'CONSTITUTIONAL UNCONSTITUTIONALITY': CONSTITUTIONAL REVIEW OF THE COVID-19 RESTRICTIONS ON FUNDAMENTAL RIGHTS IN SLOVENIA

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ABSTRACT

The article addresses some of the most important decisions of the Slovenian Constitutional Court related to the COVID-19 restrictions on fundamental rights. By taking a close look at the case law of the Constitutional Court, the author aims at presenting to the foreign readers and the international professional audience the specific features and peculiarities of the constitutional judicial discourse on the COVID-19 measures in Slovenia that has so far proved to be extremely controversial. While in the early stages of the COVID-19 crisis, the Slovenian Constitutional Court found the restriction of movement outside the municipality of one's residence in line with the Constitution, it later ruled that the government ordinances introducing the restrictions of fundamental rights were unconstitutional in several cases. In most of these cases, however, the reason for this was not the unconstitutionality of the measures themselves, but the unconstitutionality of their statutory legal basis. The overview revealed, inter alia, that since the outbreak of the epidemic, the Constitutional Court has issued certain important and groundbreaking decisions on the one hand, and made some good and less good compromises on the other.

KEYWORDS

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1. Introduction

In the spring of 2020, most European countries declared the COVID-19 pandemic.[2] To contain the transmission of COVID-19 and to protect the health and life of the citizens (especially the vulnerable), the governments responded, *inter alia*, by introducing mass restrictions on human rights and fundamental freedoms. A lengthy list of measures gradually introduced by almost all European countries[3] includes a partial or complete closure of state borders; mandatory quarantine for the infected persons; mandatory (self)isolation for those who were in contact with an infected person; mandatory testing; restriction of access to and gathering in public (urban) areas (squares, parks, playgrounds, etc.); partial or complete suspension of the public transport; restriction of non-essential economic activities; restrictions and prohibitions on cultural events, sports, competitions, etc.; restriction of access to certain health and social care services; partial or complete closure of kindergartens, schools, universities, churches, sports facilities, cinemas, theatres, opera houses, etc.; mandatory use of face masks in enclosed and—in some countries or regions—open public places; disinfection of hands and indoor facilities; restrictions and prohibitions on socialising (i.e. prohibitions on weddings, funerals, and other private events involving gathering); maintenance of interpersonal distance (also called social distancing); and introduction of special business regimes for the employees and customers in consumer goods stores, pharmacies, banks, post offices, etc., if and where their business was not prohibited by the authorities.[4] Moreover, a number of other measures to contain the spread of COVID-19 were also introduced. The governments of some countries—usually those with extremely poor epidemiological conditions—intensified the restrictions on freedom of movement by introducing a night curfew and the restriction of movement outside the municipalities, city districts, or

2 | In its report on the response to the COVID-19 pandemic, the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE/ODIHR) divided the countries into two groups. While some countries, by taking measures to slow the spread of infections and curb the pandemic, merely limited fundamental rights, others went further by temporarily suspending them. While some countries have declared one form or another of a state of emergency, others have not. Interestingly, the OSCE/ODIHR report notes that few countries have reported to international organisations the suspension of rights under international conventions, and that the (non)declaration of a state of emergency has not had a decisive impact on the adoption of measures and the intensity of fundamental rights restrictions. In some countries that have not declared a state of emergency, the restrictions on fundamental rights were nevertheless very intense. See OSCE human dimension commitments and state responses to the Covid-19 pandemic, pp. 25–28. See also Interim Report on the Measures Taken in the EU Member States as a Result Of the Covid-19 Crises and Their Impact on Democracy, the Rule of Law and Fundamental Rights, 2020, pp. 5–14.

3 | The frequently mentioned exception was Sweden. While imposing an entry ban on travel to the country, Sweden has not imposed strict measures and drastic restrictions on fundamental rights inside the country as did other European countries. The Swedish government has introduced precautionary measures to protect the most vulnerable and restricted mass gatherings of people, while the closure of kindergartens, schools, universities, libraries, cinemas, and theatres; a ban on economic activities; and general restrictions on the movement of people were not on the Swedish authorities' agenda. Face masks, for example, were not mandatory but recommended. The 'Swedish model' has been widely criticised for its 'too liberal' approach to tackling the pandemic.

4 | See Coronavirus Pandemic in the EU – Fundamental Rights Implications, 2020, pp. 15–24.

regions of people's residence. Further, in some places a general restriction on the movement of people outdoors has been temporarily imposed (the authorities banned people from leaving their homes). Eventually, most European countries were on lockdown and, resultantly, public life was stopped. A similar scenario was also present in the other continents.

By taking measures to slow and mitigate the spread of COVID-19, most countries managed to significantly reduce the number of new infections by the summer of 2020. Soon after easing the prohibitions and restrictions, however, the number of infections and COVID-19-related deaths began to rise again. In early autumn, with rare exceptions, countries worldwide experienced the second wave of the COVID-19 pandemic.[5] Rapidly, a sense of *déjà-vu* has gripped most countries, namely, the reintroduction of mass restrictions on human rights and liberties. In some countries, regions, and/or cities, public life was stopped for a second time. The second wave was followed by what is supposed to be a third wave in the spring of 2021, and towards the end of the summer of 2021, due to the rapid spread of new variants of SARS-CoV-2, a fourth wave. Restrictions and bans were reinforced by the authorities in most countries around the world, accompanied by high fines for the violators. Moreover, in some countries, violations of COVID-19 regulations and restrictions were sanctioned with imprisonment and unique 'corona sanctions'.

During the pandemic, it became clear that states cannot or will not ensure citizens the protection of their health and lives without temporary restrictions on or suspension of human rights and fundamental freedoms. The most affected were the rights protecting personal freedom and freedom of choice; freedom of movement and of residence; access to education; the possibility of peaceful gathering, association, and public expression; freedom of religion and belief; access to justice and judicial protection of rights; free scientific and artistic expression; the possibility of work; free economic initiative; the possibility to enjoy property; equality before the law and non-discrimination; dignity; and physical and mental health. The measures taken by the authorities also affected the rights of specific groups, including children, older persons, and persons with disabilities.[6] The paramount question posed on countries (i.e. on their authorities in general and courts in particular) was, and still is, under what constitutional and international legal conditions the proclamation of (the different types of) exceptional emergency situations is legitimate, and in such situations, to what extent the urgent need to save lives—itself a core fundamental rights obligation—justifies restrictions on fundamental rights. Due to the pandemic, states are faced with the difficult task of finding a balance between fundamental freedoms and principles of democratic decision-making on the one hand, and health policies and positive obligations to protect life and provide safety, and the necessity to effectively end the health crisis, on the other.[7]

5 | In contrast to some European countries, the larger and heterogeneous countries like the United States and Brazil, which globally lead in the number of COVID-19 related deaths, seemed to experience a mixture between the still ongoing first wave and a second wave. See Diaz and Constant Vergara, 2021, p. 1.

6 | See Coronavirus Pandemic in the EU – Fundamental Rights Implications, 2020, pp. 7 and 16. See also OSCE human dimension commitments and state responses to the Covid-19 pandemic, pp. 25–28.

7 | See Interim Report on the Measures Taken in the EU Member States as a Result Of the COVID-19 Crises and Their Impact on Democracy, the Rule of Law and Fundamental Rights, 2020, p. 4.

Peculiarities notwithstanding, the course of events in Slovenia was more or less like elsewhere. The Slovenian authorities responded to the danger of the spread of infections with measures and restrictions on fundamental rights that are comparable to those in most other European countries. Due to the COVID-19 outbreak, a public health emergency was declared by the government in March 2020. It was revoked in the summer of 2020, reintroduced in the autumn of 2020, and revoked again in spring 2021. Disruptions to daily interaction, education, and work; restrictions on freedom of movement from, into, and within the country; prohibitions on gathering in public places; mandatory use of face masks in enclosed public spaces and public transport; and other restrictions and prohibitions similar to those in other European countries were introduced and sanctions imposed for their violations. Those citizens, legal experts and oppositional politicians who opposed certain restrictions on fundamental rights considered them unnecessary, disproportionate, and excessively interfering with people's normal lives.[8] They also pointed to the irreparable harmful consequences of the disproportionate right's restrictions for human life and the economy.

Similar to many other countries, in Slovenia during the COVID-19 pandemic, protests emerged and gradually became permanent.[9] The participants in these protests argue that the current centre-right government is tackling the epidemic unsuccessfully and wrongly, i.e. forcing people to receive vaccination and discriminating those who have not been vaccinated, and by measures that unduly restrict people's freedom and other fundamental rights. They accuse the government of destroying democracy and the rule of law and attacking independent journalism. Furthermore, they also accuse the authorities of hate policies against ideological and political opponents, xenophobia and discrimination against refugees, corruption (i.e. in the purchase of COVID-19 protective and medical equipment, such as face masks, respirators, rapid antigen tests, etc.), and so on.[10] Gradually, two separate protests and groups of protesters emerged, one primarily

8 | In the early period of the epidemic, the people in Slovenia have taken certain government measures to contain COVID-19 better than others. Measures supported by almost two-thirds of the respondents were interpersonal distancing, mandatory use of face masks in enclosed public spaces, and general restrictions of gathering. Among the restrictions that most people rejected, however, were the closure of schools and distance learning, the restriction on movement at night (curfew), and the restriction of movement outside the municipality of one's residence. See COVID-19 Pandemic in Slovenia: Results of a panel on-line survey on the impact of the pandemics on life (SI-PANDA), 2021, pp. 10–11.

9 | The COVID-19 crisis has been marked by intense social protest worldwide. A comprehensive analyses of the protests in the United States and Europe can be found in Gerbaudo, 2020, pp. 61–75. The author ascertains that protests during the pandemic reveal the nature of the COVID-19 emergency as a moment of political suspension and heightened social confrontation. The return to pre-modern protest logics, he argues, highlights the depth of the crisis of authority revealed by COVID-19, during which inequalities have further intensified.

10 | Eurobarometer, a public opinion poll of the EU institutions, reveals that 55% of the Slovenian respondents believe that things in Slovenia are generally going in the wrong direction. At the European level, Slovenia ranks at the top of the EU in terms of dissatisfaction with the situation in the country (only respondents in Poland and Hungary are less satisfied than Slovenians with the general development of events in their country). Only 14% of the Slovenian respondents thought that things were going in the right direction in Slovenia in general (the Portuguese are the most satisfied among the Europeans, 45%). See Flash Eurobarometer: State of the European Union, 2021, Section 6.

directed against the current government, and the other one agitating against the COVID-19 restrictions.[11]

Throughout the COVID-19 crises, however, the legality and constitutionality of measures imposing restrictions on fundamental rights (including the restrictions on protests) have been constantly challenged in the Slovenian courts. The Constitutional Court—which, according to the Constitutional Court Act (CCA),[12] is the highest body of the judiciary in the field of constitutionality, legality, and protection of human rights and fundamental freedoms—received and still receives hundreds of petitions to review the constitutionality and legality of government ordinances and the COVID-19 restrictions on the fundamental rights therein. The petitioners also challenged the constitutionality of the provisions of the statutory law, which regulates the prevention of infectious diseases in the Slovenian legal system and determines the legal framework for the adoption of measures by the executive branch.

2. Constitutional review of COVID-19 restrictions on fundamental rights in Slovenia and beyond

Constitutional judicialisation of the COVID-19 measures restricting fundamental rights has taken place in most (if not all) European countries. The Constitutional Courts have ruled, with more or less empathy towards the measures of executive power, on a wide range of constitutional issues regarding the restrictions on fundamental rights. Before introducing and reflecting upon the decisions of the Slovenian Constitutional Court, we will briefly explore some of the rulings of the constitutional courts in several other Central and Eastern European countries.

In Austria, a neighbouring country of Slovenia, for example, the Constitutional Court found unlawful the regulation according to which the entry into public places was generally forbidden for the purpose of preventing the spread of COVID-19. The Constitutional Court ruled that the challenged regulation lacked a clear legal authorisation expressly providing for such a far-reaching interference with the right to free movement.[13] In another decision, the Austrian Constitutional Court ruled that property restrictions as provided in the COVID-19 regulation, including an entry ban on customer areas of business premises and, resultantly, a temporary closure of shops and businesses, are necessary to avoid the spread of the pandemic. It established that the legislator enjoys a wide margin of discretion when combating the economic consequences of the COVID-19 pandemic and that an entry ban for customer areas combined with economic support

11 | So far, the protests have been peaceful and non-violent, with three major exceptions: one in early November 2020, another in September 2021, and the third one in the beginning of October 2021. In these protests, Slovenia witnessed previously unseen scenes of mass violence, destruction, and the use of police force and special equipment to control the unrests (i.e. water cannon, tear gas, and rubber bullets). Following recent violent protests and the arrests of some protesters, some politicians from the opposition and experts warned that certain circumstances point to the excessive use of police force and called for an independent investigation into the events.

12 | CCA, Art.1§ 1.

13 | V 363/2020, ECLI:AT:VFGH:2020:V363.2020.

measures does not constitute a disproportionate interference with the fundamental right to property.[14]

The Czech Constitutional Court ruled in one of its decisions that an emergency measure that consists in the prevention or mitigation of the spread of the novel coronavirus disease has a legitimate aim. However, the regulation of the rights and obligations of individuals and the decision-making regarding which group of population will retain their rights and which will bear the burdens associated with the restriction must not be a mere expression of political will. According to the Czech Constitutional Court, in a modern democratic state governed by the rule of law, such a regulation must be founded on expert evidence; however, it is the government who assumes the responsibility, rather than its expert advisers. Therefore, the government must consider not only the specific expert evidence at its disposal, but also the overall context and impacts—both long and short term—of its measures on other areas of social life. The Constitutional Court stated that an effective constitutional review is not possible without a proper explanation from the government of the need to issue the emergency measure (including the evidence on which it was based) and appropriate substantiation of the extent to which restrictions on fundamental rights will be needed and clarification of the obligations imposed.[15]

In its decision of May 2020, the Slovakian Constitutional Court held that the necessity of protecting the life and health of the population during the COVID-19 pandemic justifies certain interferences with fundamental rights. However, it ruled that in adopting measures aimed at preventing further spread of the disease, the legislator must pass a legislation which is clear, unambiguous, and provides sufficient legal guarantees against the misuse of such data. The case concerned a piece of legislation, passed as a response to the COVID-19 pandemic, which amended the Law on Electronic Communications and allowed the Public Health Authority (PHA) to gather and use certain personal data for the purposes of COVID-19 tracking. The amended provisions obliged telecom providers to retain certain telecom identification and location data of their customers. They were required to do so for the duration of an extraordinary situation or a state of emergency in places where such had been declared in the healthcare system due to the occurrence of a pandemic or the spread of a dangerous infectious human disease. Subsequently, the data were to be provided to the PHA on the basis of a reasoned written request. The PHA was allowed to process and retain it for the duration of the extraordinary situation or state of emergency in healthcare, subject to an absolute time limit of 31 December 2020. The Constitutional Court recalled its previous case law and the case law of the CJEU, according to which blanket identification and location data collection constitute an especially serious interference with relevant rights; therefore, the strictest criteria must be applied in assessing the law's clarity and any legal guarantees. It did not find the provision obliging telecom providers to collect the data necessary to identify people who need to be notified by message of special measures adopted by the PHA to be unconstitutional. It did, however, suspend those provisions that allowed the PHA to have access to data upon request, as such notification could be carried out by the telecom providers themselves, and thus, there was no need to give the PHA access.[16]

14 | G 202/2020, ECLI:AT:VFGH:2020:G202.2020.
15 | Pl. ÚS 106/20.
16 | PL. ÚS 13/2020.

In one of the cases decided by the Hungarian Constitutional Court, a constitutional complaint was lodged challenging provisions in the new section of the Criminal Code. Under these provisions, the uttering or publishing of a statement one knew to be false or with a reckless disregard for its truth or falsity under the regime of a special legal order, with the intent of obstructing or preventing the effectiveness of protective measures, would be a felony, attracting the sanction of a prison sentence of between one and five years. According to the complainant, this provision violated the principle of clarity of norms (*nullumcrimen sine legecerta*) of the Fundamental Law. The Hungarian Constitutional Court rejected the applicant by ruling, *inter alia*, that although penal laws, which carry sanctions, require precise definition, the wording of the norms would only violate the principle of clarity of the norms if they were genuinely not interpretable. According to the Constitutional Court, the challenged new section of the Criminal Code had not been applied by the courts in enough cases to establish whether its wording was genuinely unclear. It was within the general courts' competence to interpret which statements fell under the regulation and which could obstruct or prevent the effectiveness of protective measures. Thus, according to the Constitutional Court, neither the words 'obstruct' or 'prevent', nor 'effectiveness' were genuinely unclear and no breach had occurred of the principles of rule of law and clarity of norms of the Fundamental Law. The Constitutional Court stated, however, that, stemming from the provisions of the freedom of expression and priciple of *nullumcrimen sine legecerta* of the Fundamental Law, the challenged section was to be applied to the statements that had the potential to obstruct or prevent the effectiveness of protective measures only if the perpetrator knew or had to know at the relevant time that their statement was false or they distorted the facts. The section would not be applied to statements which were being debated at the time they were made, or which later turned out to be false.[17]

The Croatian Constitutional Court issued several decisions concerning a wide range of COVID-19-related issues. In a decision of July 2020, it ruled that it is not constitutionally and legally unacceptable to exclude the possibility of citizens who have been diagnosed with SARS-CoV-2 or any other infectious disease and are, thus, in isolation, and citizens who are in self-isolation due to the suspicion that they have an infectious disease to come in person to a polling station. However, these citizens as well as all others who, for other prescribed reasons, do not come to polling stations but may vote outside polling stations, enjoy the right to request the granting of the equal possibility to vote. Therefore, the State Election Commission must secure the legal possibility to exercise the voting right guaranteed by the Constitution and the law for all citizens of the Republic of Croatia who are entitled to it, including those who request it and who have been diagnosed with COVID-19.[18] In a decision issued in September 2020, the Croatian Constitutional Court ruled that it is competent to review the decisions of the Civil Protection Headquarters (along with the Minister of Health), an entity authorised to take measures to prevent the spread of the virus. It also ruled that the decision on whether certain measures to combat the COVID-19 pandemic will be taken by the application of the constitutional provisions on a state of war or emergency is in the exclusive domain of the Parliament.[19] Further, the Constitutional Court ruled that a decision on the mandatory use of face masks and

17 | 15/2020. (VII. 8.) AB.
18 | U-VII-2980/2020.
19 | U-I-1372/2020.

a decision on the organisation of public transport that are proportionate to the aim to be achieved (protection of human health and life) in the context of a global pandemic outweigh the individual rights of citizens who are obliged to respect and act according to the measures taken by competent authorities to protect the life and health of the entire population.[20] Furthermore, according to the Croatian Constitutional Court ruling, the freedom of religion as provided by the Constitution is not absolute. Gatherings of believers at religious ceremonies can be restricted if there is a strong public interest and if the restriction is proportionate. The Constitutional Court pointed out that measures that restrict religious gatherings do not unduly restrict the constitutional guarantee of freedom of religion and freedom of public demonstrations of religious convictions if their scope does not jeopardise the very essence of the constitutional guarantees.[21] According to the Croatian Constitutional Court, the constitutional principles of free enterprise and free markets are also not absolute. However, the measures restricting the property rights and work for the purposes of protecting the interests and security of the state, nature, human environment, and human health must meet the requirements of proportionality as referred to in the Constitution.[22]

In Serbia, several initiatives challenging the constitutionality and legality of the Decision on Declaring a State of Emergency were submitted to the Constitutional Court. Pursuant to the provisions of the Constitution, the Decision on Declaring a State of Emergency was adopted by the President of the Republic, together with the President of the National Assembly and the Prime Minister, and confirmed by a decision of the National Assembly. Referring to the case law of the European Court of Human Rights, the Serbian Constitutional Court established that a 'public emergency' exists if the situation is actual or imminent, if its effects involve the whole nation, if the continuation of the organised life of the community is under threat, and if the crisis or danger is of such an extraordinary nature that regular measures or restrictions are not sufficient to restore public order. It found that the occurrence of the infectious disease of COVID-19 and the danger of its uncontrolled spread on the territory of the Republic of Serbia could be considered an emergency that posed a significant threat to the health of the general population and the normal course of life in the country, including the functioning of its institutions, public services, the economy, and especially the health system. Drawing from the above, the Constitutional Court held that the decision to declare a state of emergency due to the pandemic was in line with the Constitution.[23] In a later case, the Constitutional Court pointed at a special legal regime of derogation from human rights that implies a temporary suspension of certain human rights in emergency circumstances. However, it was found that the challenged measures of the Decree on Measures during a State of Emergency prohibiting the movement of certain categories of persons did not constitute deprivation of liberty, according to neither their purpose nor content. The purpose of these measures was not to deprive the persons concerned about their liberty, but to additionally and effectively protect particularly vulnerable persons, such as the elderly, from the possibility of illness, and the asylum seekers and irregular migrants accommodated in asylum centres and reception centres. According to the Constitutional Court, the purpose of the

20 | U-II-3170/2020 *et al.*
21 | U-II-5709/2020 *et al.*
22 | U-II-6087/2020 *et al.*
23 | IUo-42/2020.

temporary restriction was their effective protection and the effective protection of the general population from dangerous infectious diseases. The provision of the Decree on Measures during a State of Emergency and the Decree on Misdemeanour for Violation of the Order of the Minister of the Interior on Restriction and Prohibition of Movement of Persons on the Territory of the Republic of Serbia were also challenged in this case, stipulating that due to non-compliance with the prohibition of movement, misdemeanour proceedings may be initiated and completed. This was even the case in the event that criminal proceedings have been initiated or are in progress for a criminal offence that includes the features of that misdemeanour, notwithstanding the prohibition from the Law on Misdemeanours and the constitutional principle *ne bis in idem*. The Constitutional Court found that the disputed decrees that enabled the possibility of parallel conducting misdemeanour and criminal proceedings in relation to the same offence were neither in accordance with the Constitution nor with the European Convention on Human Rights.[24]

The Slovenian Constitutional Court issued its first important COVID-19-related decision in the summer of 2020, when the pandemic reached one of its peaks in Slovenia. It ruled by a narrow majority that an ordinance adopted by the government restricting people's movement to the territory of the municipalities of their residence was consistent with the Constitution. At the beginning of the autumn of 2020, the Constitutional Court addressed several petitions[25] for the review of the constitutionality and legality of the restriction of movement at night (e.g. a curfew). Finding these petitions admissible for further review and assessment on the merits, it rejected the petitioners' proposal to suspend the implementation of the challenged provisions of the government ordinance. Following the issuance of these two decisions, however, the Constitutional Court's attitude towards the government measures to contain the all and its restrictions on human rights and fundamental freedoms became significantly less empathetic.

In December 2020, the Constitutional Court ruled that two government orders extending closure of schools (e.g. the restriction of gathering in kindergartens, schools, and universities) and the decision of the Minister of Education on distance learning were not valid because they had not been published in the Official Gazette (the government published them on its website instead). The Constitutional Court ruled that due to an inappropriate way of publishing the government ordinance on the temporary restriction of gathering in educational institutions, it was invalid too as much as it concerns the institutions for the education of children and adolescents with special needs. The Constitutional Court gave the government three days to rectify the legal irregularities in the publication of its acts; otherwise, distant learning would have to be abandoned (e.g. classes would have to be held in schools) despite the danger COVID-19 posed. Another important decision by the Constitutional Court was issued at the end of March 2021. It found the petition admissible and started the proceedings to assess the constitutionality and legality of the government ordinances that first restricted public protests, and then limited them to a maximum of ten participants. At the same time, the Constitutional Court suspended the

24 | IUo-45/2020.

25 | In Slovenia, the proceedings for the review of the constitutionality of laws and sub-statutory general acts can be, *inter alia*, initiated by a Constitutional Court order on the acceptance of a petition to initiate a review procedure, which may be lodged by anyone—be it a natural or legal person—who demonstrates legal interest. See CCA, Art. 1 § 1.

implementation of the challenged provisions of these ordinances until its final decision in July 2021. The Constitutional Court established that due to their length and effects, the challenged provisions severely interfered with the right to peaceful assembly and freedom of association from Art. 42 of the Constitution.

Perhaps the most important decision regarding measures to contain the COVID-19 pandemic was issued by the Slovenian Constitutional Court in May 2021. At the initiative of several petitioners, it reviewed the provisions of the Communicable Diseases Act (CDA) authorising the government to restrict or prohibit movement and/or gathering of people to prevent the introduction of an infectious disease into the country or its spread within the country.[26] It also assessed the constitutionality and legality of the provisions of several government ordinances that restricted movement and prohibited gathering of people in public places from April to October 2020 (the ordinances were adopted on the basis of the challenged provisions of the CDA). The Constitutional Court ruled that the challenged provisions of the CDA are unconstitutional because they leave it to the discretion of the executive branch without any limitation to choose the methods, types, scope, and duration of restrictions with which it can intensively interfere with the constitutional rights of free movement and peaceful assembly. Consequently, the Constitutional Court found that the challenged government ordinances, in the parts in which they were adopted on the basis of the unconstitutional CDA provisions, were also inconsistent with the Constitution.

In the following subsection, the above-mentioned decisions of the Slovenian Constitutional Court will be addressed in greater detail. These decisions will be referred to, *inter alia*, in the light of the warnings of some legal experts that Slovenia, during the pandemic, has been witnessing disproportionate and harmful restrictions on the fundamental rights and the erosion of law with devastating consequences for the entire legal system. By taking a close look at the COVID-19-related case law of the Constitutional Court, we look forward to presenting to the foreign readers and the international professional audience the specific features and peculiarities of the judicial discourse on the COVID-19 measures in Slovenia that has so far proved to be extremely controversial.

2.1. Overview of the Slovenian Constitutional Court's case law

2.1.1. Order and Decision No. U-I-83/20 on the prohibition of movement outside the municipality of one's residence

In this case, the Constitutional Court reviewed the constitutionality and legality of Ordinance/38 and Ordinance/52. Finding that the petition to initiate the review procedure of the constitutionality of the ordinances raises a particularly important precedential constitutional question of a systemic nature on which the Constitutional Court had not yet had the opportunity to take a position, it carried out the review despite the fact that the ordinances ceased to be in force. The question at issue was whether the prohibition of movement outside the municipality of one's permanent or temporary residence determined by the challenged government ordinances was consistent with the first paragraph of Art. 32 of the Constitution, which guarantees freedom of movement to everyone.

The review of the constitutionality and legality of the ordinances started in March 2020 with the procedure for examining the petition. The question on the constitutional judges' table was whether the petitioner has demonstrated legal interest for their petition

26 | CDA, points 2 and 3 of Art. 39 § 1.

to be decided on merits.[27] An important circumstance in the procedure for examining the petition in this case was that the petitioner was not convicted of a minor offence for violating the government ordinances where they could exhaust the available legal remedies. For this reason, the petitioner was also not able to file, together with their petition for the review of the two ordinances, a constitutional complaint against an individual legal act, which is, as a general rule, a necessary precondition for a petition to be admissible. In Order No. U-I-83/20, dated 6 April 2020, the Constitutional Court referred to its previous decisions in similar matters and held that it is not possible to require the petitioner to violate the allegedly unconstitutional or illegal provisions of the ordinances to initiate minor offence proceedings and substantiate the legal interest for filing a petition. In the present case, the judges also assessed that the petition for the review of the constitutionality and legality of sub-statutory general acts raises a particularly important precedential constitutional question of a systemic nature on which the Constitutional Court had not yet had the opportunity to take a position. On the basis of these arguments, the Constitutional Court ruled by eight votes to one that the petitioner succeeded in demonstrating the legal interest and found the petition admissible for further review.[28]

By Order No.U-I-83/20, the Constitutional Court also decided to suspend the implementation of Art. 7 of Ordinance/38 until its final decision.[29] Pursuant to this provision, the restrictions on movement and gathering of people determined by this ordinance were in force until the government established—with an act published in the Official Gazette—that reasons for the restrictions ceased to exist. The Constitutional Court ordered that its decision on the suspension must be implemented in such a manner that the government will check weekly, taking into account the opinion of the epidemiologists, whether the measures taken to contain the spread of infections (including restriction of movement outside municipalities) are still necessary and whether they are achieving the objectives pursued. On this basis, the government should decide whether to extend, amend, or abolish the restrictions according to the ruling of the Constitutional Court.

27 | Pursuant to Arts. 22–24b of the CCA, the legal interest is deemed to be demonstrated if a law, executive regulation (i.e. an ordinance adopted by the Government), or other general act whose review has been proposed by the petitioner directly interferes with their rights, legal interests, or legal position. In its case law, the Constitutional Court has taken a position that as a general rule legal interest in filing a petition is demonstrated if the petitioner is involved in a concrete legal dispute in which they have exhausted all regular and extraordinary legal remedies and if a petition is filed together with a constitutional complaint against an individual legal act. Moreover, as a general rule, a petition must be such as to raise particularly important precedential constitutional questions of a systemic nature. See also Mavčič, 2000, pp. 172–189.

28 | Judge Jaklič voted against this decision. In a partially dissenting separate opinion, he pointed out that, as a rule, the Constitutional Court may accept the petition only after all legal remedies have been exhausted and if the petitioner has also lodged a constitutional complaint against an individual act issued on the basis of the challenged provisions of the general act. In the opinion of Jude Jaklič, in the case at hand, like any other citizen, the petitioner should first seek judicial protection before the regular courts. See Jaklič, 2020a.

29 | Pursuant to the first paragraph of Art. 39 of the CCA, a petitioner is entitled to propose to the Constitutional Court to issue a temporary injunction on and suspend the implementation of the challenged provisions until the final decision. The court issues such an injunction if the implementation of the challenged provisions could result in harmful consequences that are difficult to remedy.

The petitioner claimed that the ordinances were inconsistent with Art. 2 of the Constitution because they were unclear and ambiguous.[30] According to the petitioner, they were also inconsistent with points 2 and 3 of the first paragraph of Art. 39 of the CDA, because this provision did not give the authority to issue the restrictions on movement and gathering to the government, but to the Minister responsible for health. The measures determined in the challenged ordinances are not limited in time and go beyond the measures provided for in Art. 39 of the CDA. The challenged provisions restricted freedom of movement quite intensively that—in the petitioner's view—could and should have been allowed only in the event of a previously declared state of emergency by the National Assembly on the basis of Art. 92 of the Constitution, which did not happen in the given circumstances. The measures introduced by the ordinances were also unreasonable in view of the objectives pursued. Additionally, according to the petitioner, the ordinances granted mayors the power to further encroach on fundamental rights, for which the government, in the opinion of the petitioner, has no authority in law and the Constitution.[31]

The Constitutional Court issued its final ruling in this case in Decision No. U-I-83/20, dated 27 August 2020. It found that the challenged provisions of the two ordinances were not inconsistent with the Constitution. The decision was adopted by five votes to four. Five out of nine constitutional judges gave either consenting or dissenting separate opinions.

The challenged ordinances were reviewed by the Constitutional Court on the basis of the test of legitimacy, which entails an assessment of whether the legislature pursued a constitutionally admissible objective; and on the basis of the strict test of proportionality that comprises an assessment of whether the interference was appropriate, necessary, and proportionate in the narrower sense. Applying the test of legitimacy, the Constitutional Court assessed that by restricting movement to the municipality of one's residence, the government pursued a constitutionally admissible objective, i.e. the containment of the spread of the contagious COVID-19 and, thus, the protection of human health and life. It emphasised that striving to achieve this goal is a constitutional obligation of state authorities and that a slow and inadequate response to the emergence of a contagious disease that could put human health or even life at risk would be inconsistent with the positive obligations of the state to protect the right to life (Art. 17 of the Constitution), the right to physical and mental integrity (Art. 35 of the Constitution), and the right to health care (the first paragraph of Art. 51 of the Constitution). While the Constitutional Court stressed that particular emphasis must be placed on the positive obligations of the state in the event of a contagious disease, it also underlined the duty of every individual to protect other people's health, particularly the health of vulnerable groups, which may also justify restrictions on freedom of movement.[32]

Applying the test of proportionality, the Constitutional Court first underlined as an important circumstance of its review the fact that state authorities were inevitably faced with considerable uncertainty when introducing the measures at issue, since, particularly at the beginning of its spread, there existed almost no scientific or medical research on COVID-19. Despite such uncertainty, these measures must be based on verifiable grounds, expert opinions, and forecasts that could be taken into consideration at the time

30 | Order No. U-I-83/20.
31 | *Ibid.*
32 | Decision No. U-I-83/20.

of their adoption. In this framework, however, the deciding authorities responsible for epidemic risk management have wide discretion regarding the choice of measures.[33]

The Constitutional Court assessed that the prohibition of movement outside the municipality of one's permanent or temporary residence was an appropriate measure for achieving the pursued objective since there existed a requisite probability according to the data available at the time of the adoption of the challenged ordinances that it could have contributed towards reducing or slowing down the spread of COVID-19, primarily by reducing the number of actual contacts between persons living in areas with a higher number of infections and who are consequently at a higher risk of transmission of the infection, and persons living in areas with a lower number of infections or even no infections at all.[34]

In the review of the necessity of the interference, the Constitutional Court deemed it crucial that the previously adopted measures (i.e. closure of educational institutions, suspension of public transport, general prohibition of movement and gatherings in public places and areas) did not enable, at the time of the adoption of the challenged ordinances, the assessment that they would prevent the spread of infection to such an extent that—with regard to the actual systemic capacity—adequate health care could be provided to every patient. In such conditions, further measures to prevent the spread of infection and, thereby, the collapse of the health care system were necessary.[35]

The Constitutional Court assessed that the measure restricting movement to the municipality of one's residence was also proportionate in the narrower sense. It found that the demonstrated level of probability of a positive impact of the measure on the protection of human health and life outweighed the interference with freedom of movement. In this assessment, the Constitutional Court deemed it important that the measure included several exceptions to the prohibition of movement outside the municipality of one's residence. It also assessed the restriction on movement as regards the time and territory of its application, by estimating that the longer such a measure lasts, the more invasive the interference becomes. However, this does not entail that the challenged restrictions on the right to freedom of movement were disproportionate in the narrower sense in light of their temporal dimension. The Constitutional Court held that the regulations were in force for a relatively short period of time and that their original invasiveness could by no means have exceeded in the days of their validity. Regarding the territorial limitation of the measures, it stated that such measures can apply to the territory of the whole country if it is ascertained, on the basis of existing scientific information, that the areas where there is a risk of infection are scattered all over the country and if the constitutionally admissible objective cannot be achieved in any other manner.[36]

For these reasons, the Constitutional Court decided that the prohibition of movement outside the municipality of one's residence did not disproportionately interfere with the freedom of movement, as determined by the first paragraph of Art. 32 of the Constitution. As the remaining allegations against the ordinances stated in the petition did not raise any particularly important precedential constitutional questions and the petitioner failed to demonstrate legal interest for a constitutional review regarding these

33 | *Ibid.*
34 | *Ibid.*
35 | *Ibid.*
36 | *Ibid.*

allegations, the Constitutional Court rejected the petition in the remaining part. Last but not least, the petitioner also alleged the unconstitutionality of Art. 39 and certain other statutory provisions on which the challenged ordinances were based. In this regard, the Court explained that in the case at hand, it did not take a position on the constitutionality of the statutory bases for the adoption of the challenged ordinances.

The constitutional judges, who disagreed with the majority decision, presented their views on the challenged provisions of the government ordinances in dissenting separate opinions. Judge Mežnar, for example, argued that the position of some judges that the prohibition of movement outside the municipality of one's residence was a disproportionate measure does not mean a flat opposition to all COVID-19 measures. However, she pointed out that the government did not have the legal authority to adopt the challenged ordinances because, according to the provisions of the CDA in force at the time, the Minister of Health had such authority. In this regard, Judge Mežnar pointed to the fact that the government received the authority only after the CDA was amended. She also argued that during the review proceedings, some judges had persistently warned that the Constitutional Court could and should not assess the constitutionality and legality of executive acts (e.g. government ordinances) without prior review of Art. 39 of the CDA, because the challenged provisions of this act provide a statutory legal basis for the assessed executive measures. Regretfully, in the view of Judge Mežnar, the majority of the Constitutional Court judges decided otherwise. According to her, the prohibition of movement outside the municipality of one's permanent or temporary residence in addition to the already existing general restriction on movement and gathering in public places was not necessary and proportionate for further (stronger) prevention of contacts between individuals. According to the judge, this measure did not limit people-to-people contacts.[37]

In his dissenting separate opinion, Judge Čeferin assessed that the majority of constitutional judges were satisfied with the finding that in the context of the COVID-19 pandemic, the executive authorities should be left with an almost unlimited discretion in choosing and implementing measures. He described the majority decision as a dangerous precedent. In his opinion, the Constitutional Court failed to carry out its basic mission, i.e. the supervision over the conduct of the executive branch and its restrictions on human rights and fundamental freedoms. Judge Čeferin also pointed out that the majority of constitutional judges did not substantiate their claim that the government ban on the crossing of municipal borders was supported by the epidemiological profession. According to him, Dr Ivan Eržen, the then director of the National Institute of Public Health (NIJZ), who was later dismissed by the government, publicly expressed an opinion that the prohibition of movement outside the municipality of one's residence was an unnecessary measure. A careful examination of measures to contain the COVID-19 epidemic, according to Judge Čeferin, shows that the restriction on movement outside the municipality of one's residence could not contribute to curbing the spread of the virus. On the contrary, prohibiting people from leaving their domicile municipality could even increase the risk of infection. Lastly, Judge Čeferin wondered whether the principle of proportionality is a tool that allows proper weighing in cases where a fundamental right has to be restricted in the public interest or for the sake of other fundamental rights, or merely a means of justifying such a restriction. In his view, the proportionality test used by the constitutional courts is an empty criterion. If the constitutional judges misjudge

37 | Mežnar, 2020a.

the meaning and weight of the rights and interests on the scale, it shows the wrong result. In assessing the constitutionality of the prohibition of crossing the municipal borders, the Constitutional Court used the proportionality test in such a way that it could not show a different result than it did because it was used as a means to justify a majority decision. According to the judge, a critical, objective, and fair application of the proportionality test would lead to a different result. It would show that the measure prohibiting movement outside the municipality of one's residence was disproportionate and that the government interfered with the freedom of movement of the people, the right guaranteed in Art. 32 of the Constitution.[38]

2.1.2. Orders Nos. U-I-426/20 and U-I-427/20 on the admissibility of the petitions to review the constitutionality and legality of the prohibition of movement at night (curfew)

In October 2020, referring to the rapid increase in the number of infections,[39] the government restricted, with some exceptions, the movement of people between 9 pm and 6 am. Regarding this restriction, several petitions were submitted to the Constitutional Court to initiate review proceedings of its constitutionality and legality.

One of the petitions was filed by a well-known Slovenian human rights expert and a practising lawyer. The petitioners claimed unconstitutional several government ordinances, including Ordinance/147, which introduced a curfew. According to the petitioners, points two and three of the first paragraph of Art.39 of the CDA, which provided a statutory legal basis for the restriction by the government ordinances on the movement and gathering in public places, were also unconstitutional. With Order No. U-I-427/20, dated 21 December 2020, the Constitutional Court unanimously found that the petition was partially admissible. It assessed that the petition raises important precedential constitutional issues concerning interferences with the rights of all residents throughout the country and that the Constitutional Court has not yet had an opportunity to address them. As such, the Constitutional Court specifically pointed out the general restriction on movement between 9 pm and 6 am. Additionally, it found that legal interest was also demonstrated by the petitioners regarding the assessment of the constitutionality of Art. 39 of the CDA.[40]

The petitioners proposed to the Constitutional Court to suspend until its final decision the implementation of the challenged provisions of Art. 39 of the CDA and the provisions of the ordinance that introduced a curfew. This proposal was rejected by the Constitutional Court one and a half months prior to the decision on the admissibility of the petition by Order No. U-I-427/20, dated 5 November 2020. The order was issued by eight votes to one. All, but one, of the judges were of the opinion that the implementation of the challenged provisions of the ordinance would not lead to irreparable harmful consequences and that the condition for suspending the enforcement of the government ordinance was, therefore, not met. Judge Mežnar, who voted against the majority decision, claimed in her dissenting separate opinion that she advocated an alternative decision by which the

38 | Čeferin, 2020.
39 | In the second half of October 2020, the number of confirmed new infections exceeded two thousand for several consecutive days.
40 | Order No. U-I-427/20. The Constitutional Court rejected the remainder of the petition with an explanation that it would not open important precedent-setting constitutional issues.

Constitutional Court would properly balance the harmful consequences of the COVID-19 pandemic on the one hand and a mass interference with the people's fundamental rights on the other. In her opinion, the curfew was an unconstitutional measure because it interfered with the right to personal liberty, without a legitimate legal basis. She agreed that in the epidemiological situation, the government has had a duty to limit the spread of COVID-19; however, the curfew, in her opinion, did not contribute to limiting the harmful effects of the COVID-19 pandemic. In Judge Mežnar's opinion, the curfew determined by the challenged ordinance meant that the majority of the population in Slovenia was prevented from leaving their homes after 9 PM. Hence, people were not allowed to leave their homes for more than one third of a day, and their movement outside the municipality of their homes was prohibited in the remaining two thirds. Exceptions were defined very narrowly and did not include—in terms of the spread of infections—completely harmless walks or recreation. Referring to the criteria applied by the European Court of Human Rights, Judge Mežnar claimed that curfew was not a temporary restriction of movement, but a restriction of personal liberty. Such a restriction was, in her view, unprecedented in Slovenia's recent history, and could not be introduced on the basis of Art. 39 of the CDA, as these provisions only provided for the restriction of movement.[41]

Judge Mežnar gave the same dissenting separate opinion to Order No. U-I-426/20, dated 21 December 2020. In this decision, the Constitutional Court examined the petition in which another petitioner proposed the review of the constitutionality of the curfew provisions and their suspension. A separate opinion to this Order was also given by Judge Jaklič who agreed with the Constitutional Court's rejection of the petitioner's proposal for issuing a temporary injunction. Judge Jaklič stated that by taking measures to restrict movement at night, the government was trying to prevent the further spread of COVID-19 and prevent the development of events that we have witnessed during the peak of the epidemic in Italy. In his view, the government considered a carefully prepared advice from its expert group for COVID-19 and followed other countries where the same restriction was imposed. In Judge Jaklič's view, only partially restricted movement of persons (nine hours per day at night) in the worst period of the COVID-19 pandemic that provided for urgent exceptions could not outweigh the dangers if the court would have followed the petitioner's proposal and withheld the measure. In his opinion, there was a serious threat that if the measures were suspended, the constitutional judges themselves would cause deterioration of health and death of a large number of people. The threat to constitutional rights and values by the mass and permanent loss of human life and health is disproportionately greater than the threat to constitutional rights by the temporary and partial restriction of movement, with the exceptions provided for. According to Judge Jaklič, the petitioner's motion was, therefore, clearly unfounded.[42]

The Constitutional Court issued its final decision regarding the constitutionality and legality of the curfew provisions in Decision No. U-I-79/20, dated 13 May 2021 where it

41 | See Mežnar, 2020b.Judge Mežnar also asserted that the measures, which are usually addressed as a "curfew", are not necessarily comparable in different countries.In her opinion, a comparison of the Slovene and Austrian versions shows that the latter, in contrast to the Slovene version, is regulated by a statutory law, is less invasive and contains several exceptions that are broadly defined (for example, meeting daily needs, staying outdoors for physical or mental well-being etc.).According to the judge, in Austria, the government is not allowed to introduce curfews that prohibit residents from walking, recreation or merely sitting in public parks.
42 | Jaklič, 2020c.

also ruled on the constitutionality of the challenged provisions of Art. 39 of the CDA. This decision is addressed in Section 2.1.5.

2.1.3. Partial Decision and Order No. U-I-445/20 and Order No. U-I-473/20 on the restriction of gatherings in educational institutions

In this case, the Constitutional Court decided on the admissibility of a petition of two minor children attending primary school for children with special needs. They challenged the regulation that prohibited gatherings in educational institutions and determined that educational work for children with special needs be temporarily carried out at a distance. The measures in question were adopted by points 3 and 5 of the first paragraph of Art. 1 of Ordinance/152. Additionally, the petitioners proposed the Constitutional Court to suspend the implementation of the challenged ordinance provisions until the final decision. The petitioners also proposed to the Constitutional Court to initiate the proceedings to assess the constitutionality and legality of three orders issued by the government to extend the validity of the measures determined by the challenged provisions of the ordinance and the decision of the minister responsible for education on the temporary implementation of educational work in primary and music schools at a distance.

In Partial Decision and Order No. U-I-445/20, dated 3 December 2020, the Constitutional Court found the petition admissible by eight votes to one[43] and immediately proceeded to decide on the merits of the case. Notwithstanding the fact that Ordinance/152 ceased to be in force meanwhile, it found that conditions were met for a substantive assessment of the challenged provisions of the ordinance.[44] Furthermore, the Constitutional Court established that the government adopted Ordinance/152 on the basis of the CDA that in point 3 of the first paragraph of Art. 39 provides that the government may prohibit the gathering of people in schools, cinemas, restaurants, and other public places until the danger of a contagious disease ceases. According to the challenged provisions of the ordinance, the prohibition of gathering is also applied in institutions for the education of children and adolescents with special needs. Given that the challenged legal regulation by the ordinance may establish restrictions on the fundamental rights of children with special needs as a vulnerable group, according to the Constitutional Court, the case at hand concerned a decision on an important precedent constitutional issue for which the petitioners have demonstrated legal interest.

43 | Judge Jaklič, who voted against the majority decision, gave dissenting separate opinion. Two judges gave consenting separate opinions.

44 | In Art. 47 § 1, the CCA stipulates that if a general act that ceased to be in force when a petition is lodged is challenged by the petition, and the consequences of its unconstitutionality or unlawfulness were not remedied, the Constitutional Court decides on its constitutionality or legality. In the case at hand, the Constitutional Court found that the petitioners had not shown such consequences as they state only that the long-term closure of schools hindered their personal development, but did not claim that this is an independent consequence of the challenged provisions of the ordinance. The latter notwithstanding, it was of the opinion that there was a sufficient public interest in the substantive assessment of the challenged legal regulation. Such public interest exists, according to the Constitutional Court, if the requirement of legal predictability in a certain area of regulating social relations demands a decision of the Constitutional Court on particularly important precedent constitutional issues of a systemic nature, which may reasonably be raised in relation to acts of the same nature and comparable content in the future.

The petitioners claimed that due to the closure of schools, they were denied access to education according to the programs for children with special needs, additional professional assistance, and all other special treatments (i.e. physiotherapy, occupational therapies, pool therapies, speech therapy, and psychological treatments) provided to them at school. They alleged that the implementation of educational work at a distance means a denial of their rights to care and education, and training for active work in society. They explained that, in contrast to their peers, they need specific help in learning, an individualised approach, and special professional methods of working with more adaptations and illustrations. They stated that their parents do not have the appropriate special skills and the teaching materials needed to adapt learning to their specific needs and deficits. The petitioners also claimed that the individual treatment they receive at school is not possible at home because both of them have one healthy primary school sibling, who also needs the parents' help and supervision in school work. In the petitioners' opinion, the challenged government ordinance and orders were inconsistent with Arts. 2 (the principle of the rule of law), 14 (equality before the law and prohibition of discrimination), 52 (rights of disabled persons), 56 (rights of children), and 57 (education and schooling) of the Constitution.[45]

In their response to the petition, both the government and the minister responsible for education rejected the petition as unfounded. According to them, the opening of schools, including those for children with special needs, would be dangerous for the health of children and school staff ,and for public health in general.[46]

The Constitutional Court found in Partial Decision and Order No. U-I-445/20 that the validity of the measures determined by the challenged ordinance was limited to seven days following its publication, and that the government decided to extend their validity three times by adopting the challenged orders. Since the challenged orders were not published in the Official Gazette of the Republic of Slovenia (they were published on the government's website instead), the Constitutional Court ruled that they could not have entered into force. Consequently, this legal circumstance also affected the validity of the measures determined by the challenged provisions of the ordinance. The Constitutional Court reasoned that by adopting the challenged orders, the government regulated in an abstract manner the rights, obligations, and legal position of an indefinite number of the legal entities and natural persons to whom such measures applied (educational institutions, particularly the pupils attending them). According to the Constitutional Court, this entails that, in terms of content, the orders of the government were regulations and they should be published in the Official Gazette before they entered into force. This also applied to the order issued by the minister responsible for education which determined that, in light of the then epidemiological situation, educational work in primary and music schools was to be temporarily carried out at a distance. According to the Constitutional Court, this order was also not publicised appropriately.[47]

In view of the fact that the Constitutional Court established that the temporary prohibition of gatherings in educational institutions was extended by invalid government orders, such organisations should have been reopened immediately. However, as the Constitutional Court was aware that the epidemiological situation in the country might

45 | Partial Decision and Order No. U-I-445/20.
46 | *Ibid.*
47 | *Ibid.*

not yet permit gatherings in such large numbers and that certain guidelines and organisational adaptations might be necessary for these organisations to reopen, it determined the manner of implementation of its decision. It decided that the adopted decision would apply only after the expiry of a three-day period following its publication in the Official Gazette. By so ruling, the Constitutional Court allowed, according to its own wording, sufficient time for the competent authorities to decide on the closure of educational institutions and to order that education be carried out at a distance to reassess whether such measures are scientifically justified. Given that one of the possible decisions that the government be able to take was that schools and other educational institutions must continue to be closed, the Constitutional Court stated that in such a case, the conditions would be met for the temporary suspension of the challenged provisions of the ordinance (e.g. those related to the prohibition of the implementation of education in the institutions for children with special needs); however, it has not ruled so in its partial decision. Instead, the Constitutional Court resorted to warning and pointing at harmful consequences if the government insisted on keeping the institutions for children with special needs closed. It agreed with the petitioners that this may affect their personal development. In the Constitutional Court's view, further enforcement of a possibly unconstitutional regulation could undoubtedly have detrimental consequences for children with special needs. Taking into account their special features and needs, they need a specially adapted implementation of education, which they can usually receive only in institutions where they are dealt with by specially trained workers. According to the Constitutional Court, if continued, school closures would have had far greater harmful consequences for these children than for other children.[48]

Soon after Partial Decision and Order No. U-I-445/20 were issued, the government re-introduced almost the same legal regulation prohibiting gatherings in educational institutions and introducing the temporary implementation of educational work at a distance. The provisions of the new Ordinance/181 that applied to schools and educational institutions for children with special needs were challenged by the same petitioners as in the above mentioned case No. U-I-445/20. In Order No. U-I-473/20, dated 21 December, the Constitutional Court unanimously found that the petition is admissible[49] and that the conditions were met for a substantive assessment of the challenged provisions, despite the fact that the Ordinance/181 ceased to be in force meanwhile. Additionally, it initiated the proceedings to assess the constitutionality of Ordinance/183 on the temporary prohibition of gatherings in institutions in the field of education that was in force at the time of the issuance of the Constitutional Court's decision in this case. It found admissible the petition to initiate the review of the constitutionality and legality of the order of the minister responsible for education on the temporary implementation of educational work at a distance, insofar as it applied to schools and educational institutions for children with special needs. Finally, the Constitutional Court suspended the implementation of the challenged provisions of Ordinance/181 and the Minister's order until its final decision, while ruling that the Government must, no later than by 4 January 2021, enable the start of the implementation of programs for children with special needs.

48 | *Ibid.*

49 | Order No. U-I-473/20 was issued by eight judges of the Constitutional Court. Judge Jaklič who was the only judge who voted against Partial Decision and Order No. U-I-445/20 did not take part in the admissibility proceedings and did not vote in this case.

In his consenting separate opinion titled 'Plight teaches how to think', Judge Pavčnik drew attention to the plight of children with special needs and of their parents. According to the judge, whenever possible, the cliffs between Scylla and Charybdis should be crossed so that children with special needs receive as much assistance as possible, provided that all those implementing the program and providing them with individual assistance can be adequately protected. If the risk of infection can be avoided as much as possible, he claimed, it is natural that we need to come to the aid of a vulnerable group.[50] Judge Mežnar, who also gave consenting separate opinion, warned that the Ministry of Education and the government had been ignoring the decision of the Constitutional Court for three weeks; therefore, at the initiative of the same initiators, the Constitutional Court had to reconsider the reasons for closing schools and institutions for children with special needs. She emphasised that it was no surprise that the Constitutional Court had repeated its message from Decision U-I-445/20 and had taken it a step further and instructed the government to provide conditions for the opening of educational institutions for children with special needs by 4 January 2021 at the latest. The Constitutional Court cannot force a government to respect its decisions; however, a good government, according to Judge Mežnar, does not even think of ignoring them.[51]

2.1.4. Order and Decision No. U-I-50/21 on the prohibition of public protests

In the spring of 2021, two petitioners who wished to remain anonymous[52] filed a petition for the review of the constitutionality and legality of multiple provisions of two government ordinances in the parts that completely prohibited public protests and later limited them to up to ten participants to prevent the spread of COVID-19. By Order No. U-I-50/21 dated 15 April 2021, the Constitutional Court unanimously found the petition admissible for further consideration, although the ordinances were no longer in force. It has also initiated the procedure for assessing the constitutionality and legality of two other ordinances prohibiting protests that were still in force at the time the decision was issued. On the proposal of the petitioners, the Constitutional Court suspended the implementation of the challenged provisions of the ordinances until its final decision by five votes to four. The Court ordered the government to adopt in the case of further restriction of protests a new regulation within seven days, taking into account guidelines determined by the Constitutional Court in the reasoning of the Order. Additionally, it ruled that protests were temporarily still prohibited until 18 April 2021 (i.e. for three more days following the publication of the decision of the Constitutional Court in the Official Gazette) and that the provisions from point 14 of Art. 57 of the CDA shall also apply until the protests are still prohibited. According to this statutory provision, a fine of 400–4,000 Euros may be imposed on an individual who violates measures determined by the executive ordinances adopted on the basis of the first paragraph of Art. 39 of the CDA. Judges gave two consenting separate opinions and three dissenting separate opinions to the majority decision.

The petitioners alleged a violation of the right to peaceful assembly (Art. 42 of the Constitution) and freedom of expression (Art. 39 of the Constitution). According to them,

50 | Pavčnik, 2020.
51 | Mežnar, 2020c.
52 | The petitioners feared that because they dared to challenge its decisions, they would receive retaliatory measures from the government.

one of the key elements of democracy is the possibility of gathering in public places, especially in front of symbolic institutions of state power. They emphasised that they were banned from having a possibility to express their views on public affairs in the current political situation, including disagreement with certain policies, and their concern for the future of the country. They also claimed that the authorities had unjustifiably prohibited them from opposing certain government measures to contain the COVID-19 epidemic. The petitioners pointed out that, on the one hand, to prevent the spread of infections, the government allows various forms of association of people and determines the way they should be exercised (e.g. shopping, recreational activities, and gathering in churches). On the other hand, the government banned protests completely and for a long time. It is unacceptable in the view of the petitioners that the gathering of people for the purpose of peaceful protest and public expression of their opinion enjoys less legal protection than some permitted forms of association, because the right to peaceful protest is an important building block of political democracy.[53]

The petitioners also drew attention to the unacceptable practice of the authorities competent in the field of minor offences. According to the petitioners, they fine those who express their political views in public, even if it involves gathering of only two or three people, while it is allowed, for example, in commercial centres and other closed spaces to stand in line without an adequate interpersonal distance. The petitioners referred to the documents from which, in their opinion, it follows that the prevention of gathering in open public places does not make a significant contribution to the prevention of infections.[54]

Furthermore, the petitioners alleged that the limitation of the number of participants in the protests (and gatherings in public places in general) to a maximum of ten persons was also not proportionate and constitutionally permissible. According to them, there are milder measures by which the government could prevent the spread of infections while still allowing gatherings of more than ten people. The petitioners accused the government of equating the gathering of people within the meaning of the right of assembly from Art. 42 of the Constitution (as an important democratic mechanism) with other forms of assembly, which are protected only within the framework of general freedom of action.[55]

The petitioners proposed to the Constitutional Court to suspend the implementation of the challenged provisions of the ordinances. They were of the opinion that they would otherwise suffer irreparable damage, as participation in the ongoing protests, given the current political situation, could not be replaced later. Participation in protests, in their opinion, could not contribute to an increase in the number of infections if all the instructions and recommendations of the NIJZ were followed.[56]

Replying to the petition, the government stated that the prohibition of protests was based on point 3 of the first paragraph of Art. 39 of the CDA. According to the government, the prohibition meant the concretisation of the limitation of the right of peaceful assembly and association allowed by the third paragraph of Art. 42 of the Constitution. The government also stated that this measure was adopted in accordance with the latest findings of epidemiologists. It opposed the petitioners' proposal to suspend the implementation

53 | Order No. U-I-50/21.
54 | *Ibid.*
55 | *Ibid.*
56 | *Ibid.*

of the challenged provisions of the ordinances by arguing that the petitioners' claims about the occurrence of harmful consequences in the case of further implementation of the measure were unspecified and unfounded. The government drew attention to Decision U-I-18/20, where the Constitutional Court rejected the proposal for the temporary suspension of the measure prohibiting movement outside the municipality of residence. This, in its view, means that measures to prevent the spread of COVID-19 are necessary in a democratic society to ensure public health.[57]

The Constitutional Court found in Order No. U-I-50/21 that to conceal the identity of the petitioners, special circumstances must indicate the need to abandon the general rule of publicity of the procedure for the review of the constitutionality of general acts and its participants. In the case at hand, the Constitutional Court found that such circumstances were not demonstrated. When ruling on the existence of the legal interest for filing a petition, the Constitutional Court drew from the fact that the challenged sub-statutory regulation prohibited the petitioners from peaceful assembly under the threat of a financial sanction. It considered that the petitioners were not obliged to meet standard prerequisites for the legal interest to be demonstrated,[58] because in the given case, they could only do so by committing a minor offence (e.g. by violating the ordinances and exposing themselves to be fined). This is due to the fact that the Public Assembly Act distinguishes between the public gatherings that must be permitted by a competent authority and the so-called unorganised public gatherings. When it comes to an unorganised public gathering, a person cannot be in a position to challenge an individual act and exhaust the legal remedies unless they commit a minor offence and receive a fine. As this was the situation in the given case and, additionally, the petitioners addressed an important constitutional issue of precedent importance, the Constitutional Court found that they demonstrated the legal interest and that their petition is admissible for further consideration. Last but not least, the Constitutional Court decided to suspend the implementation of the challenged provisions of the ordinances until its final decision, because it assessed that further implementation of the prohibition of protests could cause harmful consequences that are difficult to remedy, if it would find the challenged provisions unconstitutional in its decision on the merits.[59]

In this case, a final decision was issued two months after the ruling in the admissibility procedure. Regarding the prohibition of public protests and limitation of the number of participants to a maximum of ten persons, the Constitutional Court established in Decision No. U-I-50/21 dated 17 June 2021 that due to their length and effects, they severely interfered with the right of peaceful assembly and association. The Constitutional Court explained that the challenged measures were adopted to prevent the spread of a communicable disease, which is a constitutionally admissible objective for limiting human rights. In this respect, it stressed that when balancing the right to health and life, on the one hand, and the right of peaceful assembly and public meeting, on the other, these two

57 | *Ibid.*

58 | As previously explained, the Constitutional Court has taken a position in its case law that, as a general rule, legal interest in filing a petition is demonstrated if the petitioner is involved in a concrete legal dispute in which he/she has exhausted all regular and extraordinary legal remedies and if a petition is filed together with a constitutional complaint against an individual legal act. Also, as a general rule, a petition must be such as to raise particularly important precedential constitutional questions of a systemic nature.

59 | Order No. U-I-50/21.

rights are in opposition and enjoy a high level of constitutional protection. The Constitutional Court found, however, that the challenged measures were not necessary because there exists a set of measures by which it is possible to prevent the infections at public protests and which interfere to a lesser extent with the right of peaceful assembly and association than the complete prohibition of public protests or a limitation thereof to a maximum of ten people. This includes the distribution of face masks and hand sanitisers to protesters, the closing of public spaces and roads to ensure sufficient space for maintaining an appropriate interpersonal distance between protesters, and the duty of protest organisers to present a plan regarding hygienic measures. Prior to the entry into force of the challenged measures, the government had not ascertained whether the objective of ensuring public health could be attained by such milder measures for limiting public protests. Thus, the Constitutional Court assessed that the government did not consider the positive duty of the state to ensure the exercise of the right of peaceful assembly to a reasonable degree, and the duty to cooperate with organisers of public protests.[60]

Since the challenged ordinances ceased to be in force, on the basis of the second paragraph in conjunction with the first paragraph of Art. 47 of the CCA, the Constitutional Court merely established that they were inconsistent with the Constitution in the part wherein they prohibited public protests or limited them to a maximum of ten participants. It ruled that the establishment of the inconsistency of the challenged ordinances with the third paragraph of Art. 42 of the Constitution had the effect of abrogation.

2.1.5. Decision No. U-I-79/20 on the unconstitutionality of points 2 and 3 of the first paragraph of Art.39 of the Communicable Diseases Act

Decision No. U-I-79/20 dated 13 May 2021 was described by the constitutional judges who gave separate opinions as groundbreaking.[61] Upon a petition submitted by multiple petitioners, the Constitutional Court reviewed points 2 and 3 of the first paragraph of Art. 39 of the CDA. These provisions authorise the government to prohibit or restrict the movement in infected or directly endangered areas and prohibit gathering of people in public places to prevent the introduction and spread of a communicable disease in the state if this goal cannot be reached by other measures determined by the CDA. The Constitutional Court also reviewed several ordinances that were adopted by the government on the basis of the challenged statutory provisions from April to October 2020. The Constitutional Court found by five votes to three that the challenged provisions of the CDA were unconstitutional. It ordered the National Assembly to provide a new statutory regulation within two months from the publication of its decision in the Official Gazette. However, it ruled that the challenged provisions of the CDA should continue to apply until the unconstitutionality was remedied. The Constitutional Court also found unconstitutional the challenged ordinances and unanimously rejected the petition to initiate proceedings to assess the constitutionality of certain other provisions of the CDA and the Government Act. It also unanimously rejected the petitioners' proposal to initiate proceedings to review the constitutionality of the government's order that declared COVID-19 in the territory of the Republic of Slovenia. Three judges gave consenting separate opinions to

60 | Decision No. U-I-50/21.

61 | Judge Mežnar, for example, described this decision of the Constitutional Court as groundbreaking not because of the content (which was expected in her opinion), but because of the long and difficult decision-making process.

the decision. Separate opinions were also given by the three judges who voted against the majority decision.

The petitioners alleged, *inter alia*, that the challenged statutory regulation grants the government the authority to restrict, at its own discretion, the fundamental rights of individuals without any statutory limitations or criteria. In their view, the CDA does not determine in what way and to what extent the movement can be restricted by an executive act issued on its basis, nor does it determine the criteria for these restrictions. The challenged provisions are inconsistent with the Constitution, according to the petitioners, because they do not determine the time limit for the measures, which professional bodies make decisions on whether the conditions for declaring a pandemic are met, and which measures should be implemented.[62]

According to one of the petitioners, the challenged provisions of the CDA are also inconsistent with the Constitution because they do not provide for informing the public. He claimed that the public had the right to know the exact data about the COVID-19 pandemic to be able to check whether the measures were lawful, proportionate, and necessary. Residents also had the right to know what the real dangers are and whether there are also different scientific and professional opinions beside the official ones. In practice, however, according to the petitioner, the measures to contain COVID-19 were adopted on the basis of selective and incomplete information, and the government did not inform the public objectively and transparently.[63]

As previously pointed out, the petitioners also challenged several government ordinances that determined the prohibitions and restrictions of movement and gathering in public places as well as certain protective measures on the basis of the challenged statutory provisions. Regarding the restriction of movement at night (e.g. the curfew), they considered that this measure infringed so intensely on human rights and fundamental freedoms that it could only be imposed in the event of a previously declared state of war or state of emergency on the basis of Arts. 16 and 92 of the Constitution. They argued that this measure could not be based on Art. 39 of the CDA, which, according to them, was also inconsistent with the Constitution. Regarding the prohibition of movement outside the municipality of one's residence, the petitioners considered that it was not reasonable, necessary, proportional, and constitutionally legitimate; and that it was not supported by professional reasons. Regarding the prohibitions and restrictions of movement and assembly in public places, the petitioners considered that this measure severely reduced the possibility for people to socialise. In their view, these prohibitions and restrictions violated the freedom of movement and the right of peaceful assembly and association as well as the personal rights of citizens and other residents.[64]

According to the petitioners, certain COVID-19 measures were also disproportionate because they caused enormous economic damage and had negative consequences for people's mental health and treatment of other diseases. The petitioners argued that the competent authorities did not analyse the harmful consequences of the measures. If the authorities would adequately protect the elderly population, according to the petitioners,

62 | Decision No. U-I-79/20.

63 | The petitioner asserted that most of the measures were based on untrue data on the number of deaths due to COVID-19-19, because these data do not differentiate between deaths due to SARS-CoV-2 infection and cases where an infected person died from another cause.

64 | Decision No. U-I-79/20.

all other measures would be meaningless, unnecessary, and counterproductive. As in case No. U-I-83/20, the petitioners claimed in this case too that the ordinances had not been adopted by the competent authority, because the restrictions, pursuant to the then provisions of the CDA, could only be adopted by the minister responsible for health, not the government.[65]

The Constitutional Court assessed these allegations from the viewpoint of the constitutional provisions which expressly determine that freedom of movement and the right of peaceful assembly and association may be limited by law, in conjunction with the principle of legality determined by the second paragraph of Art. 120 of the Constitution. This principle requires that the executive branch of power perform its work on the basis and within the framework of statutory laws.

The Constitutional Court referred to its hitherto case law in accordance with which the executive branch of power must not regulate matters falling within the domain of legislative decision-making without a statutory authorisation. Whenever the legislature authorises the executive branch of power to adopt an implementing regulation (i.e. by adopting sub-statutory acts), it must first by itself regulate the foundations of the content that is to be the subject of the implementing regulation, and determine the framework and guidelines for regulating the content in more detail by the implementing regulation. A blank authorisation granted to the executive branch of power (i.e. an authorisation not containing substantive criteria) entails, according to the Constitutional Court, the legislature's failure to legislate statutory subject matter. A general act that directly interferes with the human rights or fundamental freedoms of an indeterminate number of individuals can, as a general rule, only be a (statutory) law. However, according to the Constitutional Court, it is not inconsistent with the Constitution if the legislature—to effectively protect human rights and fundamental freedoms, and ensure fulfilment of the positive obligations that stem from the Constitution—exceptionally leaves it to the executive branch of power to prescribe measures by which the freedom of movement and right of assembly and association of an indeterminate number of individuals are directly interfered with. However, a statutory law must determine the purpose of these measures, or their purpose must be clearly evident therefrom. Furthermore, according to the Constitutional Court, pursuant to the requirement of Art. 2 of the Constitution (the principle of the rule of law), a statutory law must determine with sufficient precision the admissible types, scope, and conditions regarding the restriction of the freedom of movement and the right of assembly and association, as well as other appropriate safeguards against the arbitrary restriction of human rights and fundamental freedoms.[66]

The Constitutional Court concluded that the challenged statutory regulation in the CDA does not fulfil this constitutional requirement, as it allows the government to choose, upon its own discretion, the types, scope, and duration of restrictions, which interfere—possibly very intensely—with the freedom of movement of—possibly all—residents on the territory of the Republic of Slovenia. The challenged statutory regulation also leaves it to the government to freely assess, throughout the entire period while the threat of the spread of the communicable disease lasts, in which instances, for how long, and in how extensive an area in the state will it prohibit the gathering of people in those public places where, according to the Government's assessment, there exists a heightened risk

65 | *Ibid.*
66 | *Ibid.*

of spreading the communicable disease. The regulation also lacks safeguards that could limit the discretion of the government, such as the duty to consult or cooperate with the experts and to inform the public of the circumstances and opinions of experts that are important for deciding on such measures.[67]

In view of the above, the Constitutional Court concluded that points 2 and 3 of the first paragraph of Art. 39 of the CDA are inconsistent with the constitutional provisions on the freedom of movement and the right of peaceful assembly and association. It decided that the National Assembly must remedy the established inconsistency within two months of the publication of the Decision in the Official Gazette and that until the inconsistency is remedied, points 2 and 3 of the first paragraph of Art. 39 of the CDA shall still apply. The Court explained in the reasoning of the decision that it so decided to protect the health and lives of people that could be at risk in the future due to the absence of a statutory basis for the measures, and thus prevented the occurrence of an even graver unconstitutional situation.[68]

The Constitutional Court also established that in the part where they were adopted on the basis of an unconstitutional statutory regulation, the challenged ordinances adopted by the government were inconsistent with the Constitution. It decided that the establishment of such inconsistencies shall have the effect of (immediate) abrogation.

Judge Knez, the president of the Constitutional Court, who voted against the abrogation of Art. 39 of the CDA, emphasised in his separate opinion that the Constitutional Court was faced with difficult constitutional questions in a changing epidemiological situation in this case. How specific the statutory provisions must be for the executive branch to set limits within which it can operate depends, according to Judge Knez, on the field of regulation and issues that are regulated. Whether the statutory law regulates situations that are difficult to predict in advance and, therefore, cannot be precise in anticipating measures; and whether the different constitutional rights and fundamental freedoms collide, which these rights are, and how strong a collision can be are also relevant. Judge Knez emphasised that the CDA does not introduce punitive measures (these require stricter criteria in terms of limiting the executive branch), but measures arising from the clash of different human rights, which are at the same time rights with different statuses. On the one hand, there was a positive duty of the state to protect people's lives and health and the functioning of the health care system, and on the other hand, there was a question of the intensity of interference with the right of freedom of movement and association. In this respect, the majority decision of the Constitutional Court, in his opinion, refers to inadequate reasons for establishing the unconstitutionality of the challenged executive clause in the CDA.

In this regard, Judge Knez pointed out that the expectations and demands that the Constitutional Court addressed to the legislator were not realistic.[69] In contrast to the president of the Constitutional Court, Judge Mežnar described—in her consenting separate opinion—the decision as groundbreaking and emphasised that the Constitutional Court has had good reasons for the ruling that the challenged provisions of the CDA are not consistent with the Constitution.[70]

67 | *Ibid.*
68 | *Ibid.*
69 | Knez, 2021.
70 | Mežnar, 2021.

3. Discussion and conclusion

A common characteristic of measures to contain the COVID-19 pandemic in most countries, including Slovenia, the restrictions are imposed by the executive branch of power, without public debate and the involvement of the legislator.[71] Since the declaration of the pandemic in March 2020, the Slovenian government has taken a wide range of reasonable, urgent, and justified mandatory and recommended measures to reduce human contact and slow the spread of infections. In addition, some controversial prohibitive measures and mass restrictions of fundamental rights were deployed, and eventually most of them ended on the tables of the Constitutional Court's judges.

While in the early stages of the COVID-19 crisis, the Slovenian Constitutional Court found the restriction of movement outside the municipality of one's residence in line with the Constitution, it later ruled that the government ordinances introducing the restrictions of fundamental rights were unconstitutional in several cases. In most of these cases, however, the reason for this was not the unconstitutionality of the measures themselves, but the unconstitutionality of their statutory legal basis. The overview in this article reveals, *inter alia*, that while assessing the constitutionality of the restrictions of fundamental rights, the Constitutional Court issued certain important and even groundbreaking decisions on the one side, and made some good and less good compromises on the other.

In the Constitutional Court's review of the constitutionality and legality of the restriction of movement outside the municipality of one's residence (Decision No. U-I-83/20), judges who voted for the decision and gave consenting opinion and those who opposed the decision and gave dissenting opinion had 'good' reasons and arguments in support of their positions. Figuratively speaking, in this 'hard case', there was no 'correct' decision of the Constitutional Court. In some way, the proportionality test ceased to be an instrument that would lead to an exclusive legally 'correct' balance between conflicting constitutional rights or between a right that is restricted (i.e. the freedom of movement) and public interest (i.e. the state's positive obligation to protect human lives and public health). Instead, it became substantively hollow and, as Judge Čeferin pointed out in his separate opinion, served as a tool to justify the vote of the majority of the Constitutional Court's judges.

It follows from the above that the Constitutional Court ruling whether the restriction of movement outside the municipality of one's residence was consistent with the Constitution was in a way dictated by the personal characteristics and preferences of the constitutional judges, rather than by their legal expertise. What really decided whether the measure was constitutional or not were the values that took precedence over other values on the judges' value scale[72], the 'conservatism' and 'liberality' of judges, their sensitivity to the conflicting findings in epidemiological research, and perhaps even their age and their personal health. Exaggerating a little bit, in our view, the legal arguments 'pro' and 'contra' the decision, which in this case was reached by a narrow majority of the constitutional judges, can be compared with the selling items on the supermarket shelves. The constitutional judges picked items (i.e. legal arguments) that correspond to their personal

71 | Tzevelekos, 2020. See also Mežnar, 2020a.

72 | Here the key question was, in our view, whether (the illusion of) liberty intimately means more to the constitutional judge than (the illusion of) security (or vice versa).

(moral, aesthetic, etc.) preferences. In the end, at one of the peaks of the pandemic, the majority of judges passed a vote that the restriction of movement to the municipality of one's residence was consistent with the Constitution. The Constitutional Court's ruling on this controversial constitutional issue became *res iudicata* and it is legally legitimate, whether or not one agrees with it.

Convincing arguments were given by the five judges who voted for the majority decision and the four judges who did not. The judges who opposed the majority decision pointed out, *inter alia*, that the government did not have the legal authority to adopt the challenged ordinances (according to the provisions of the CDA in force at the time, the Minister of Health had such authority). These judges alleged that the provisions of points 2 and 3 of the first paragraph of Art. 39 of the CDA were not consistent with the Constitution, because they gave too much power to the executive branch to restrict freedom of movement without determining the limits of such restrictions. They argued that the Constitutional Court should have first ruled on the constitutionality of the statutory basis for restricting freedom of movement and then proceeded to the assessment of the constitutionality of the government ordinances, but the majority of judges were of a different opinion. Furthermore, those judges who voted for the majority decision did not substantiate their claim that the restriction on crossing municipal borders was supported by the epidemiological expertise. The then director of the National Institute for Public Health, who is an epidemiologist, publicly assessed this measure as unnecessary (he was later removed by the government from his position). Finally, according to the judges who opposed the majority decision, the restriction on crossing the municipal borders—in addition to the already existing general restriction of movement and gathering in public spaces—was not necessary for further (stronger) prevention of contact between people. These judges claimed that the only effect of the measure was the reduction of the area through which the citizens and other inhabitants of Slovenia were allowed to move. As a result, this could not decrease but increase the risk of spreading COVID-19.

The author of this article publicly stated his position on the restriction of movement outside the municipality of one's residence shortly after the introduction of this measure in an article published by one of the largest newspapers in the country.[73] The article set out the reasons why I believe the prohibition was illegal and unconstitutional. The restriction of fundamental rights by the executive branch of power by an executive (sub-statutory) act is permitted if the statutory law provides authority to the executive power, and determines the criteria and limits for the restriction of the fundamental right. According to the established Constitutional Court practice, the legislator may neither abandon the determination of these criteria nor leave it to the executive branch. I pointed to the fact that the Constitutional Court decided on this in the past when assessing the constitutionality of the Defense Act and the Natural Disasters Protection Act. In my view, Art. 39 of the CDA that gives the statutory basis to the executive ordinances prohibiting movement across the municipal borders is inconsistent with the Constitution because it does not stipulate such criteria. In the article, I expressed the view that SARS-CoV-2 was not a reason for the police in Slovenia to watch over the illegal crossing of municipal borders, for Slovenes to start attacking cyclists from 'foreign' municipalities, and for intruding on each other. The true reason for these unfortunate practices was a measure that unnecessarily disproportionately restricted people from moving outside the municipality of

73 | Flander, 2020.

their residence. Nevertheless, I concluded the article with false optimism, assuming that a curfew, as an even stricter measure, will not be introduced in Slovenia. I felt that the government was quite successful in containing the pandemic at the time, and for this reason, unlike the governments of some other countries, it was not planning excessive and humiliating measures.

When imposing a night curfew, the Minister of the Interior explained in a statement to the media that this measure was based on the experience of curbing COVID-19 in other countries. He also stated that many cases of the spread of infections were due to private socialising at night, private parties in pubs, restaurants, etc.[74] When a curfew was introduced, only a few lawyers publicly expressed their opinion. Blaž Kovačič Mlinar, a renowned practising lawyer, for example, pointed out that the state would act in accordance with the Constitution when introducing this measure if it had previously declared a state of emergency, as some other European countries did; however, he doubted that declaring a state of emergency would increase citizens' legal security.[75] Janez Pogorelec, the former acting director of the governmental legislative service, expressed the view that the curfew and other government measures to limit the spread of infections were indisputable and that their statutory basis in the CDA was also consistent with the Constitution. According to him, this was confirmed by the Constitutional Court when deciding on the prohibition of movement outside the municipality of one's residence.[76] A different position was taken by the constitutional law expert Andraž Teršek, who, together with Damijan Pavlin, a practising lawyer, addressed a petition to the Constitutional Court to review the constitutionality of the curfew and some other government measures. Teršek expressed the opinion that the government acts unconstitutionally if it prohibits movement throughout the country (e.g. if a curfew is introduced), without a prior declaration of a state of emergency. Although the Constitution gives the state the power to restrict the right to free movement, in Teršek's view, it must provide convincing reasons that this is necessary, appropriate, and proportionate to achieve a legitimate aim in the public interest. If a different measure with less interference with constitutional rights and freedoms is available to prevent and contain the spread of an infectious disease, the milder measure should be taken. Teršek sees no connection between the restriction on a citizen to walk outside after 9 PM and the danger of spreading a contagious disease. He sees this restriction neither as an appropriate and effective legal, health, and social policy nor as a measure protecting people.[77]

In a press statement, I expressed a view that is very similar to that of Teršek. I pointed out that a general prohibition of movement from 9 PM to 6 AM across the whole country for all legal addressees (with rare exceptions, which included, for example, coming to and returning from workplace) suspends the constitutional right to freedom of movement. The government and legislator cannot and must not base this measure on either Art. 32 of the Constitution or Art. 39 of the CDA. On the basis of these provisions, the government may restrict a fundamental right by an executive regulation, but it cannot and must not permanently or temporarily annul or suspend it. In my opinion, the basis for such a measure is in Art. 16 of the Constitution, which allows the temporary suspension of the

74 | Cerar, 2020.
75 | Lebar, 2020.
76 | *Ibid.*
77 | Teršek, 2020a and 2020b. See also Cerar, 2020.

so-called relative constitutional rights in a state of war or emergency, which may be declared by the National Assembly on the basis of Art. 92 of the Constitution whenever a great and general danger threatens the existence of the state. Eventually, the government did not propose the introduction of this special measure formally and the parliament did not deploy it.[78]

By Orders Nos. U-I-426/20 and U-I-427/20, the Constitutional Court has not yet issued its final decision on the curfew. It decided in a preparatory procedure on the legal interest of the petitioners and on the proposals for the temporary suspension of the measure. Nevertheless, this decision of the Constitutional Court was clearly of a substantive nature, thanks to judges who gave separate opinions. In this case, too, the constitutional judges had 'good' reasons and arguments for both the decision that the implementation of the challenged provisions should be suspended, and the opposite decision. The tab on the Constitutional Court's scales were the personal and human preferences of the nine constitutional judges, their vision of 'good society', their 'conservatism' and 'liberality', their personal view on and perception of the epidemic, and their attitude towards the measures imposed by other countries. Whether a judge is also willing to pay attention to scientifically credible alternative views of smaller expert groups and individual epidemiologists (who are too often silenced) was also relevant while making the decision.

In any case, Judge Mežnar highlighted some important nuances in her dissenting separate opinion. She noted that making the decision to suspend the provisions on the curfew was a matter of weighing. On the one hand, the Constitutional Court weighed the damage caused to all residents of Slovenia due to the restrictions on freedom of movement and personal liberty, and the damage caused to those who were unable to receive medical care due to the potentially unmanageable conditions in hospitals. The judge pointed out that in the circumstances at the time, this kind of weighing was extremely difficult and ungrateful work. There were many infections on a daily basis, hospitals were overcrowded with patients, and medical staff performed their work in demanding conditions. Therefore, in her opinion, it is not surprising that the majority of constitutional judges estimated that if the curfew was suspended, some (vulnerable) individuals and public health in general would be significantly more affected than the population if their freedom of movement at night was further restricted. However, the judge pointed out that the regulation of this measure, as it was, was not the only possible choice. As in some other countries where they have introduced a curfew, in Slovenia too, either the government or the Constitutional Court could provide exceptions to the general prohibition of movement that would provide residents with the opportunity to carry out non-problematic activities such as recreation and walks at any time of the day (even at night). Such an exception would significantly limit the harmful consequences of the measure annulled by the courts in some countries.[79]

The Constitutional Court considered in Partial Decision and Order No. U-I-445/20 and Order No. U-I-473/20 a petition of two minor children attending primary school for children with special needs admissible and found invalid the challenged provisions of the government ordinance that prohibited gatherings in educational institutions because the validity of the ordinance was extended several times by the government orders that were not published in the Official Gazette of the Republic of Slovenia (they were published on

78 | Cerar, 2020.
79 | See Mežnar, 2020b.

the government's website instead). However, the Constitutional Court decided that the adopted decision would apply only after a three-day period following its publication in the Official Gazette. With this decision, it wanted to ensure the government sufficient time to reassess whether the closure of educational institutions and the decision that education be carried out at a distance were scientifically justified. According to its own words, the Constitutional Court had an alternative to this decision, namely the possibility of suspending the implementation of the challenged provisions of the government ordinance until its final decision. If so ruled, the Constitutional Court would efficiently ban the government from further prohibition of gatherings in educational institutions denying the petitioners (and other children with special needs who form a very small group among the schoolchildren) access to education according to programs for children with special needs, additional professional assistance, and all other special treatments. Somewhat surprisingly, the Constitutional Court did not issue a temporary injunction; instead, it resorted to warning and pointing out the harmful consequences if the government insisted on keeping the institutions for children with special needs closed.

The ruling of the Constitutional Court in this case turned out to be a bad compromise, since the government reintroduced almost the same prohibition of gatherings in educational institutions with a new ordinance that was immediately challenged by the same petitioners. Thus, the Constitutional Court was given a second opportunity to rule according to what it previously considered to be an alternative. It was significantly less hesitant in case No. U-I-50/21, where it suspended the implementation of the challenged provisions of the ordinances that first prohibited public protests and later limited them to up to ten participants until its final decision. In its final decision in this case, the Constitutional Court established that due to their length and effects, these two measures severely interfered with the right of peaceful assembly and association.

As previously pointed out, in Slovenia, Decision No. U-I-79/20 on the (un)constitutionality of points 2 and 3 of the first paragraph of Art. 39 of the CDA was probably the most important among the Constitutional Court's decisions related to the COVID-19 restrictions of fundamental rights. Similar to Judge Mežnar, Judge Šugman-Stubbs in her consenting separate opinion described the decision in this case groundbreaking and perhaps the most important one this year. However, she emphasised that the ruling in this case was not without flaws and shortcomings that should be overlooked.[80]

Judge Šugman-Stubbs drew attention to the fact that the Constitutional Court established that the challenged provisions of Art. 39 are inconsistent with the Constitution with a delayed effect of abrogation.[81] In our view, by so ruling, the Constitutional Court established a strange situation of—one could say—'constitutional unconstitutionality' of Art. 39 of the CDA as the challenged provisions of this article were simultaneously declared unconstitutional and retained valid until remedied. The fact that the ordinances that were adopted on the basis of the provisions of Art. 39 of the CDA (before decision No. U-I-79/20 was issued) were found by the Constitutional Court unconstitutional with an effect of abrogation (*ex nunc*), and not an effect of annulment (*ex tunc*) is also problematic. Consequently, the decision in this case introduces a distinction (inequality?) between

80 | Šugman-Stubbs, 2021.Her separate opinion was joint by Judge Čeferin.

81 | The ordinances that were adopted on the basis of the provisions of Art. 39 of the CDA were found by the Constitutional Court unconstitutional with an effect of abrogation (*ex nunc*), not by an effect of annulment (*ex tunc*).

those violators of the ordinances who have paid fines on the basis of unconstitutional ordinances and whose cases have become final, and those whose minor offence cases have not yet become final for various reasons because the ordinances that were found unconstitutional with an effect of abrogation (*ex nunc*) may not be used in pending proceedings and sanctions (i.e. fines) may not be imposed on the violators. The latter notwithstanding, Judge Šugman-Stubbs considers that there are good substantive reasons for this distinction.

Moreover, according to Judge Šugman-Stubbs, by the decision in this case, the Constitutional Court enabled Art. 39 of the CDA to be applied in the future, despite its unconstitutionality, until the established unconstitutionality is eliminated by the legislator. In other words, it enabled the issuance of new executive ordinances on an unconstitutional basis. Thus, the Constitutional Court ensured the validity of these ordinances, although they would be essentially unconstitutional. The judge considers that there are good substantive reasons for this. The Constitutional Court could not derogate the challenged provisions of Art. 39 of the CDA without such a method of the implementation of the derogation, as the absence of any legal basis in the future would lead to an even more serious unconstitutional situation. The pandemic is still ongoing, stated Judge Šugman-Stubbs, and the state has a positive obligation to protect people's health and lives.[82]

However, it seems devastating that the Constitutional Court decided so late in this case. The decision was published almost 15 months after the first petition was filed, after the end of the third wave of the pandemic, after dozens of ordinances had been issued on an unconstitutional basis, and after fines for several million Euros were issued to the citizens. According to Judge Šugman-Stubbs, the Constitutional Court should not allow this. However, she believes that despite these and other weaknesses of the decision in this case, the Constitutional Court ruled independently, logically, convincingly, and wisely, in a legally consistent and theoretically acceptable way, and in accordance with the established judicial practice.[83]

An even stronger and alarming message was sent by Judge Mežnar who, after a long time, again felt that the Constitutional Court has enforced the Constitution without fear and bad compromises. She acknowledged that she was proud to be among the five judges who outvoted other judges and warned that mass and intense encroachments on basic human rights in the last year and a half have become more acceptable than ever after World War II. While this turnaround came suddenly, the disintegration of fundamental rights is not primarily driven by ideological and political reasons, but with a universal fear of an unknown disease. The constitution, international conventions, and content of fundamental human rights have not changed. The psychological attitude of people towards their own freedom has changed. We are easily willing to give it up just 'to be healthy and alive'. Sooner or later, according to Judge Mežnar, this trend will also be reflected in constitutional courts.[84]

82 | Šugman-Stubbs, 2021.
83 | *Ibid.*
84 | Mežnar, 2021.

Postscript

In Slovenia, in addition to the rulings of the Constitutional Court, the courts of general jurisdiction also issued important decisions on COVID-19 measures. Recently, the Supreme Court ruled that there was no adequate statutory basis for considering the failure to wear a face mask in enclosed public spaces as a minor offence and for imposing penal sanctions thereon.[85] The Supreme Court ruled on the request for the protection of legality against the final judgement of the district court, by which the perpetrator was reprimanded for a minor offence under the CDA (point 14 of Art. 57, in connection with point 2 of the first paragraph of Art. 39 of the CDA). The Supreme Court stated that pursuant to point 2 of the first paragraph of Art. 39 of the CDA, the executive branch is entitled to 'prohibit or restrict the movement of the population in infected or directly endangered areas'. Since the failure to wear a face mask cannot and may not be considered 'prohibition or restriction of movement', the Supreme Court held that it might not have been determined a minor offence and sanctioned as such by the government ordinance, as the latter cannot be considered a regulation by which minor offences may be determined. In other words, according to the Supreme Court, the legal obligation[86] to wear a face mask cannot be understood as a 'prohibition or restriction of people's movement in certain areas', but as an independent interference with the individual's freedom of action (Art. 35 of the Constitution) that requires an independent statutory basis.[87] The case was decided by a panel of three judges; while two of them voted in favour of the decision, one voted against it.[88]

Currently, Slovenia is in the midst of the fourth wave of the COVID-19 pandemic. Meanwhile, the government has dropped most of the previous restrictions (with the exception of the mandatory use of face masks in enclosed public spaces and public transport, hand disinfection, and personal distancing) and introduced the PCT condition. According to this measure, employees in the public and private sectors and users of services must present a certificate of vaccination, recovery, or a negative result of a rapid antigen test or PCR test for SARS-CoV-2. In practice, this means that without the PCT certificate, with some exceptions, nobody may work at the premises of the employer and visit shops (with the exception of small supermarkets selling food and other basic necessities), restaurants, cinemas, and theatres. Soon after introducing the PCT, the government took another step towards—in its own wording—an even stronger care for the health and lives of the citizens. The ordinances that came into force at the beginning of October stipulated that the employees in the state administration (i.e. in ministries and administrative units, government offices, directorates and services, the police, army, penitentiary institutions, etc.) shall be fully vaccinated against or recovered from COVID-19 if they wish to perform work at the employer's premises. Thus, the government abolished the possibility

85 | Judgement No. IV Ips 10/2021 dated 21 September 2021.
86 | *Ibid*. The Supreme Court emphasised that it did not rule on the issue of the legal obligation to wear a face mask as such. It assessed whether, in the light of the wording of Art. 39 of the CDA and the fundamental principles of penal law, the failure to wear a facemask can be sanctioned as a minor offense.
87 | *Ibid*.
88 | The judge who voted against the decision gave dissenting separate opinion.

of testing and submitting a negative test on COVID-19 as evidence that a person is not infected. Some trade unions, independent legal experts, and other individuals were very critical of this manoeuvre. According to them, the government wants to force employees in the state administration to undergo vaccination under the threat of losing their jobs. They see an indirect introduction of compulsory vaccination in an unconstitutional and illegal way in the new PC condition that replaced the PCT condition. Dissatisfied with the *modus operandi* of the authorities, the trade union of police employees filed a petition with the Constitutional Court to review the constitutionality and legality of the ordinances. A proposal was also made to suspend the implementation of the ordinances and ensure priority consideration for the petition. A petition was also filed by the trade union of employees in the Slovenian Army, the trade union of the Ministry of Defense, and some other trade unions of employees in the state administration. The petitioners assessed that the restriction on performing work due to non-compliance with the condition of vaccination or recovery would endanger the basic existential security of and cause irreparable damage to the employees who have not been fully vaccinated and have not recovered from COVID-19. The fact that the existential security of their families would also be endangered is, according to the Trade Union, unacceptable and in complete contradiction with the European standards. The petitioners' claim that the government should repeal the ordinances was heard by the Constitutional Court (if not by the government itself). In the preparatory procedure, the Constitutional Court found the petition admissible and suspended the implementation of the ordinances until its final decision.[89]

Despite Resolution 2361 of the Council of Europe[90] stating that vaccines against COVID-19 shall not be forced upon an individual and prohibiting discrimination on the basis of vaccination, the Slovenian government has recently informed the public that it considers the possibility of introducing mandatory vaccination of all residents or at least certain occupational groups. If crossing the Rubicon, it would most likely trigger new opposition and petitions by citizens for the review of the constitutionality of yet another government measure. The hard times for the fundamental rights and the constitutional courts do not seem to end soon...

89 | Order No. U-I-210/21 dated 30 September 2021.

90 | See Resolution 2361, Section 4.3. Pleading for a safe and efficient deployment of vaccines against COVID-19, the Resolution emphasises the need for a human rights-based approach. According to the Resolution, member states have a responsibility to ensure good public health and high immunisation coverage by COVID-19 vaccines; however, the measures must not violate the right and liberty of an individual to bodily autonomy and informed consent. In point 60 of Section 4.3, the Resolution states that vaccines shall not be forced upon an individual.

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