors or their colleagues—who do not want to harm their professional colleagues. Case closed.

This question may soon receive a more concrete answer from Strasbourg. The ECtHR Grand Chamber will consider the case of *Vavříčka and Others v. The Czech Republic*.<sup>78</sup> This decision will be a legally binding judicial precedent for all the Member States of the Council of Europe (with the so-called *erga omnes* legally binding effect). Finally, it is high time for the ECtHR not to only “say” something substantial on the issue but to decide on this quintessential question regarding one of the fundamental human rights, possibly the most fragile one; according to daily political, legal and social practices and from the short-term future perspective.

This lawsuit was prompted by the fact that some parents refused to vaccinate the child for religious reasons, other parents refused only certain vaccines because they doubted their effectiveness, and third group of parents wanted to vaccinate the child later than required by law. In other cases, however, the parents refused to vaccinate their children because of their major health issues. One parent was fined. The other five parents were forbidden to enrol their children in kindergarten. They rejected the vaccine against tuberculosis, polio, Hepatitis B, measles, mumps and rubella.<sup>79</sup>

On 1 July 2020 the ECtHR Grand Chamber held its hearing in the *Vavříčka* case. It was noted the Judges were “very curious.” Eighteen questions were asked by the judges at the end of the oral pleadings, which was commented upon as being “exceptional” for the Court, and which may indicate the scepticism of some judges as to the usefulness of the obligation to vaccinate. Here are some selected questions: what level of vaccination coverage is necessary to ensure the safety of the population; are government approaches of promotion rather than mandatory vaccination less effective; how could unvaccinated children infect vaccinated children; who decides what is in the best interests of the child if the parents’ opinions differ from those of experts; what is the benefit of vaccinating infants against hepatitis B; who draws up the list of mandatory vaccinations and what safeguards are in place to avoid conflicts of interest; what percentage of serious cases are reported following vaccination; can vaccination be imposed on individuals as an act of solidarity? If so, under which article of the ECHR is there an obligation of solidarity?

In response, the Czech Government mainly hid behind the recommendations and information provided by the World Health Organization. It was unable to answer precisely what rates of vaccination coverage were required and provided the figure of less than 10 recognised serious cases per year as a result of vaccinations in the Czech Republic. For their part, the applicants replied that countries without compulsory vaccination achieved vaccination coverage rates equivalent to those where it is compulsory; that the side effects of vaccines are not adequately studied, and that the objection to vaccination was not a question of freedom of religion, but rather a conscientious objection raised in the context of scientific debate.<sup>80</sup>

In my view, the ECtHR will simply have to examine, above all, the general nature of the obligation to vaccinate as such. In particular, and above all (the above-mentioned, already written in the decision of the Slovenian Constitutional Court) the problem of the absence of an effective legal mechanism that would enable and allow parents to oppose vaccination of their children, and also other people who refuse to be vaccinated. Not only for religious or worldview reasons but especially for health reasons.

The final decision of the ECtHR will not be able to avoid the fact that many European countries do not have compulsory vaccination prescribed by law. Mandatory, compulsory vaccination cannot be considered to be a matter of “self-evidentness”.<sup>81</sup> There is no such legal obligation in neighbouring Austria, or in Cyprus, Denmark, Spain, Estonia

<sup>78</sup> Application No. 47621/13 and five other applications/cases: *Novotná v. Czech Republic* (No. 3867/14); *Hornych v. Czech Republic* (No. 73094/14); *Brožík v. Czech Republic* (No. 19306/15); *Dubský v. Czech Republic* (No. 19298/15); and *Roleček v. Czech Republic* (No. 43883/15).

<sup>79</sup> See Gregor Puppinc: Compulsory Vaccination: The Grand Chamber of the ECHR will Decide. European Centre for Law and Justice, February 2020, available at <<https://eclj.org/conscientious-objection/echr/vaccination-obligatoire-la-cedh-va-se-prononcer-en-grande-chambre>> (27.6.2020).

<sup>80</sup> Christophe Foltzenlogel: Mandatory Vaccination: Important hearing before the Grand Chamber of the ECHR. European Centre for Law & Justice, July 2019, available at <<https://eclj.org/conscientious-objection/echr/vaccins-obligatoires-la-grande-chambre-a-entendu-les-arguments-des-requerants-et-du-gouvernement-tcheque>> (1.8.2020).

<sup>81</sup> Just a brief insight into Internet forum discussions shows too many people consider those who are scared of vaccinations, question them and reject to be vaccinated, themselves or their children, are labelled and marked as »mad« and to represent »irresponsible danger to the

and Finland, nor in Germany, Ireland, Lithuania, Luxembourg, Norway, nor in the Netherlands and Portugal, nor in the United Kingdom and Sweden.<sup>82</sup>

Puppinck (2020)<sup>83</sup> refers to the words of Daniel Floret, President of the Technical Committee for Vaccination (CTV) of the High Council for Public Health, that in these countries, the level of immunity is similar to levels of the countries that have mandatory vaccination required by law. From this (of course with the accuracy of the data) follows the logical conclusion that compulsory vaccination not only has no direct but also no statistically “greater” effect on immunity and disease conditions than in countries where vaccination is not legally prescribed as mandatory.<sup>84</sup> If these data are accurate, we expect the following decision of the ECtHR:

1. The goal of vaccination, which is to prevent the spread of an infectious diseases and protect the health of the entire population, is in itself a legitimate and (constitutionally, legally) acceptable goal;
2. However, this goal must be achieved through more lenient measures that respect the fundamental rights and freedoms of parents and other people who refuse vaccination;
3. If these lenient measures are not available, if legal mechanisms to refuse vaccination are not available or are not effective, and if people and parents who refuse vaccination are simply punished, treated like criminals and their children are banned from enrolling and entering kindergartens and/or schools, then this represents an obvious gross violation of fundamental human rights;
4. If the state does not provide an effective option by law to claim compensation from the state, if vaccination has caused damage to health, it has not fulfilled its positive legal obligations: in the light of the Constitution and the ECHR.

A different decision of the ECtHR would be an unpleasant surprise. Or even no decision on the issue, thus letting the governments legally invoke new compulsory vaccines without any real and effective control, restrictions, and transparency.

The decision of the ECtHR will directly impact the Slovenian legislator. End of September 2020, the Ministry of Health proposed almost the same legislative changes that are being challenged before the ECtHR in the case of *Vavrička*: with almost exactly the same proposals which we characterise to be constitutionally and conventionally unacceptable discrimination, stigmatisation and social isolation of the people who refuse to be vaccinated, but particularly parents who refuse to vaccinate their children, and, of course, discrimination, stigmatisation, and social isolation of such children, especially if the provisions on strict sanctions for those who refuse to be vaccinated and the provisions on preventing the children from enrolling in kindergartens and schools will be enacted.

Amendments to the *Communicable Diseases Act* (CDA) were finally adopted at the session of the National Assembly on 29 September 2020.<sup>85</sup>

After the adoption of the decision of the Constitutional Court of the Republic of Slovenia No. U-I-83/20, by which a majority of five judges confirmed the constitutionality of the measures taken by the Government of the Republic of Slovenia during the official Coronavirus Covid-19 Pandemic, four judges wrote in their separate opinions that the Court’s final decision should also include the verification of the constitutionality of the provisions of the CDA. Judge Dr. Čeferin wrote that the CDA is “under-regulated” and that it gives the Government too much leeway and too far-

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society as a whole«. Most usually harsh, insulting and vulgar words are being used by the vast majority of the general public when addressing them.

<sup>82</sup> World Health Organization, Regional office for Europe, The organization and delivery of vaccination services in the European Union, 2018, available at <<https://www.euro.who.int/en/publications/abstracts/the-organization-and-delivery-of-vaccination-services-in-the-european-union-2018>> (29.6.2020); World Health Organization, Vaccination: European Commission and World Health Organization join forces to promote the benefits of vaccines, 2019, available at <<https://www.who.int/news-room/detail/12-09-2019-vaccination-european-commission-and-world-health-organization-join-forces-to-promote-the-benefits-of-vaccines>> (25.6.2020); European Commission, Roadmap on Vaccination, available at <[https://ec.europa.eu/health/sites/health/files/vaccination/docs/2019-2022\\_roadmap\\_en.pdf](https://ec.europa.eu/health/sites/health/files/vaccination/docs/2019-2022_roadmap_en.pdf)> (29.6.2020).

<sup>83</sup> Gregor Puppinck: Compulsory Vaccination: The Grand Chamber of the ECHR will Decide. European Centre for Law and Justice, February 2020, available at <<https://eclj.org/conscientious-objection/echr/vaccination-obligatoire--la-cedh-va-se-prononcer-en-grande-chambre>> (27.6.2020).

<sup>84</sup> National Institutes of Health. PLoS One. 2018; 13(1): e0191728. Published online 25 January 2018, doi: 10.1371/journal.pone.0191728, available at <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5784985/>> (29.7.2020).

<sup>85</sup> As of the date of submission of this article for review, the officially consolidated text of this Act has not yet been published on the website of the Government of the Republic of Slovenia.

reaching powers to decide on the introduction of special measures and to set restrictions on constitutional rights and freedoms. I agree with this assessment. In my critical commentary on this US decision<sup>86</sup>, I wrote, among other things, that the majority on the Constitutional Court had granted the Government a *blank check* for the adoption of special and restrictive measures, even if only in relation to the risk of epidemics, or the public health care for the entire population, and according to the official - mostly statistical - positions of the group of experts of the Government. I am convinced that there were several unconstitutional solutions in the CDA even before the amendments to this Act.

I analyzed the changes of the CDA in detail. I am convinced that there are now even more unconstitutional solutions in the Act. I am also sure that there quite a number of them are very obvious. This Act continues to give the Government a broad and practically unlimited scope of action to decide on special measures and to restrict certain constitutional rights and freedoms when the Government indicates the threat of an epidemic or the spread of an infectious disease. Among the most obviously unconstitutional legal solutions, I count those that involve interference with the *right to privacy, freedom of movement and the right to legal protection of personal data*.

In my opinion, the provisions of the Act that regulate the degree of “restriction”, namely the “prohibition” of enrolment and attendance of kindergartens, schools and faculties for non-vaccinated children, adolescents and adults, are an example of obvious unconstitutionality. I describe them as a path to discrimination, segregation, stigmatization and social isolation of certain groups of children, adolescents, their parents and other adults. The legal regime introduced by the amended Act is essentially similar, almost identical to the one that has long been under the scrutiny but not yet decided by the ECtHR in the case *Vavříčka and Others v. Czech Republic*.

If the ECtHR upholds the complainants’ case and upholds their arguments, the decision will set a precedent and be binding on all Member States of the Council of Europe. Otherwise, if the ECtHR upholds the complainants’ arguments against compulsory vaccination, the provisions of the CDA on compulsory vaccination will immediately become legally untenable and unenforceable, being unconstitutional and unacceptable in the light of common European standards of legal protection of fundamental human rights and freedoms.

As regards the amended CDA, I also allege the apparent unconstitutionality of the provisions on the question of state (compensation) liability for damage to health caused to an individual by a vaccine. The provisions governing this issue do not constitute the implementation of an almost seventeen-year-old Constitutional Court Decision No. U-I-127/1 (2004), in which the Constitutional Court ordered the legislator to regulate (within one year !!) the question of state liability for damages separately, and in a way that provides effective legal protection for the individual. The transfer of this question to the secondary application of the Administrative Litigation Act and the legal reference to the application of the general civil law regulation of the question of liability does not constitute compliance and implementation of this Constitutional Court decision. Therefore, the CDA is clearly unconstitutional in this part as well.

The amended CDA also does not allow the effective exercise of the right to refuse vaccination on justified health grounds, since the legislation defines the study and analysis of vaccines, their efficacy, side effects and composition as “trade secrets.” And Information Commissioner has already decided by Decision No 090-163/2014 that such legal solution doesn’t represent the infringement of the constitutional right to receive information of a public nature. In this part I also claim the unconstitutionality of the Act.

## 5 Conclusion

We should be deeply concerned that partisan politics have already made their intention to classify people (legally, by acts or statutes) into different “risk groups,” according to their previous and chronic illnesses, but especially concerning previous positive tests on COVID-19. On the one hand, with the intention of adjusting to the (higher) level of insurance premiums that people will have to pay according to their “risk for the health of others”. And on the other hand, with the intention that the State will legally allow itself control over the fundamental human and constitutional right to privacy and over the fundamental human and constitutional right to freedom of movement; again, based on the determination of such “risk.”

<sup>86</sup> Available at < <https://andraz-tersek.si/commentary-and-criticism-of-the-decision-of-the-constitutional-court-of-the-republic-of-slovenia-no-u-i-83-20-on-the-legality-and-constitutionality-of-the-restrictions-of-constitutional-and-fundame/> >

In addition, there are some constitutionally controversial resolutions in current legislation. There is the Patients' Rights Act<sup>87</sup> on one side, also assuring the patient's right to "informed consent" and, vice versa, "explanatory obligation" of the medical doctors (Article 20). On the other side,

"[S]tudies on the safety and efficacy of vaccines, on the basis of which the Public Agency for Medicines and Medical Devices (JAZMP) issues marketing authorisations on the Slovenian market, are protected in Slovenia as a business secret (Article 68 of ZZDR-2).<sup>88</sup> No one has access to them (no, not even medical doctors and researchers). Physicians are obviously not bothered by this at all, as to my knowledge, neither they as individuals nor medical associations have ever requested access to these studies."<sup>89</sup>

We find this to be not only illegal violation of the patients' rights but also breach of the constitutional rights to health, privacy, dignity, security, and liberty interest.

The ECtHR decision in a case of *Vavrička and Others v. The Czech Republic* will play a big part. Hopefully not too big to handle for the ECtHR; in the sense of "politically" avoiding a determined and concrete "legal decision." ECtHR is expected to deliver its decision before the end of 2020: just as the question of a general vaccination obligation against COVID-19 will arise.

Therefore, let me conclude by an assessment that in the period of the official pandemic and the post-pandemic times several important, complex and controversial constitutional issues surfaced. It is legitimate and ethically necessary to address and discuss them. But above all, judicial protection of fundamental human rights based on common-sense evaluation and persuasive legal arguments, or by other words, strict judicial control over governments and legislatures must remain the essential and necessary precondition of the legitimacy of the contemporary political process and legal order, of the constitutional democracy itself.

<sup>87</sup> Official Gazette of the Republic of Slovenia, Nos. 15/08 and 55/17.

<sup>88</sup> See Medical Products Act, Official Gazette of the Republic of Slovenia, Nos. 17/14 and 66/19.

<sup>89</sup> See Javna agencija za zdravila in medicinske pripomočke (JAZMP) pravi: "Študije o varnosti in učinkovitosti cepiv so poslovna skrivnost" [*The Public Agency for Medicines and Medical Devices JAZMP says: "Studies on the safety and efficacy of vaccines are a trade secret"*], available at <<https://www.ideoloski-konstrukti.com/2019/11/05/javna-agencija-za-zdravila-in-medicinske-pripomo%C4%8Dke-jazmp-pravi-%C5%A1tudije-o-varnosti-in-u%C4%8Dinkovitosti-cepiv-so-poslovna-skrivnost/>> (20.8.2020). Quoting Mateja Čerňič: *Ideološki konstrukti o cepljenju [Ideological Constructs about Vaccination]*. Založba Vega, 2018.