Number: U-I-79/20
Date: 13 May 2021

DECISION

At a session held on 13 May 2021 in proceedings to review constitutionality and legality initiated upon the petitions of Žan Pajtler, Maribor, Borut Korošec, Celje, and others, all of whom are represented by Boštjan Verstovšek, attorney in Celje, and Aleš Karlovčec, Ljubljana, Damjan Pavlin, and Barbara Nastran, both from Kranj, and Vladko Began, Šmarje pri Jelšah, the Constitutional Court

decided as follows:

1. Points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act (Official Gazette RS, Nos. 33/06 – official consolidated text, 49/20, 142/20, 175/20, and 15/21) are inconsistent with the Constitution.

2. The National Assembly must remedy the inconsistency established in the preceding Point within two months of the publication of this Decision in the Official Gazette of the Republic of Slovenia.

3. Until the established inconsistency referred to in Point 1 of the operative provisions is remedied, points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act shall apply.

4. The petition for the initiation of proceedings to review the constitutionality of the third paragraph of Article 5 and the first paragraph of Article 7 of the Communicable Diseases Act is rejected.

5. The petition for the initiation of proceedings to review the constitutionality of the third paragraph of Article 21 of the Government of the Republic of Slovenia Act (Official Gazette RS, No. 24/05 – official consolidated text, 109/08, 8/12, 21/13, 65/14, and 55/17) is rejected.

6. The following were inconsistent with the Constitution:

- **The Ordinance on the Temporary General Prohibition of the Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia (Official Gazette RS, No. 30/20);**
- **The Ordinance on the Temporary General Prohibition of the Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement Outside of One's Municipality (Official Gazette RS, Nos. 38/20 and 51/20);**
- **The Ordinance on the Temporary General Prohibition of the Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement Outside of One's Municipality (Official Gazette RS, Nos. 52/20 and 58/20);**
- **The Ordinance on the Temporary General Prohibition of the Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia (Official Gazette RS, No. 60/20); and**
- **The Ordinance on the Temporary General Prohibition of the Gathering of People in Public Places and Areas in the Republic of Slovenia (Official Gazette RS, Nos. 69/20, 78/20, and 85/20),**

in the part in which they were adopted on the basis of points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act.

7. The findings referred to in the preceding Point of the operative provisions shall have the effect of abrogation.

8. The petition for the initiation of proceedings to review the constitutionality of the Ordinance on the Mandatory Installation of Hand Sanitiser Dispensers in Apartment Buildings (Official Gazette RS, No. 135/20) is rejected.

9. The petition for the initiation of proceedings to review the constitutionality of the Order on the Declaration of an Epidemic of the SARS-CoV-2 (COVID-19) Communicable Disease in the Territory of the Republic of Slovenia (Official Gazette RS, Nos. 19/20 and 68/20) is rejected.

10. The proposals that the identity of the petitioners and their legal representatives be concealed are dismissed.

REASONING

A

The summary of the petitions

1. The petitioners filed petitions for the initiation of proceedings to review the constitutionality and legality of a number of ordinances adopted by the Government from April through October 2020 in order to contain and manage the threat of the COVID-19 epidemic. The challenged ordinances regulated restrictions on the movement and gathering of people, as well as several protective measures. The challenged ordinances are the following:

- the Ordinance on the Temporary General Prohibition of the Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia (hereinafter referred to as Ordinance/30);
- the Ordinance on the Temporary General Prohibition of the Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement Outside of One's Municipality (hereinafter referred to as Ordinance/38);
- the Ordinance on the Temporary General Prohibition of the Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement Outside of One's Municipality (hereinafter referred to as Ordinance/52);
- the Ordinance on the Temporary General Prohibition of the Movement and Gathering of People in Public Places and Areas in the Republic of Slovenia (hereinafter referred to as Ordinance/60);
- the Ordinance on the Temporary General Prohibition of the Gathering of People in Public Places and Areas in the Republic of Slovenia (hereinafter referred to as Ordinance/69);
- the Ordinance on the Temporary Measures for Mitigating the Threat of Infection and the Spread of Infection with the SARS-CoV-2 virus (Official Gazette RS, No. 90/20 – hereinafter referred to as Ordinance/90); and
- the Ordinance on the Mandatory Installation of Hand Sanitiser Dispensers in Apartment Buildings (hereinafter referred to as Ordinance/135).

2. The petitioners also challenged the Order on the Declaration of an Epidemic of the SARS-CoV-2 (COVID-19) Communicable Disease in the Territory of the Republic of Slovenia (hereinafter referred to as the Order), the Communicable Diseases Act (hereinafter referred to as the CDA), and the third paragraph of Article 21 of the Government of the Republic of Slovenia Act (hereinafter referred to as the GRSA).

3. The petitioner Žan Pajtler (hereinafter referred to as the first petitioner) challenged Ordinance/30, Ordinance/90, and Ordinance/135. He opines that the measures introduced by Ordinance/30 interfere with human rights and fundamental freedoms with such intensity that they could only be introduced in the event of war or a state of emergency (Articles 16 and 92 of the Constitution). In connection therewith, he alleges that also a review of Article 39 of the CDA should be carried out. The first petitioner also

alleges that the measures should not have been adopted for the entire territory of the Republic of Slovenia. He alleges that, in accordance with the official instructions, the Police perform control over violations of the Ordinance, even though in accordance with the CDA it is the health inspectorate that has the authorisation to carry out such control. Allegedly, individuals have no factual expectancy regarding the further steps; public announcements are made daily and only then is it explained what individual ordinances in fact mean, as well as that the measures will progressively increase, which puts them in a very uncertain position.

4. According to the first petitioner, Ordinance/135 is inconsistent with Articles 2 and 153 of the Constitution and Article 21 of the GRSA, because allegedly in reality Ordinance/135 is a legally non-binding act, whereas the Government labelled it an "ordinance".

5. The petitioners Borut Korošec and others (hereinafter referred to as the second petitioners) challenge Ordinance/38 and Ordinance/52. They claim that Ordinance/38 was not adopted by the competent authority, because on the basis of Article 39 of the CDA then in force, that regulation could only be adopted by the minister responsible for health [hereinafter: the Minister], and not by the Government. They opine that the restriction of movement to the municipality of one's residence is not reasonable, necessary, urgent, proportionate, or constitutionally legitimate, that it is not based on scientific reasons, and that it is inconsistent with Articles 14 and 32 of the Constitution and Article 39 of the CDA. All of the imposed measures are allegedly based on untrue data on the number of deaths due to COVID-19, as the data on the mortality caused by COVID-19 on the basis of which the adopted measures are based allegedly does not differentiate between deaths due to COVID-19 and instances where a person who was indeed infected with SARS-CoV-2 died due to some other cause. The adopted measures are allegedly disproportionate, as on their account significant economic damage is being incurred, and they allegedly also have other negative repercussions in the field of the treatment of other diseases and regarding mental health. The competent authorities allegedly did not carry out any analysis of the harmful consequences of the counter-epidemic measures or a comparison of which consequences are graver. The second petitioners opine that the state should appropriately protect the older population, whereas all the other measures are allegedly without reason, unnecessary, and even counter-productive. Ordinance/52 is allegedly also inconsistent with Order of the Constitutional Court No. U-I-83/20, dated 16 April 2020 (Official Gazette RS, No. 58/20), and the CDA, as the Government allegedly did not fulfil its obligation stemming from the mentioned order of the Constitutional Court and obtain the opinion of the competent expert authority as determined by the CDA, i.e. the National Institute of Public Health (hereinafter referred to as the NIPH).

6. Furthermore, the second petitioners allege that the challenged two ordinances are implementing regulations of the executive branch of power by which measures restricting the freedom of movement were introduced. They draw attention to the fact that, in

accordance with Article 87 of the Constitution, the rights and obligations of legal entities may only be determined by law. Interferences with human rights and fundamental freedoms are also only admissible if regulated by law. The second petitioners warn that the second paragraph of Article 32 of the Constitution expressly determines that the freedom of movement may only be limited by law and only where this is necessary to ensure the course of criminal proceedings, to prevent the spread of communicable diseases, to protect public order, or if the defence of the state so demands. In view of the above, it is alleged that the challenged two ordinances entail a serious interference with the competence of the legislative branch of power.

7. The second petitioners also challenge the CDA. They opine that the CDA is inconsistent with the Constitution as it does not prescribe a time limit regarding the measures and does not determine which scientific authorities adopt decisions on whether the conditions for declaring an epidemic are fulfilled and which measures should be carried out. The first paragraph of Article 39 of the CDA allegedly imposes on the executive branch of power generalised criteria for interfering with human rights, due to which it is allegedly inconsistent with Article 2, the second paragraph of Article 32, and Article 87 of the Constitution. According to the second petitioners, the CDA does not determine in what manner and scope movement can be restricted by an implementing regulation adopted on its basis, and it also does not determine the criteria for such limitations; on the contrary, it gives the Minister a blanket authorisation to choose by him- or herself, by an implementing regulation, without any restrictions or criteria determined by law, the measures, manner, and degree of restricting the movement of individuals.

8. The CDA is allegedly also inconsistent with the second paragraph of Article 39 of the Constitution because it does not envisage informing the public. The second petitioners allege that the Government did not inform the public and that it did not inform it objectively and transparently. He presents a list of numerous questions that the Government should have answered to the public, but it allegedly did not do so. The Government allegedly adopts measures to contain and manage the threat of COVID-19 on the basis of selective and incomplete information. The second petitioners opine that the residents of the Republic of Slovenia have the right to be informed objectively and comprehensively, in particular when measures that limit or even abolish constitutionally protected human rights and fundamental freedoms are at issue. Allegedly, residents have the right to learn accurate information and verify on the basis thereof whether the measures adopted by the Government were in conformity with the Constitution, lawful, proportionate, and necessary. According to the second petitioners, the CDA should prescribe that all (anonymised) relevant data on deaths (age, sex, associated diseases, autopsy results, the official medical grounds for death, etc.) be transparently published. Allegedly, it should determine a fair, balanced manner of informing the public by all state authorities. Allegedly, residents have the right to know what the real threats are and whether there also exist opinions that are different from those that are official (in order to be able to form their own opinion and to think critically). In the opinion of the second petitioners, it would

be best to adopt a special law on the manner of informing the public by all state authorities on all public matters, not only with regard to the epidemic.

9. In the assessment of the second petitioners, also the third paragraph of Article 5 and the first paragraph of Article 7 of the CDA are inconsistent with the Constitution. The third paragraph of Article 5 of the CDA is allegedly inconsistent with the Constitution as it allegedly determines that the epidemiological situation is changing and assessed in conformity with the programmes of the World Health Organisation (hereinafter referred to as the WHO). The second petitioners opine that the CDA should have clearly determined itself the manner in which the epidemiological situation is monitored and studied and that in this respect it should not refer to other WHO programmes. Allegedly, the first paragraph of Article 7 of the CDA does not contain a definition of an epidemic that is sufficiently precise.

10. Furthermore, the second petitioners challenge the third paragraph of Article 21 of the GRSA. According to the position of the second petitioners, this provision in practice allows the Government as an authority of the executive branch of power to interfere with fundamental human rights by an implementing regulation without an express statutory authorisation, bypassing the Constitution and laws, although on the basis of Article 87 of the Constitution a restriction of human rights should be reserved only for a law. The provision allegedly allows the possibility of too broad an interpretation and thus of arbitrary decision-making by the executive branch of power. Thereby, the provision allegedly negates the second paragraph of Article 32 and Article 87 of the Constitution, destroys the hierarchy of legal regulations, and allows the executive branch of power to autonomously interfere with fundamental human rights.

11. The second petitioners also challenge the Order. They allege that it is not limited in time and that it does not determine in what circumstances the Minister must cancel it; therefore, it is inconsistent with Article 16 of the Constitution. Furthermore, the Order is allegedly also based on untrue data on the number of deaths due to COVID-19.

12. The petitioner Aleš Karlovčec (hereinafter referred to as the third petitioner) challenges Order/52, Order/60, Order/69, and points 2 and 3 of the first paragraph of Article 39 of the CDA, with regard to which he later withdrew his petition insofar as it refers to Order/52. He opines that the challenged two orders are inconsistent with the principle of legality determined by the second paragraph of Article 120 of the Constitution, as they overstepped the authorisation under Article 39 of the CDA, which is so vague and indeterminate that it is also itself inconsistent with the mentioned principle, as well as with Article 2 of the Constitution. The two Orders are allegedly also inconsistent with Articles 32 and 42 of the Constitution, in accordance with which limitations of the freedom of movement and of the right of assembly and association can only be introduced by law. The third petitioner stresses that administrative authorities must not adopt implementing regulations without a substantive basis in the law. All important normative decisions should be adopted by the legislature in a substantively specific, clear, and precise

manner. The above-stated is allegedly particularly important in the event of the regulation of the exercise or limitation of human rights. Since Article 39 of the CDA only very superficially regulates the purpose of measures and coercive measures (the prohibition or limitation of the movement of people and the prohibition of the gathering of people in public spaces), it allegedly leaves the regulation of too many issues to the Government. In the challenged orders, the Government allegedly regulated numerous questions that are allegedly unrelated to the CDA, whereby it overstepped the framework of the CDA. According to the third petitioner, the CDA should be significantly more complete; it should contain more content and legal guarantees. In the assessment of the third petitioner, the CDA should regulate by itself also the temporal limitation of measures and the cooperation of the expert community (expert authorities and the manner of determining scientific bases). Allegedly, Articles 32 and 42 of the Constitution and the principle of proportionality require that the statutory regulation determine the thorough informing [of the public] and the reasoning of the extension, modification, or abolishment of measures. For these reasons, also the challenged Orders, in particular Article 6 of Order/60 and Article 5 of Order/69, which determine that it must be assessed on a weekly basis whether the measures are scientifically well-founded, are allegedly inconsistent with the Constitution, as they allegedly do not protect rights with sufficient force and effectiveness, and they do not protect against arbitrariness.

13. In the assessment of the third petitioner, Article 3 of Order/69, which contains a completely blanket transfer of the authorisation of the legal regulation of the limitation of the right of assembly to the NIPH, is inconsistent with Articles 2, 120, and 121 of the Constitution, as it allegedly concerns the broad and comprehensive transfer of authorisation to regulate the content of a human right to a public institution that is not an authority.

14. Furthermore, the third petitioner alleges that the restriction of movement and gathering in public spaces is disproportionate. This provision is allegedly also inconsistent with Articles 14 and 35 of the Constitution. Ordinance/60 allegedly provides religious adherents admissible grounds not only for moving by road or path to a church, but even for mass gatherings in a church as a closed public space – predominantly for the older and more threatened older population. Thereby, atheists are thereby discriminated against on grounds of religion. The social and emotional connections of the third petitioner and his possibility of cooperating and socialising with other people are allegedly strongly limited, and thus also his personality rights.

15. The third petitioner also alleges that the fourth paragraph of Article 3 of Order/60 is inconsistent with Article 32 of the Constitution, as it allows municipalities to further restrict movement.

16. Petitioners Damjan Pavlin and Barbara Nastran (hereinafter referred to as the fourth petitioners) challenge Order/38. They opine that it is inconsistent with the principle of legality, as it was allegedly adopted by bypassing the law or contrary thereto. The fourth

petitioners stress that the determination of rights or obligations in conformity with Article 87 of the Constitution is reserved for the National Assembly, i.e. the legislative branch of power. Similar allegedly follows from Articles 32 and 42 of the Constitution, and Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR). Order/38 allegedly restricts the freedom of movement, the right of assembly, and the right to privacy in a way that is outside the substantive and value criterion of the CDA. Except for the exhaustively listed exceptions in Articles 3, 4, and 5 of Order/38, people in the Republic of Slovenia were not even allowed to leave their private premises at the address of their temporary or permanent residence. In the opinion of the fourth petitioners, the CDA does not envisage such restrictions. The CDA allegedly only prescribes the possibility of restricting movement as a subsidiary option that should be applied in a restrictive manner and only in the event that the objective cannot be attained by measures already envisaged by the CDA. In the opinion of the fourth petitioners, these restrictions can only refer to endangered and infected areas, which in accordance with the fourth paragraph of Article 7 of the CDA must be declared in advance (which is allegedly not the same as declaring an epidemic), with regard to which the act that is to determine these areas has allegedly not been adopted. The Government thereby interfered with the right to the freedom of movement in an originary manner, i.e. without a statutory authorisation, and hollowed it out virtually completely. Such an interference is allegedly also disproportionate.

17. The fourth petitioners allege that the challenged ordinance is inconsistent with the principle of legality also because it was adopted by the Government, although the CDA authorised the Minister to order the measures determined by Article 39 of this Act. The challenged ordinance is allegedly also inconsistent with Article 2 of the Constitution, as allegedly it is not sufficiently clear and precise. The fourth petitioners allege that the provisions of the ordinance that allowed municipalities or mayors to further restrict movement are also inconsistent with the Constitution.

18. The petitioner Vladko Began (hereinafter referred to as the fifth petitioner) challenges Ordinance/52 and Ordinance/60, and also Article 39 of the CDA. He opines that the challenged two ordinances are inconsistent with the principle of legality, as allegedly there is no statutory basis therefor. In fact, in his opinion, movement and gathering may only be limited by law (and not by an ordinance), which allegedly follows from Articles 32, 42, and 87 of the Constitution. Therefore, the two ordinances are also inconsistent with Articles 120 and 153 of the Constitution.

19. The fifth petitioner opines that also the CDA is inconsistent with the principle of legality determined by Articles 2, 120, and 153 of the Constitution. The principle of a state governed by the rule of law determined by Article 2 of the Constitution allegedly requires it to be evident or at least predictable from the law what kind of limitations an individual must expect. From Articles 120 and 153 of the Constitution it allegedly follows that a law must by itself determine 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. Thus, in the opinion of the fifth petitioner, Article 39 of the CDA should determine the conditions, criteria, and fundamental criteria for restricting measures. Neither Article 39 nor other provisions of the CDA contained them; therefore, in the assessment of the fifth petitioner, the Government's decision-making was arbitrary, and the challenged ordinances are inconsistent with the Constitution. The CDA also does not determine the criteria from which it is evident what is considered to be an infected area or an area directly at risk. The fifth petitioner explains that even though an epidemic may be declared for the entire state, there can be significant differences between different areas, and differences as regards the possibility of being infected can also exist between closed or open public or private spaces.

20. In the opinion of the fifth petitioner, the restriction of movement and gathering in public spaces determined by the challenged ordinances is disproportionate. The fifth petitioner alleges that the restriction of movement and gathering in open public spaces could only be admissible if the usage of masks and other protective equipment were prescribed in advance for movement in these spaces, and this measure proved to be ineffective. He alleges that the challenged two ordinances are also inconsistent with Article 14 of the Constitution and Article 4 of the CDA in the part where they determine that they shall not be used for activities carried out by the services competent for ensuring the performance of the tasks of the state, self-governing local communities, and public services. In the opinion of the fifth petitioner, this means that for the persons who perform the mentioned tasks, neither the obligation to maintain a safe distance from other persons, nor the use of protective equipment and the disinfection of hands applies – for which there are allegedly no reasonable grounds.

21. The fifth petitioner also alleges that the two ordinances are inconsistent with Article 16 of the Constitution, as allegedly a state of emergency was not declared, and the two ordinances allegedly restricted human rights contrary to Article 16 of the Constitution in "a normal" state.

The summary of the reply of the National Assembly

22. The Constitutional Court served the petitions by which the petitioners also challenge the CDA and/or the GRSA on the National Assembly. The National Assembly explains that the CDA regulates different measures for preventing and managing communicable diseases. The measures are allegedly adapted to different instances and allegedly differ from one another, depending on the circumstances of the concrete case. The challenged measures determined by points 2 and 3 of Article 39 of the CDA are allegedly connected with a situation in which it is impossible to prevent, by other measures determined by the CDA, the introduction of certain communicable diseases into the Republic of Slovenia and the spread thereof. Communicable diseases are inherently very diverse. This is allegedly evident from Article 8 of the CDA, which among the diseases due to which the

general and special measures determined by the CDA are carried out also included numerous communicable diseases, which, in view of their nature, are also further classified by an implementing regulation of the Minister. Therefore, the law allegedly regulates the system of selecting measures in accordance with the principle of moving from the most lenient measure that can still prevent the introduction or spread of a communicable disease, to the strictest measure for such a purpose. In doing so, it does not expressly determine that a stricter measure that entails a more severe interference with the rights of individuals may only be used under the condition that prior to that a milder measure was applied. Allegedly, the system for protecting the population from communicable diseases can also in such manner appropriately respond and adapt to the actual circumstances and needs. In the opinion of the National Assembly, it is possible to deduce therefrom that such a regulation observes the constitutional principle of proportionality as one of the implementing principles of a state governed by the rule of law determined by Article 2 of the Constitution.

23. In the opinion of the National Assembly, the measure determined by point 2 of the first paragraph of Article 39 of the CDA (the prohibition or restriction of the movement of people in infected areas or in areas directly at risk) can be deemed to be a continuation or escalation of the measures of isolation, quarantine, and compulsory treatment and the transfer of patients (Articles 18 through 21 of the CDA), as well as of some other measures (e.g. the system of compulsory vaccination determined by Article 22 of the CDA, disinfection determined by Article 26 of the CDA, and compulsory medical checks determined by Articles 31 and 32 of the CDA). The restriction of movement, as the strictest measure, is allegedly based on the second paragraph of Article 32 of the Constitution, in accordance with which the right to the freedom of movement, which is a general right that belongs to everyone, may be restricted by law, but only in certain instances, *inter alia* when the spread of a communicable disease must be prevented. Hence, the restriction of the freedom of movement determined by point 2 of the first paragraph of Article 39 of the CDA is, in accordance with the Constitution, not admissible immediately when a communicable disease occurs, but only if other measures determined by the CDA cannot prevent the introduction or spread of communicable diseases in the state. Furthermore, this restriction is allegedly only admissible in infected areas or in areas directly at risk, which in extreme situations (where there exists a possibility of the rapid spread of a certain communicable disease) could also entail the entire territory of the Republic of Slovenia, and otherwise only narrower parts thereof. The National Assembly opines that the measure of the prohibition or limitation of movement is also limited in time, as the measure allegedly loses its substantive statutory basis if the area for which it was ordered is no longer infected or directly at risk.

24. In the assessment of the National Assembly, also point 3 of the first paragraph of Article 39 of the CDA (the prohibition of the gathering of people in public areas), concerns the continuation or escalation of other measures determined by the CDA. The constitutional starting point for limiting the gathering of people in public areas is allegedly the third paragraph of Article 42 of the Constitution, in accordance with which the right of

peaceful assembly and public meeting and to freedom of association can be, *inter alia*, limited by law if protection from the spread of communicable diseases so requires. Also the right of assembly and association allegedly cannot be limited due to the mere appearance of a communicable disease, but also in this event certain conditions or limitations determined by law are key. The law allegedly determines when an interference with the human right of assembly and association is admissible (i.e. necessary, urgent, and sufficient).

25. The National Assembly opines that Article 39 of the CDA contains all the necessary elements for constitutionally consistent application: the measures determined by this Article are allegedly only admissible when the other measures determined by the CDA cannot prevent the introduction or spread of certain communicable diseases; in these instances, only some of the measures listed in points 1 through 4 of the first paragraph of Article 39 of the CDA can be imposed; the measures determined by points 2 and 3 are allegedly also limited in space in time.

26. In the assessment of the National Assembly, the definition of an epidemic determined by the challenged first paragraph of Article 7 of the CDA is a legal standard that is determined to a sufficient degree in order to enable an assessment in each individual case whether due to the emergence of a certain communicable disease immediate action must be taken in conformity with the CDA.

27. The National Assembly opines that also the allegation as to the unconstitutional denial of sovereignty due to the indeterminate nature of the foreign criteria of the WHO, which refers to the third paragraph of Article 5 of the CDA, is not substantiated, as the Republic of Slovenia is a member of that international organisation.

28. As regards the alleged inconsistency of the third paragraph of Article 21 of the GRSA with the Constitution, the National Assembly alleges that, in accordance with this provision, the Government may regulate by an ordinance only individual questions, adopt individual measures of general importance, or adopt other decisions for which a law or decree determines that the Government shall regulate such by an ordinance. In such manner, this statutory provision (in conformity with Article 153 of the Constitution – the conformity of legal acts) ensures the conformity of an implementing regulation within the hierarchy of legal acts. The GRSA allegedly determines substantive restrictions (only individual questions or measures that have a general meaning) and establishes that an ordinance must be connected with the content established by law, which the Government (in more detail and within the limits of the law) shall regulate by this type of implementing regulation. In view of the above, the third paragraph of Article 21 of the GRSA allegedly does not allow for arbitrary decision-making by the executive branch of power and is allegedly not inconsistent with Article 87 of the Constitution.

The summary of the reply and opinion of the Government

29. The Constitutional Court also served the petitions on the Government. The latter explains that it adopted the ordinances by referring to Article 39 of the CDA, and that thereby it only determined in more detail the restrictions already determined by the CDA on the basis of the second paragraph of Article 32 of the Constitution, and that thereby it did not regulate by an ordinance questions reserved for a law. The ordinances allegedly also pursue the purpose and objective of the law and do not narrow other rights. The Government alleges that the CDA regulates a precisely determined field (i.e. communicable diseases) and concurrently determines that the executive branch of power may order precisely determined measures, which the Government indeed has done by means of ordinances. It allegedly follows from the intention of the CDA that measures should be adopted on the basis of a law but only following an expert assessment of which measures should be applied in the individual case of a communicable disease and the circumstances thereof (the role of the NIPH in the field of the prevention of communicable diseases is allegedly determined already by Article 5 of the CDA). From Article 39 of the CDA there allegedly also follows the requirement that the principle of proportionality be observed, with regard to which the CDA allegedly expressly determines that in the event of a balancing between constitutionally protected values regarding the life and health of the population and the freedom of movement and association of individuals, the protection of the life and health of the population has priority. With respect to point 3 of the first paragraph of Article 39 of the CDA, in the opinion of the Government, the right of association can only be restricted if protection from the spread of communicable diseases so requires, until the threat of the spread thereof ceases. As well as with respect to the restriction of movement in accordance with point 2 of the first paragraph of Article 39 of the CDA, also in this event the Government can only restrict the right of assembly in instances where other measures determined by the CDA cannot prevent the prevent the introduction or spread of communicable diseases in the state. In the opinion of the Government, it must also be taken into consideration that, in the past, the state had not yet faced an epidemic of a communicable disease for which exceptionally little information existed in the initial stage. Therefore, the ordinances were issued in accordance with Articles 120 and 153 of the Constitution. They were allegedly also not inconsistent with the principles of clarity and precision determined by Article 2 of the Constitution, as they were sufficiently clear.

30. With respect to the allegation that the measures introduced interfere with human rights and fundamental freedoms with such intensity that they could only be introduced in the event of war or a state of emergency (Articles 16 and 92 of the Constitution), the Government explains that interferences with human rights are also admissible in times of peace. In the opinion of the Government, the case at issue does not concern the most intense interferences by the state with human rights or interferences that would entail an abrogation of human rights (the restrictions of movement that were not introduced would perhaps be even more drastic). The Government also opines that the conditions for declaring a state of emergency were not met, as the existence of the state from the viewpoint of its constitutive elements was not jeopardised. The measures were allegedly adopted precisely in order to prevent the collapse of the health care system, which in the

worst-case scenario could indeed threaten the existence of the state and would require interferences with human rights that would be much more severe.

31. In the assessment of the Government, the measures introduced were appropriate, necessary, and proportionate in view of the trends regarding the number of people infected and the fact that in the opinion of health experts the spread of this disease can only be effectively prevented by prohibiting and restricting interpersonal contact. The measures were allegedly adopted on the basis of the opinions and findings of health experts. The Government alleges that infected persons were detected in the territory of the entire state, therefore measures had to be adopted for the area of the Republic of Slovenia; the regional adoption of measures would allegedly have been ineffective in view of how small the state is and in view of daily commuting. As regards the allegation of the petitioners that the limitation of movement and gathering in public spaces is also inconsistent with Articles 14 and 35 of the Constitution, the Government replies that the consequences of the restriction of movement can inherently also become apparent in other areas of life and that other rights were indirectly interfered with only to the extent necessary to protect public health and the life of the inhabitants.

32. With respect to the allegation that Ordinance/38 was not adopted by the competent authority, the Government explains that that Ordinance was adopted on the basis of Article 2 and the eighth paragraph of Article 20 of the GRSA. In the hierarchy of the executive branch of power, the Government is an authority that is allegedly hierarchically superior to an individual ministry; furthermore, it is also responsible for the situation in all areas, i.e. also in the field of measures for controlling epidemics that have consequences for the entire population and require an interdisciplinary response from all the entities involved. The Government opines that the Ministry of Health voted in favour of adopting the Ordinance, therefore (also) the Minister could have imposed the measures determined by the Ordinance. He draws attention to the fact that Article 7 of the Act Determining Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy (Official Gazette RS, No. 49/20 – hereinafter referred to as the ADIMCEMC) amended Article 39 of the CDA, namely such that the power to adopt certain measures was transferred from the Ministry of Health to the Government. The measures mentioned in Article 39 of the CDA allegedly refer to different fields of life; therefore, in view of the substantive diversity of the measures, it would be more sensible if the Government, as a collective authority, decided thereon instead of an individual minister, as the CDA determined prior to the amendment thereof.

33. In view of the allegation that Order of the Constitutional Court No. U-I-83/20 was not observed, the Government alleges that Article 8 of Ordinance/52 was amended (Official Gazette RS, No. 58/20), namely such that it was limited in time in a clear manner as regards the continued monitoring of whether further measures were necessary, and also all ordinances adopted subsequently contained this provision.

34. As regards the allegation of the petitioners that Ordinance/38 is inconsistent with the Constitution because it allows municipalities and mayors to further restrict the movement [of people], the Government replies that the challenged regulation ensures that the exceptions from the temporary prohibition of the movement and gathering [of people] can be determined in more detail at lower levels, closer to the local population, in accordance with the principle of subsidiarity and by implementing the constitutional principle of local self-government as determined by Article 9 of the Constitution. Allegedly, this provision entails an instructive provision for self-governing local communities, which already on the basis of their powers can determine rules or impose certain restrictions. Allegedly, the challenged Ordinance only authorises mayors to determine in more detail the exceptions from the general prohibition of movement and association, and does not authorise them to interpret the exceptions determined by Article 3 of Ordinance/38 contrary to their content or to further restrict the right to free movement or gathering.

35. The Government opines that the definition of epidemics determined by the first paragraph of Article 7 of the CDA entails a legal standard that is sufficiently defined. Allegedly, that provision allows that on the basis of an expert assessment, appropriate measures determined by the CDA shall be adopted and carried out every time a certain communicable disease arises. In the assessment of the Government, in the event an epidemic has already been declared, it is not required that infected and directly threatened areas be specifically declared.

36. With respect to the challenged third paragraph of Article 21 of the GRSA, the Government explains that this statutory provision only determines the form of the acts that the Government adopts (e.g. ordinances), but this provision does not entail a substantive basis for adopting implementing regulations or other acts. In order to adopt a certain act on the basis of Article 21 of the GRSA, the Government or the Minister must have a substantive basis in the law, which in the given instances can be found in the CDA. In this context, the Government adds that the determination of measures that are limited in time in order to prevent the spread of communicable diseases is, in its opinion, a question of general importance.

37. As regards the allegations that refer to the Order, the Government stresses that on the day this Order was adopted, it was not at all possible to predict the length of the epidemic or how far-reaching its consequences would be, as it was a communicable disease that was completely new and thus far unknown. By declaring an epidemic, the Republic of Slovenia followed the declaration of a pandemic by the WHO. The Government alleges that the epidemic was declared on the basis of the expert opinion of the NIPH and by taking into consideration the trends in the number of infected persons.

The statements of the petitioners regarding the replies of the National Assembly and the Government

38. The Constitutional Court served the replies of the Government and of the National Assembly on the petitioners. In their replies, some petitioners additionally substantiated the positions and allegations that had essentially already been presented in their petitions.

The expansion of the petition

39. On 30 April 2021, the second petitioners filed an extensive supplement and expansion to the petition by which they also challenge numerous ordinances that the Government adopted in the period from October 2020 until this expansion was filed, the Order on the Application of Measures Determined by the Communicable Diseases Act for COVID-19 (Official Gazette RS, No. 117/20), and the Decree on the Implementation of Screening Programmes for the Early Detection of the SARS-CoV-2 Virus Infection (Official Gazette RS, Nos. 204/20, 20/21, 59/21, and 64/21).

B – I

As regards joining and partly excluding petitions

40. The petitions pose a series of equivalent questions that are related to one another. A number of petitioners challenge the same ordinances, as well as the CDA, on the basis of which the challenged ordinances were adopted. In light of the above, the Constitutional Court joined the petitions in order to consider and decide on them jointly. Then, the Constitutional Court excluded from the joined case those parts of the petitions that refer to the question of the legality and constitutional consistency of the measure of the obligatory use of a protective mask or another form of covering the mouth and nose area and the disinfection of hands, which the petitioners pose as regards Ordinance/52, Ordinance/60, and Ordinance/90, as it assessed that the joint consideration of this question in conjunction with other questions was not necessary and sensible. For the same reason, the Constitutional Court also excluded the part of the second petitioners' petition that refers to acts only challenged in the extension of the petition. The Constitutional Court will decide separately on these parts of the request.

As regards proposals to conceal personal data

41. Some petitioners propose that in the decision or order hereon their personal data and the data of their representatives not be stated. They opine that due to the general fear of COVID-19, petitions could be misinterpreted. In their environment, the petitioners could be stigmatised and become a target of attacks. They could become victims of harassment and insulted on the internet and social media, by post, and locally. There also exists a threat of the misuse of police authorisations.

42. In accordance with the second paragraph of Article 38a of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, 109/12, and 23/20 – hereinafter referred to as the CCA), the Constitutional Court can decide, in order to protect the privacy of participants in proceedings, that the personal data of a participant in proceedings or the personal data of other individuals not be stated in a decision or order. In order to conceal their identity, special circumstances must be demonstrated in the individual case that demonstrate the need to depart from the general rule that procedures before the Constitutional Court be public.[1] In the case at issue, such circumstances were not demonstrated. The allegations of the petitioners as to possible stigmatisation, attacks, harassment, and the misuse of police authorisations are completely generalised.[2] Furthermore, a number of months have passed from the adoption and entry into force of the challenged ordinances, and also the number of filed petitions that challenge the governmental ordinances on the restriction of movement and gathering [of people] has increased. In light of the above, the Constitutional Court dismissed the proposals to conceal their identity (point 10 of the reasoning).

As regards the legal interest to file petitions

43. Anyone who demonstrates legal interest may lodge a petition for the initiation of proceedings to review constitutionality or legality (the first paragraph of Article 24 of the CCA). In accordance with the second paragraph of the mentioned Article, legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority whose review has been requested by the petitioner directly interferes with his or her rights, legal interests, or legal position.

As regards the legal interest to file a petition against the Order

44. Article 1 of the Order determined that in the area of the Republic of Slovenia an epidemic of COVID-19 be declared. The petitioners did not demonstrate that declaring an epidemic had a direct effect on their rights and legal interests or that it interfered with their legal position, and declaring an epidemic is in and of itself also not a condition for adopting other acts challenged by the petitioners. In view of the above, the Constitutional Court rejected the petition to initiate proceedings to review the constitutionality or legality of the Order (Point 9 of the operative provisions).

As regards the legal interest to file petitions against the challenged ordinances

45. Challenged Ordinance/30, Ordinance/38, Ordinance/52, Ordinance/60, and Ordinance/69 addressed all individuals in the territory of the Republic of Slovenia. All the mentioned ordinances prohibited or restricted the gathering of people in public places and

[1] Order of the Constitutional Court No. U-I-104/20, U-I-107/20, U-I-122/20, U-I-129/20, U-I-130/20, U-I-132/20, U-I-137/20, U-I-140/20, dated 1 July 2020, paragraph 5 of the reasoning.

[2] *Cf.* Order of the Constitutional Court No. U-I-235/20, dated 2 July 2020, Para. 3 of the reasoning.

areas in the Republic of Slovenia. Ordinance/30, Ordinance/38, Ordinance/52, and Ordinance/60, also prohibited the movement of people in public places and areas in the Republic of Slovenia and access to public places and areas in the Republic of Slovenia, with the exception of exhaustively determined instances and under certain conditions. Furthermore, Ordinance/38 and Ordinance/52 prohibited the movement [of people] outside the municipality of their permanent or temporary residence, and also included exhaustively determined exceptions that applied under certain conditions. In the event of a violation of these prohibitions, the ordinances envisaged liability for a minor offence and referred to minor offence sanctions in accordance with the law regulating communicable diseases (Article 6 of Ordinance/30, Article 8 of Ordinance/38, Article 9 of Ordinance/52, Article 7 of Ordinance/60, and Article 6 of Ordinance/69).

46. In fact, the petitioners do not allege that due to the violation of the challenged ordinances they were sentenced for committing a minor offence, and together with the petition they also have not filed a constitutional complaint against a decision issued in minor offence proceedings based on the challenged ordinances. However, it is also not possible to require the petitioners to fulfil the statutory definition of a minor offence by violating the allegedly unconstitutional or unlawful provisions of the challenged ordinances in order to substantiate their legal interest. It follows from the challenged case law of the Constitutional Court that legal interest to file a petition is demonstrated even if the petitioner does not file the petition together with a constitutional complaint against an individual legal act that is based on the provisions of a general act that he or she deems to be constitutionally disputable if the petitioner could only elicit the issuance of such an individual act by acting contrary to mandatory regulations[3] or in such a way so as to expose him- or herself to unacceptable legal risk.[4] For this reason, also in the event where the petitioner could only achieve that an individual act be issued by acting in line with the statutory definition of a minor offence, the Constitutional Court deems that legal interest to initiate proceedings to review the constitutionality of a general act is fulfilled.[5] The case at issue also entails such an instance.

47. In view of the above, the legal interest of petitioners for a review of the constitutionality and legality of Ordinance/30, Ordinance/38, Ordinance/52, Ordinance/60, and Ordinance/69 at the time of filing the petitions was demonstrated.[6] Since the petitioners allege, *inter alia*, that the limitations of movement and/or assembly regulated by the challenged ordinances did not have any statutory basis in conformity with the

[3] Decision of the Constitutional Court No. U-I-192/16, dated 7 February 2018 (Official Gazette RS, No. 15/18, and OdlUS XXIII, 2), Para. 19 of the reasoning.

[4] Order of the Constitutional Court No. U-I-194/17, dated 22 March 2018, Para. 13 of the reasoning.

[5] Orders of the Constitutional Court No. U-I-107/15, dated 7 February 2019, Para. 17 of the reasoning, and No. U-I-40/17, dated 18 December 2019, Para. 21 of the reasoning.

[6] *Cf.* Order of the Constitutional Court No. U-I-83/20, Paras. 16–18 of the reasoning.

Constitution, the Constitutional Court deemed that the petitioners had a legal interest to challenge the ordinances in their entirety.

48. Ordinance/135 imposed the mandatory installation of hand sanitizers in multi-apartment buildings by the entrances to the building and by the entrance to the elevator, if there is one, in the building. The second paragraph of Article 24b of the CCA determines that a petition must also include data from which it is evident that the challenged regulation directly interferes with the petitioner's rights, legal interests, or his or her legal position. The petitioner must also submit the relevant documents to which he or she refers to support legal interest. The first petitioner who challenges this order did not demonstrate that he lives in a multi-apartment building and did not submit documents from which the mentioned circumstance would follow. Therefore, the petitioner did not demonstrate legal interest to challenge Ordinance/135, therefore the Constitutional Court rejected the petition to initiate proceedings to review the constitutionality of this Ordinance (Point 8 of the operative provisions).

As regards legal interest to file petitions against the CDA and the third paragraph of Article 21 of the GRSA

49. The legal interest of petitioners to challenge the CDA exists insofar as in the challenged part this law directly interferes with their rights, legal interests, or legal position (the second paragraph of Article 24 of the CCA). The petitioners, *inter alia*, fault the CDA for not regulating the informing of the public [regarding such matters]. The allegation is connected with a concrete action (failure to inform [the public] or the non-objective informing thereof) of the Government by issuing the challenged ordinances that were issued on the basis of points 2 and 3 of the first paragraph of Article 39 of the CDA. It is not admissible in proceedings before the Constitutional Court to challenge this act of the Government, as it is neither an implementing regulation nor a general act issued for the exercise of public authority (which could be challenged by a petition on the basis of Article 24 of the CCA), or an individual act by which a state authority decides on a right, obligation, or legal benefit of an individual or legal entity (which can be challenged by a constitutional complaint on the basis of the first paragraph of Article 50 of the CCA). However, the petitioners also allege that a statutory regulation that does not regulate informing the public in such instances is already inconsistent with the Constitution. The alleged statutory legal gap, which can be found in points 2 and 3 of the first paragraph of Article 39 of the CDA, has a direct effect on the position of individuals. Since the Constitutional Court assessed that this is an important constitutional question, it accepted the petition in this part, and in view of the fulfilled conditions determined by the fourth paragraph of Article 26 of the CCA, proceeded to decide on the merits of the case.

50. In the remaining part, the challenged provisions of the CDA are not directly applicable. The legal interest of the petitioners [to initiate a] review of the constitutionality of these provisions therefore only existed at the time when the petition was filed insofar as the challenged ordinances were based thereon. Ordinance/30, Ordinance/38,

Ordinance/52, Ordinance/60, and Ordinance/69 were adopted with reference to points 2 and 3 of the first paragraph of Article 39 of the CDA; therefore, the petitioners demonstrate legal interest to challenge these provisions also insofar as they allege that these provisions do not contain criteria that are sufficiently precise for restricting the freedom of movement and the right of assembly and association. The legal interest of petitioners also exists as regards the third paragraph of Article 5 of the CDA, which refers to monitoring and studying the epidemiological circumstances of communicable diseases, as the established epidemiological circumstances were of decisive importance in deciding on the introduction of the measures determined by points 2 and 3 of the first paragraph of Article 39 of the CDA.

51. However, the legal interest of petitioners does not exist as regards the initiation of proceedings to review the constitutionality of the first paragraph of Article 7 of the CDA, which contains a definition of epidemics, as epidemics or the declaration thereof are not necessary conditions for introducing the measures determined by Article 39 of the CDA. Therefore, the Constitutional Court rejected the petition to initiate proceedings to review the constitutionality or legality of the first paragraph of Article 7 of the CDA (Point 4 of the operative provisions).

52. The third paragraph of Article 21 of the GRSA determines that "[t]he Government regulates by an ordinance individual questions or adopts individual measures of general importance and adopts other decisions for which a law or decree determines that the Government regulates such by an ordinance." Since this is a general definition of instances in which the Government decides by an ordinance, the Constitutional Court deemed that the challenged ordinances were also based on that provision, which entails that the legal interest of petitioners to challenge them existed at the time of filing the petition.

As regards the need for legal protection concerning the continuation of the procedure despite the cessation of the validity of the challenged ordinances

53. The challenged ordinances ceased to be in force during the procedure before the Constitutional Court. Ordinance/30 was in force from 20 March through 29 March 2020. On 30 March, Ordinance/38 entered into force, which abrogated Ordinance/30. Ordinance/38 ceased to be in force on 18 April 2020, when Ordinance/52 entered into force, and the latter ceased to be in force when Ordinance/60 entered into force, i.e. on 30 April 2020. Article 6 of Ordinance/60 determined that the Government shall establish the scientific justification for the measures determined by this Ordinance every seven days and decide, by taking into account scientific grounds, whether these measures should remain in force or be modified or repealed, and the National Assembly and the public should be informed thereof. As the Constitutional Court already explained in Partial Decision and Order No. U-I-445/20, dated 3 December 2020 (Official Gazette RS, No. 179/20, Paras. 11–15 of the reasoning), such a provision must be interpreted such that the validity of measures solely on the basis of an ordinance shall come to an end seven

days following its adoption, and the further validity of the measures depends on the validity of the further decisions of the Government to prolong them, with regard to which these decisions must be published in the Official Gazette of the Republic of Slovenia prior to entering into force. Since within a period of seven days following the entry into force of Ordinance/60 in the Official Gazette no governmental order or other regulation by which the validity of measures determined by Ordinance/60 would be prolonged was published, the Ordinance ceased to be valid when this period expired. The same holds true as regards Ordinance/69, which entered into force on 18 May 2020 and whose Article 5 contained an identical provision as Article 6 of Ordinance/60. Since within a period of seven days following the entry into force of Ordinance/69 no regulation by which the validity of the measures determined by that Ordinance would be prolonged was published in the Official Gazette, also Ordinance/69 ceased to be valid when this period expired.

54. If during the course of proceedings before the Constitutional Court a regulation or general act issued for the exercise of public authority ceases to be in force, is modified, or amended, the Constitutional Court decides on its constitutionality or legality only if the petitioner demonstrates that the consequences of its unconstitutionality or illegality have not been remedied (the second paragraph in conjunction with the first paragraph of Article 47 of the CCA). In fact, if the consequences of the unconstitutionality or illegality of a regulation that has already ceased to be in force have already been remedied, the possible granting of a petition would bear no effect on the petitioner's legal position. In such an event, the petitioner does not have the need for legal protection [in the form] of a review of the constitutionality or legality of the regulation, and, on the basis of the third paragraph of Article 25 in conjunction with Article 47 of the CCA, the petition must be rejected. Therefore, the Constitutional Court called upon the petitioners to explain whether they maintain [what they stated] in the filed petition or to demonstrate the circumstances from which it is evident which consequences of the unconstitutionality of the ordinances have not been remedied. In the case at issue, the need for legal protection regarding the assessment of the ordinances in the case at issue is also important for the existence of legal interest for a review of the constitutionality of the third paragraph of Article 5 and points 2 and 3 of the first paragraph of Article 39 of the CDA (except insofar as these provisions have a direct effect on the legal position of petitioners – point 49 of the reasoning of this Decision) and of the third paragraph of Article 21 of the GRSA, as the legal interest of the petitioners for a review of these statutory provisions is based on their legal interest for a review of the challenged ordinances (paragraphs 50 and 52 of this Decision).

55. Following a call to reply, the first petitioner stated that the consequences of Ordinance/30 had not been remedied, as the measures were only made stricter as subsequent ordinances were adopted.

56. The second petitioners, who challenge Ordinance/38 and Ordinance/52, opine that, in fact, the challenged two ordinances have not ceased to be in force for several months, as the Government adopted substantively similar ordinances approximately by the end of

May, and the introduction of identical or even stricter measures is allegedly to be expected also in the future. The primary petitioner in the group of second petitioners also alleges that due to the prohibition or limitation of [freedom of] movement and [the right of] assembly, the decline in economic activity (as a result of disproportionate measures), intimidation by the Government as regards participation in protests, one-sided, partial, and the non-objective reporting by the Government regarding the circumstances and the systematic intimidation of people, he suffered psychological damage (severe stress, fear, traumas), which also affected his immune system. He also got the feeling of living under a dictatorship, due to which he allegedly sustained non-material damage. The consequences of this psychological damage still remain and also this damage can allegedly not be remedied.

57. The third petitioner did not respond to the call to reply of the Constitutional Court.

58. The fourth petitioners stated in their response to the call to reply that the negative consequences of the challenged Order/38 did not cease at the end of its validity, but will persist until the Constitutional Court adopts a position as to the allegations in their petition. What is allegedly at issue is mass interference by the state with basic human rights, and such interference allegedly does not lose its effect when the regulation ceases to be in force. The challenged ordinance allegedly has direct effect, and, in view of its specific nature, the petitioners do not have the possibility to initiate subsidiary proceedings for the judicial review of administrative acts. The petitioners allege that they could not perform their work as their law offices were closed and personal contact with their clients was allegedly no longer possible. They explain that they have not attached receipts or medical reports as they do not have such documents and because the scope of this damage can only be assessed with the assistance of experts. The petitioners allege that their petition opens an especially important precedential constitutional question that is in conformity with the position of the Constitutional Court in Decision No. U-I-83/20, dated 27 August 2020 (Official Gazette RS, No. 128/20).

59. The fifth petitioner alleged that the consequences of Ordinance/52 and Ordinance/60 were not remedied and also cannot be remedied, as time cannot be turned back. Following the cessation of the challenged ordinances, the consequences allegedly no longer occur on the basis thereof; however, they occur on the basis of subsequent ordinances. A serious consequence of the ordinances is that they reduced trust in the law. In the assessment of the petitioner, it is essential that legal interest existed at the time of filing the petition, as the petitioner has no influence on the cessation of the validity of the regulation [at issue]. Therefore, the Constitutional Court should decide on the petition. Otherwise, the right to judicial protection is hollowed out, which is allegedly also contrary to the principle of fairness.

60. By such allegations, the petitioners failed to demonstrate the existence of the condition determined by Article 47 of the CCA. In order to demonstrate the existence of the mentioned condition, they should demonstrate either that the consequences that

occurred as a result of the direct effect of the challenged [implementing] regulation still persist, or that an individual act was adopted on the basis of the challenged [implementing] regulation by which their rights, obligations, or legal benefits were decided on.[7] In fact, some of the petitioners allege the occurrence of consequences but they do not explain the grounds from which it follows that the consequences that occurred precisely on the basis of the challenged ordinances did not cease when these ordinances ceased to be in force. The petitioners who allege the existence of damage do not concretise or demonstrate such damage. The need for legal protection also cannot be demonstrated by alleging that the consequences will exist for so long as the Constitutional Court does not carry out an assessment [of constitutionality] or by alleging that legal interest does not cease together with the cessation of the validity of the regulation at issue, as, according to such an understanding of Article 47 of the CCA, the need for legal protection would always exist.

61. The above mentioned does not entail that in the part that the petitions refer to the ordinances and the statutory provisions that were the basis for their adoption the petitions must be rejected. Namely, in paragraph 43 of the reasoning of Decision No. U-I-129/19, dated 1 July 2020 (Official Gazette RS, No. 108/20), the Constitutional Court adopted the position, which it also repeated in Decision No. U-I-83/20 (paragraph 27 of the reasoning), that in the event of the review of regulations that are adopted periodically and for a limited period of time, a specifically expressed public interest, if substantively established by the Constitutional Court, can substantiate an exception from the procedural impediment determined by the second paragraph of Article 47 of the CCA. This happens when the requirement of legal predictability in a certain field of regulation of social relations exceptionally demands a decision by the Constitutional Court on particularly important precedential constitutional questions of a systemic nature which in a reasonable assessment can also be raised with respect to acts of the same nature and of comparable content that may be periodically adopted in the future.

62. The petitions allege the unconstitutionality and illegality of the regulations by which, and on the basis of which, in order to contain and manage the spread of COVID-19, interferences with the human rights and fundamental freedoms of all individuals in the area of the Republic of Slovenia were introduced. The [declaration of the] COVID-19 epidemic was in fact repealed following the entry into force of the challenged Ordinance (the Ordinance on the Revocation of the SARS-CoV-2 (COVID-19) Epidemic, Official Gazette RS, No. 68/20), but then on 19 October 2020 an epidemic was again declared (the Ordinance on the Declaration of the SARS-CoV-2 (COVID-19) Epidemic in the Territory of the Republic of Slovenia, Official Gazette RS, No. 146/20). Some measures regulated by the challenged ordinances were reintroduced in the same or a similar form

[7] In the second instance, the petitioner should also file, together with a petition, a constitutional complaint against that act, namely following the exhaustion of all legal remedies (such is stated in Order of the Constitutional Court No. U-I-174/05, dated 13 December 2007, Official Gazette RS, No. 122/07, and OdlUS XVI, 87).

by further ordinances and remain in force at the time of the adoption of the present Decision. As regards other measures that were regulated by the challenged ordinances, it is not possible to exclude their reintroduction. Since the validity of such measures must be limited in time, it should be expected that the Constitutional Court will also in the future not be able to carry out a substantive assessment of such regulations at the time of their particularly short span of validity.[8] Therefore, it was necessary to assess whether the petitioners raise particularly important precedential constitutional questions.

63. In the assessment of the Constitutional Court, the allegations of the petitioners that refer to the third paragraph of Article 5 of the CDA and the third paragraph of Article 21 of the GRSA do not raise questions that correspond to the mentioned standard of importance and precedential quality; therefore, the Constitutional Court rejected the petition in this part (Points 4 and 5 of the operative provisions).

64. However, among the questions raised by the petitions are also those that can be qualified as particularly important precedential constitutional questions. One such question is undoubtedly the question of the constitutional conformity of points 2 and 3 of the first paragraph of Article 39 of the CDA and the constitutional conformity of the challenged provisions of the ordinances based thereon (i.e. Ordinance/30, Ordinance/38, Ordinance/52, Ordinance/60, and Ordinance/69), as the mentioned provisions of the CDA allegedly do not contain criteria that are sufficiently precise to limit the freedom of movement and the right of assembly and association.

65. Since this question concerns the constitutional conformity of the challenged ordinances in their entirety, the Constitutional Court decided to answer it first. The Constitutional Court accepted for consideration the petitions against Ordinance/30, Ordinance/38, Ordinance/52, Ordinance/60, Ordinance/69, and points 2 and 3 of the first paragraph of Article 39 of the CDA and, since the conditions determined by the fourth paragraph of Article 26 of the CCA were fulfilled, it proceeded to decide on the merits of the case.

B – II

The review of points 2 and 3 of the first paragraph of Article 39 of the CDA

66. The petitioners allege that Article 39 of the CDA is inconsistent with Articles 2 and 32, the second paragraph of Article 39, Articles 42 and 87, the second paragraph of Article 120, and Article 153 of the Constitution, because the criteria for interfering with the freedom of movement and the right of assembly and association it determines are too general, overly vague, and imprecise. Allegedly, the CDA does not determine the manner and scope of the limitation of rights, the conditions for introducing measures, the time

[8] *Cf*. Para. 28 of the reasoning of Decision of the Constitutional Court No. U-I-83/20.

limitation of measures, the cooperation of experts, and informing the public. It allegedly gives the Minister or the Government the authorisation to decide, at their own discretion, without any limitations or criteria determined by law, i.e. in an originary manner, on the restriction of the rights of individuals.

The challenged statutory regulation

67. The CDA determines communicable diseases that jeopardise the health of the population of the Republic of Slovenia and nosocomial infections that occur in causal relation to the performance of a health care activity, and also prescribes measures for their prevention and management (Article 1 of the CDA). In the CDA, the measures for prescribing and managing communicable diseases are divided into general and specific measures. Special measures also include isolation and quarantine. The first paragraph of Article 18 of the CDA determines that isolation is a measure by which the treating physician, the regional health care institution, or the NIPH restricts the free movement of a person who contracted a communicable disease that can result in the direct or indirect transmission of the disease to other people. In conformity with the first paragraph of Article 19 of the CDA, quarantine is a measure by which free movement is limited and compulsory medical checks are prescribed for healthy individuals who were in contact or are suspected of having been in contact with someone who contracted plague, viral hemorrhagic fever (Ebola, Lassa, Marburg), or a communicable disease regarding which the Minister or the Government declared an epidemic on the basis of the fourth paragraph of Article 7 of this Act during its contagious phase. Hence, among the special measures, the legislature regulated two by which an individual's free movement is limited in order to prevent the spread of a communicable disease. Since it allowed the possibility that the introduction or spread of a certain communicable disease cannot always be prevented by merely limiting the movement of sick people and people regarding whom there exists a suspicion that they were in contact with sick people, the legislature determined that the movement and gathering of people could also be restricted more broadly. The challenged points 2 and 3 of the first paragraph of Article 39 of the CDA determined that the Government, when other measures determined by the CDA cannot prevent the introduction and spread of certain communicable diseases in the Republic of Slovenia, *inter alia*, may prohibit or limit the movement of the population in infected or directly jeopardised areas and/or prohibit the gathering of people in schools, cinemas, public bars, and other public spaces, as long as the threat of the spread of the concrete communicable disease lasts. The whole text of Article 39 of the CDA reads as follows:

> "When the measures determined by this Act cannot prevent the introduction of certain communicable diseases into the Republic of Slovenia and the spread thereof, the Government of the Republic of Slovenia can also impose the following measures:

> 1. the determination of the conditions for travelling to a state in which there exists a possibility of infection with a dangerous communicable disease and for arriving from these states;
> 2. the prohibition or limitation of the movement of the population in infected or directly jeopardised areas;
> 3. the prohibition of the gathering of people in schools, cinemas, bars, and other public places until the threat of the spread of the communicable disease passes;
> 4. the limitation or prohibition of the sale of individual types of merchandise and products.
>
> The Government of the Republic of Slovenia must immediately notify the National Assembly of the Republic of Slovenia and the public of the measures determined by the previous paragraph."

The quoted text from the Act includes the changes introduced by Article 7 of the ADIMCEMC, which entered into force on 11 April 2020. Prior to the entry into force of the ADIMCEMC, the CDA authorised the Minister to impose the measures determined by the first paragraph of Article 39, and the second paragraph thereof determined as follows: "The minister responsible for health must immediately notify the Government of the Republic of Slovenia, the National Assembly of the Republic of Slovenia, and the public of the measures determined by the previous paragraph." The challenged Ordinance/30 and Ordinance/38 were adopted prior to the entry into force of the ADIMCEMC, and all of the other challenged ordinances were adopted subsequently.

The starting points of the review

68. In accordance with the second paragraph of Article 120 of the Constitution, administrative authorities perform their work independently within the framework and on the basis of the Constitution and laws. The principle according to which the functioning of administrative authorities is bound to the constitutional and statutory basis and framework – the so-called legality principle – is one of the fundamental constitutional principles.[9] It is tightly connected to other fundamental constitutional principles, such as the principle of democracy (Article 1 of the Constitution), the principles of a state governed by the rule of law (Article 2 of the Constitution), and the principle of the separation of powers (the second sentence of the second paragraph of Article 3 of the Constitution). The principle of democracy requires that the most important decisions, in particular those that refer to citizens, be made by directly elected deputies by laws, while the executive power can only function on a substantive basis and within the framework of the law.[10] The above-stated is

[9] Such is stated by Decisions of the Constitutional Court No. U-I-123/92, dated 18 November 1993 (Official Gazette RS, No. 67/93, and OdlUS II, 109), and No. U-I-73/94, dated 25 May 1995 (Official Gazette RS, No. 37/95, and OdlUS IV, 51), Para. 18 of the reasoning.

[10] Decisions of the Constitutional Court No. U-I-123/92 and No. U-I-73/94, Para. 18 of the reasoning.

also required by the principle of the separation of powers; since in accordance with the Constitution legislative competence is ascribed to the National Assembly (Articles 86 through 89 of the Constitution), other state authorities must not change or independently regulate statutory subject matters.[11,12] Also the principles of a state governed by the rule of law require that the fundamental relations between the state and individuals be regulated by generally valid and abstract laws and that statutory provisions be clear, with a determinable meaning, and thus predictable.[13] The principle of legality is also tightly connected with Article 153 of the Constitution (the harmonisation of legal acts), which requires that implementing regulations and other general acts be in conformity with the Constitution and laws (the third paragraph of Article 153 of the Constitution), while individual acts and actions of state authorities, local community authorities, and bearers of public authority must be based on a law or regulation adopted pursuant to law (the fourth paragraph of Article 153 of the Constitution). The Constitutional Court has explained a number of times that the principle of legality determined by the second paragraph of Article 120 of the Constitution also binds the Government as the highest authority of the state administration.[14]

69. The principle of legality determined by the second paragraph of Article 120 of the Constitution contains two requirements: (1) implementing regulations and individual acts of the executive branch of power (both of the Government and administrative authorities) can only be adopted *on the basis of the law*, which means that they must be based on a (sufficiently precise) substantive basis in the law, and (2) they must also be *within the framework of the law*, which means that they must not exceed the possible meaning thereof.[15] For the review of the challenged provisions of the CDA, only the first requirement is important, in accordance with which the executive power may only function on the basis of a substantive and sufficiently determinable regulation in the law. It follows from the established assessment of the Constitutional Court that the executive power otherwise (also normatively) does not need an express authorisation in the law (i.e. an

[11] Decision of the Constitutional Court No. U-I-73/94, Para. 19 of the reasoning.

[12] An exception is determined by Article 108 of the Constitution. The exception refers to decrees with the force of law, which may be adopted by the President of the Republic upon the proposal of the Government in the event that the National Assembly is unable to convene due to a state of emergency or war. Such decrees may, in exception, restrict individual rights and fundamental freedoms as provided by Article 16 of the Constitution. However, the President of the Republic must submit decrees with the force of law to the National Assembly for confirmation immediately upon it next convening.

[13] See Decisions of the Constitutional Court No. U-I-123/92 and No. U-I-73/94, Para. 18 of the reasoning.

[14] See, e.g., Decision of the Constitutional Court No. U-I-73/94, Para. 17 of the reasoning, and No. U-I-84/09, dated 2 July 2009 (Official Gazette RS, No. 55/09, and OdlUS XVIII, 31), Para. 8 of the reasoning.

[15] *Cf.* Decision of the Constitutional Court No. U-I-73/94, Paras. 17–19 of the reasoning.

executive clause).[16] It does need a sufficiently clear and precise statutory regulation of those questions whose regulation falls within the exclusive competence of the legislature, i.e. questions that are key, fundamental, and central for a certain legal system, but that are also not so important as to be regulated already by the Constitution.[17] The executive power must not regulate these questions in an originary manner. Even the law must not give it authorisation for such regulation. All matters that either in accordance with the Constitution or due to their meaning fall within the scope of statutory regulation may only be regulated by the legislature by law, and the legislature may only let the executive power technically supplement, break down, and determine in more detail the statutory subject matter.[18] Whenever the legislature authorises the executive branch of power to adopt an implementing regulation, 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.[19] The intention of the legislature and the value criteria for implementing the law must be clearly expressed in the law or undoubtedly evident therefrom.[20]A blanket authorisation granted to the executive branch of power (i.e. an authorisation not containing substantive criteria) entails the legislature's failure to legislate statutory subject matter, which is inconsistent with the constitutional order.[21]

70. All of the above also applies to the regulation of rights and obligations, as in accordance with Article 87 of the Constitution this field of regulation falls within the exclusive competence of the legislature.[22] The law must regulate rights and obligations in such a manner that the position of legal entities is known or predictable by them already

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[16] See, e.g., Decision of the Constitutional Court No. U-I-73/94, Paras. 17–19 of the reasoning, Order of the Constitutional Court No. U-I-113/04, dated 7 February 2007 (Official Gazette RS, No. 16/07, and OdlUS XVI, 16), Para. 13 of the reasoning, and Decision of the Constitutional Court No. U-I-84/09, Para. 8 of the reasoning.

[17] See M. Pavčnik, *Teorija prava, Prispevek k razumevanju prava* [Theory of Law: A Contribution to Understanding Law], 5th revised edition, GV Založba, Ljubljana 2015, p. 249.

[18] *Cf.* Decision of the Constitutional Court No. U-I-50/00, dated 30 May 2002 (Official Gazette RS, No. 54-I/02, and OdlUS XI, 93), Para. 6 of the reasoning.

[19] Decisions of the Constitutional Court No. U-I-16/98, dated 5 July 2001 (Official Gazette RS, No. 62/01, and OdlUS X, 144), Para. 18 of the reasoning, and Nos. U-I-60/06, U-I-214/06, U-I-228/06, dated 7 December 2006 (Official Gazette RS, No. 1/07, and OdlUS XV, 84), Para. 126 of the reasoning.

[20] Decision of the Constitutional Court No. U-I-50/00, Para. 6 of the reasoning.

[21] Ibidem.

[22] The purpose of this provision is to ensure that all legal norms that regulate rights and obligations of legal entities in an originary manner are created in the form of laws. See Decision of the Constitutional Court No. U-I-40/96, dated 3 April 1997 (Official Gazette RS, No. 24/97, and OdlUS VI, 46), Para. 13 of the reasoning.

on the basis of the law.[23] However, when predominantly expert technical questions are at issue that are not suitable for statutory decision-making, the legislature can grant the executive [branch of] power a broad margin of appreciation.[24] A different rule applies when the regulation of the fundamental content and scope of rights and obligations is at issue, as well as the conditions and procedure for acquiring rights and for obligations to be created. These questions must be regulated by law; an administrative regulation may only further break down the statutory subject matter such that it does not determine additional rights and obligations and such that it does not widen or narrow a right or obligation regulated by law,[25] as otherwise it would interfere with the sphere of the legislative branch of power.

71. The requirement of the precision of the statutory basis where a restriction of human rights and fundamental freedoms is at issue is even stricter. Human rights and fundamental freedoms are the fundamental and central part of the constitutional order, which follows already from the Preamble to the Constitution.[26] Provisions on human rights and fundamental freedoms are not merely binding guidelines for the legislature but directly applicable safeguards [protecting] each individual (the first paragraph of Article 15 of the Constitution determines that human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution). Despite the fundamental role human rights and fundamental freedoms play in the legal order, and despite their direct applicability, the Constitution determined that human rights and fundamental freedoms may be limited (the third paragraph of Article 15 of the Constitution), but limitations must be exceptional in nature and determined as precisely as possible.[27] It follows from the second paragraph of Article 15 of the Constitution that the manner in which human rights and fundamental freedoms are exercised may only be regulated by law. This holds true all the more so regarding limitations of human rights.[28] As regards some human rights

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[23] *Cf.* Order of the Constitutional Court No. U-I-239/06, dated 22 March 2007, Para. 11 of the reasoning.

[24] Decision of the Constitutional Court No. U-I-183/99, dated 4 July 2002 (Official Gazette RS, No. 65/02, and OdlUS XI, 149), Para. 23 of the reasoning.

[25] *Cf*. Decision of the Constitutional Court No. U-I-56/98, dated 19 December 2001 (OdlUS X, 219), Para. 8 of the reasoning.

[26] One of the starting points of the Preamble of the Constitution is the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, which in Section III determines that the Republic of Slovenia guarantees the protection of human rights and fundamental freedoms to all persons in the territory of the Republic of Slovenia irrespective of their national origin, without any discrimination whatsoever, in accordance with the Constitution of the Republic of Slovenia and the treaties in force.

[27] See F. Grad, I. Kaučič, S. Zagorc, *Ustavno pravo* [Constitutional Law], 2nd Edition, Univerza v Ljubljani, Pravna fakulteta, Ljubljana 2016, p. 745.

[28] See, e.g., Decision of the Constitutional Court No. U-I-25/95, dated 27 November 1997 (Official Gazette RS, No. 5/98, and OdlUS VI, 158), Paras. 30 and 31 of the reasoning, Decision No. U-I-287/95, dated 14 November 1996 (Official Gazette RS, No. 68/96, and OdlUS V, 155, Para. 8 of

and fundamental freedoms, the Constitution also expressly determines that limitations thereof may be determined by law (this is a so-called statutory reservation, which is a special limitation clause). The Constitution framers even envisaged a regulation in accordance with which the legislature decides on limiting human rights and fundamental freedoms in time of war or a state of emergency.[29]

72. When the Constitution or a law requires the adoption of an individual act in order to interfere with a human right or fundamental freedom, i.e. an act that refers to a determined person (a court decision or the decision of an administrative authority), the law must determine a precise substantive basis for the adoption of such act. The purpose of the limitation must be clearly evident from the law. Furthermore, the law must determine the manner or types and scope of such limitation. It also must precisely determine the reasons for or conditions of such limitation and regulate procedural questions.[30] When, however, human rights and fundamental freedoms are directly interfered with by a general act, i.e. an act that refers to an indeterminable number of individuals, that act must be a law. In fact, in both instances the legislature can leave the more detailed regulation of less important and technical questions regarding the limitation of a certain human right or fundamental freedom to the executive branch of power, but – in view of the constitutional importance of human rights and the formulation of limitation clauses in the Constitution – in the law it must determine sufficiently precise criteria for such a regulation. In this context, it holds true that the degree to which the statutory authorisation is precise and accurate can vary depending on the subject matter of the regulation and the envisaged intensity of the interference with human rights or fundamental freedoms. The Constitutional Court has already adopted the position that the statutory authorisation granted to the executive branch of power must be all the more restrictive and precise the greater the interference with or effect of the law on individual human rights and fundamental freedoms.[31] It must always be sufficiently precise in order to not allow the executive power to regulate in an original manner a limitation of human rights and fundamental freedoms. Thereby, the predictability and legal certainty with respect to the implementation of human rights and fundamental freedoms are ensured, and concurrently the threat of the arbitrary limitation thereof by the authorities in power is reduced.[32] From the viewpoint of the state administration being bound by the Constitution

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the reasoning), Decision No. U-I-346/02, dated 10 July 2003 (Official Gazette RS, No. 73/03, and OdlUS XII, 70), Para. 10 of the reasoning, and Decision No. Up-1303/11, U-I-25/14, dated 21 March 2014 (Official Gazette RS, No. 25/14, and OdlUS XX, 21), Para. 10 of the reasoning.

[29] It follows from Articles 16, 92, and 108 of the Constitution that the National Assembly decides on the temporary abrogation or restriction of human rights in time of war or a state of emergency. It is only if the National Assembly cannot convene that the President of the Republic can decide thereon, upon the proposal of the Government, by decrees with the force of law, which it must submit to the President of the Republic for confirmation immediately upon it next convening.

[30] See Decision of the Constitutional Court No. U-I-346/02, Para. 20 of the reasoning.

[31] Decision of the Constitutional Court No. U-I-92/07, Para. 150 of the reasoning.

[32] See Decision of the Constitutional Court No. U-I-25/95, Paras. 42 and 43 of the reasoning.

and the law, a sufficiently precise statutory basis entails a key safeguard against arbitrary interferences by the executive power with human rights and fundamental freedoms.

73. The challenged points 2 and 3 of the first paragraph of Article 39 of the CDA enable the imposition of measures that interfere with the freedom of movement and the right of assembly and association. The first paragraph of Article 32 of the Constitution determines the right to the freedom of movement as everyone's right to choose his or her place of residence, to leave the country, and to return at any time. The mentioned provision hence enables an individual (1) the freedom of movement within the state, which means that an individual can freely move in the territory of the Republic of Slovenia without any limitations,[33] (2) the right to the free choice of one's dwelling, and (3) the right to freely cross the state border. Freedom of movement is an expression of the general freedom to act (Article 35 of the Constitution)[34] and one of the fundamental prerequisites of every free democratic society. It enables individuals to develop as active, intellectual, spiritual, and social beings. Without freedom of movement, it is difficult to imagine one's freedom in the broadest sense of the term. Furthermore, freedom of movement is a condition for the comprehensive exercise of numerous other constitutionally guaranteed human rights and fundamental freedoms, such as right of assembly and association, freedom of expression, freedom of work, the right to private and family life, the freedom of scientific and artistic endeavour, freedom of education, free economic initiative, the right to health care, freedom of conscience, and other beliefs.

74. The right of assembly and association is determined by Article 42 of the Constitution, which grants everyone the right of assembly and public meeting (the first paragraph of the mentioned Article) and the right to freedom of association with others (the second paragraph of the mentioned Article). It is one of the foundational constitutional values that allows the free expression of opinions, the formation of political will, and self-organisation.[35] The right of assembly is also the starting point and a guarantee of the system of political pluralism, without which there can be no free democratic society.[36]

75. The second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution expressly determine that freedom of movement and the right of assembly and association may be limited by law, with respect to which the Constitution also

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[33] J. Čebulj in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 337; Decision of the Constitutional Court No. U-I-83/20, Para. 40 of the reasoning.

[34] J. Čebulj in: L. Šturm (Ed.), *op. cit.*, p. 337.

[35] Decision of the Constitutional Court No. Up-301/96, dated 15 January 1998 (Official Gazette RS, No. 13/98, and OdlUS VII, 98), Para. 11 of the reasoning.

[36] See *ibidem*; see also L. Šturm in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 462.

determines the admissible objectives for which they may be limited. One of the reasons due to which freedom of movement and the right of assembly and association may be limited in accordance with the Constitution is protection from the spread of communicable diseases and the prevention of communicable diseases. By Decision No. U-I-83/20 (paragraph 42 of the reasoning), the Constitutional Court explained that the purpose of this limitation clause is to protect the health and life of people threatened by a communicable disease. It stressed that, in the event of a communicable disease, in accordance with the Constitution, state authorities have the duty to appropriately protect the health and life of people. The first paragraph of Article 5 of the Constitution binds the state to protect human rights and fundamental freedoms in its own territory. With respect to human rights and fundamental freedoms, the state has both negative and positive obligations. The negative obligations entail that the state must refrain from interfering with human rights and fundamental freedoms. The positive obligations, on the other hand, require that the state and its individual branches of power be active in protecting human rights and fundamental freedoms. In this respect, it holds true that the positive obligations of the state are all the more emphasised the higher the protected value is positioned in the hierarchy of human rights. In the event of the emergence of an epidemic of a communicable disease that could seriously jeopardise the health or even life of people, the too slow or inadequate response of state authorities would be inconsistent with the positive obligations of the state to protect the right to life (Article 17 of the Constitution), the right to physical and mental integrity (Article 35 of the Constitution), and the right to health care (the first paragraph of Article 51 of the Constitution).

76. In accordance with the Constitution, state authorities have the duty to appropriately protect the health and life of people in the event a communicable disease occurs; if necessary, also such that they limit the freedom of movement and the right of assembly and association. However, in doing so they must take into consideration that these limitations must essentially be determined already in the law, and the possible authorisation granted to the executive branch of power to regulate these limitations in more detail must be sufficiently precise (paragraph 72 of the reasoning of this decision).

77. The requirement that the statutory regulation of interferences with human rights be specifically determined also follows from the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR). With respect to a number of Convention rights, the ECtHR stresses that from the provisions of the ECHR, in accordance with which interferences with human rights must be *prescribed* by law, there follows not only the requirement that interferences be regulated by national law, but also that this law correspond with the principle of a state governed by the rule of law, which entails that it attains some quality criteria. The statutory regulation of interferences with human rights must be *sufficiently clear*, *formulated with sufficient precision*, *accessible*, and *foreseeable*.[37]

[37] See, e.g., the ECtHR Judgments in *Roman Zakharov v. Russia*, dated 4 December 2015, Para. 228 *et seq.* of the reasoning*; Stafford v. the United Kingdom*, dated 28 May 2002, Para. 63 of the

78. The freedom of movement is ensured by Article 2 of Protocol No. 4 to the ECHR, which in its third paragraph expressly determines that in the exercise of the rights under this Article there must be no limitations except those determined by law. The freedom of assembly and association is ensured by Article 11 of the ECHR, with regard to which it follows from the second paragraph of this Article that the exercise of these rights may only be limited by law. In order to assess whether there exists a sufficient statutory basis for an interference, the ECtHR applies equal quality criteria as when assessing interferences with other Convention rights.[38]

79. With respect to the requirement of foreseeability, the ECtHR stresses that statutory provisions must be formed with sufficient precision in order for the addressees to envisage the consequences of the regulation to a reasonable degree, taking into account the circumstances. The law must also offer protection from arbitrary interferences by the authorities in power with the protected right from the Convention. It would be contrary to the principle of a state governed by the rule of law if the law attributed unlimited discretion to the competent authorities. Therefore, the law must determine with sufficient precision the scope of discretion and the manner of its exercise. Furthermore, it must determine with sufficient precision the circumstances and conditions under which the competent authorities may interfere with the rights from the Convention.[39] The required precision of

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reasoning; *Dragin v. Croatia*, dated 24 July 2014, Para. 90 of the reasoning; and *Chumak v. Ukraine*, dated 6 March 2018, Para. 39 of the reasoning. See also S. C. Greer, The Exceptions to Articles 8 to 11 of the European Convention on Human Rights, Human Rights Files No. 15, Council of Europe, Strasbourg 1997, pp. 9–13; J. Viljanen, The European Court of Human Rights as a Developer of the Legal General Doctrines of Human Rights Law: Study of the Limitation Clauses of the European Convention on Human Rights, Acta Universitatis Tamperensis 965, Tampere University Press, Tampere 2003, pp. 185–208.

[38] See, e.g., the ECtHR Judgments in *Landvreugd v. the Netherlands,* dated 4 June 2002, Paras. 54, 57, and 59 of the reasoning; and *Gorzelik and Others v. Poland,* dated 17 February 2004, Para. 64 of the reasoning.

[39] As similarly determined by the International Covenant on Civil and Political Rights (Official Gazette SFRY, No. 7/71, and Official Gazette RS, No. 35/92, and MP No. 9/92 – hereinafter referred to as the ICCPR). Article 12 ensures everyone who is legally in the territory of a certain state the right to move freely therein and to freely choose one's residence. Everyone is also free to leave any country, including his own (the first and second paragraph of Article 12 of the ICCPR). The third paragraph of this Article determines that the above-mentioned rights may only be subject to any restrictions if they are provided by law, are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and are consistent with the other rights recognised by the ICCPR. In conformity with the fourth paragraph of Article 40 of the ICCPR, the Human Rights Committee has the power to submit so-called general comments, by which it interprets the provisions of the Covenant. In General Commentary No. 27, dated 1 November 1999, regarding Article 12 of the ICCPR it is stressed that the law must determine by itself the conditions under which the rights determined by Article 12 of the ICCPR may be limited.

national legislation, which in any case cannot ensure the regulation of all possible instances, depends on the content of the subject matter, the field, and the number and position of addressees.[40]

80. In the leading case from the viewpoint of statutory precision regarding limitations of the freedom of movement, namely *De Tommaso v. Italy,* the ECtHR stressed, in addition to the mentioned general starting points, that predictability cannot be absolute. In fact, foreseeability is very welcome; however, excessive precision results in the excessive rigidity of the law, which must respond to the changeable circumstances of cases. For this reason, numerous regulations contain terms that are conceptually open to a greater or lesser extent where a question of the interpretation and application thereof arises in practice.[41] The ECtHR specifically stressed that the question of the accessibility and foreseeability of a law as to its effects is an especially important factor in a case such as the one at issue [i.e. *De Tommaso v. Italy*], where the legislation in question had a very significant impact on the applicant and his right to liberty of movement.[42] In its assessment, it *inter alia* established that the categories of individuals to which the limitations of movement as preventive measures referred were not sufficiently determined by law.[43] It also adopted the position that the provision of the disputed regulation that determined that courts may impose any measure that they deem necessary to protect the community without determining in more detail the content of these measures does not

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Restrictions that are not determined or in conformity with law entail a violation of these rights. A law that grants authorisation to order interferences with the freedom of movement must contain precise criteria. The principle of proportionality must be observed not only in the law that determines the limitations, but also when they are ordered by administrative and judicial authorities. In proceedings deciding on interferences, the competent authorities must state the reasons therefor (points 12, 13, and 15 of General Commentary No. 27). Similar holds true with respect to the right of peaceful assembly and association regulated by Articles 21 and 22 of the ICCPR. Both stress that limitations may only be prescribed by law, *inter alia*, due to the protection of public health (Article 21 and the second paragraph of Article 22 of the ICCPR).

[40] The ECtHR Judgments in *Maestri v. Italy*, dated 17 February 2004, Para. 30 of the reasoning, and *Lashmankin and Others v. Russia,* dated 7 February 2017, Paras. 410 and 411 of the reasoning.

[41] The ECtHR Judgment in *De Tommaso v. Italy*, dated 23 February 2017, Para. 107 of the reasoning.

[42] *Ibidem*, Para. 111 of the reasoning. The competent court imposed on the complainant the measure of special police supervision for a period of two years and also determined for him a compulsory place of residence. In addition to the above, a number of other measures [were imposed], e.g. the obligation to report to a police station every week or upon the request of the Police, the obligation to not leave his city or town of residence, a prohibition on changing his residence, and a prohibition on leaving his home between 10 PM and 6 AM, except in an urgent case upon first notifying the authorities.

[43] *Ibidem*, Para. 113 of the reasoning.

satisfy the requirement of foreseeability.[44] The ECtHR took into consideration that a court can explain conceptually open terms in a law and thus contribute to the foreseeability thereof. However, in the case at issue it assessed that also the constitutional court of the respondent state did not resolve the problem of insufficient predictability despite having interpreted the disputed provision.[45] Furthermore, the ECtHR drew attention to the fact that, as regards the measures imposed against the complainant (including the absolute prohibition of participating in public gatherings), the regulation contained no temporary or spatial limitations; the scope of the interference with the complainant's fundamental right was entirely left to the competent court. Such a broad discretion – without a framework and the manner of exercise being sufficiently determined – is inconsistent with the requirement as to the foreseeability of the law and also does not contain the required sufficient safeguards against possible abuses.[46]

The review of points 2 and 3 of the first paragraph of Article 39 of the CDA

81. It has already been stated that the challenged points 2 and 3 of the first paragraph of Article 39 of the CDA enable the Government to impose measures which – in order to prevent the propagation of a certain communicable disease – interfere with the freedom of movement and the right of assembly and association. Contrary to some other measures determined by the CDA that are imposed by an individual act against precisely determined persons (e.g. quarantine and isolation – see paragraph 67 of the reasoning of this decision), limitations of the movement and/or gathering of people, which the Government can impose on the basis of points 2 and 3 of the first paragraph of Article 39 of the CDA, directly interfere with the rights of an indeterminate number of addressees.

82. From points 71–76 of the reasoning of this Decision it follows that, in conformity with the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution, limitations of the freedom of movement and the right of assembly and association may only be determined by law. A general act that directly limits the freedom of movement and the right of assembly and association of an indeterminate number of individuals must be a law. The legislature may leave to the executive branch of power only the more detailed regulation of the limitations that the legislature itself prescribed beforehand, and only under the further condition that it prescribed sufficiently precise criteria for such regulation [by the executive branch of power]. In the case at issue, the legislature did not envisage that every time a communicable disease occurs it would decide by itself by a law on the limitations of movement and the gathering of an indeterminate number of individuals. It granted the Government the authorisation to adopt a regulation that prohibits or limits movement and/or the gathering of people. By the challenged points 2 and 3 of the first paragraph of Article 39 of the CDA, the legislature left it to the Government not only to adopt the more detailed regulation of already adopted

[44] *Ibidem*, Para. 121 of the reasoning.

[45] *Ibidem.* See also Para. 122 of the reasoning.

[46] *Ibidem*, Paras. 123 and 124 of the reasoning.

limitations of movement and gathering, but also to decide whether, upon the occurrence of a certain communicable disease, the freedom of movement and the right of assembly and association of an indeterminate number of individuals would even be interfered with.

83. In ordinary circumstances, the legislature would violate the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution by granting the Government such an authorisation (irrespective of the precision of the instructions that it determined at the same time). It must, however, be taken into consideration that responding to the emergence of a communicable disease is a special situation. The circumstances that are important for prescribing the measures determined by points 2 and 3 of the first paragraph of Article 39 of the CDA can namely change quickly; the legislative procedure, on the other hand, takes some time. If the legislature decided by itself on the introduction, modification, or abolition of such measures it would perhaps be unable to quickly enough adapt the statutory regulation to the changing epidemiological situation or expert findings from the field of the prevention of the spread of infectious diseases. Hence, a situation could thus arise where in light of the fast deterioration or improvement of the epidemiological circumstances or the emergence of new expert findings that would require the immediate modification of the statutory regulation, the National Assembly would be unable to introduce, abolish, or adapt measures sufficiently quickly in order to effectively protect the health and life of people or to remedy the disproportionate interferences with human rights and fundamental freedoms that could arise on the basis of the statutory regulation then in force. In this specific situation, it is thus not possible to deny the National Assembly the possibility of exceptionally leaving it to the executive branch of power to prescribe measures by which the freedom of movement and the right of assembly and association of an indeterminate number of individuals are directly interfered with in order to effectively protect human rights and fundamental freedoms, as well as to ensure fulfilment of the positive obligations that stem from the Constitution. However, the law must determine the purpose of these measures or their purpose must be clearly evident therefrom. Furthermore, the law must determine with sufficient precision the admissible types, scope, and conditions regarding the restriction of the freedom of movement and of the right of assembly and association, as well as other appropriate safeguards against the arbitrary restriction of human rights and fundamental freedoms. If there is no substantive basis in the law, it is not possible to speak of a limitation of human rights and fundamental freedoms by law. Therefore, the Constitutional Court will assess below whether the challenged provisions of the CDA satisfy the mentioned constitutional requirement.

84. The first paragraph of Article 39 of the CDA determines that the measures determined by this Article may only be imposed “when the measures determined by this Act cannot prevent the introduction of certain communicable diseases into the Republic of Slovenia and the spread thereof.” The communicable diseases due to which it is admissible to introduce the measures determined by Article 39 of the CDA are determined by the first paragraph of Article 8 of the CDA. The third paragraph of Article 8 of the CDA determines that if a threat of other communicable diseases occurs that could jeopardise the health of

the population, the Government can decide that the measures determined by this law apply thereto, and must without delay notify the National Assembly of such decision. It follows from the above that the goal of imposing the measures determined by this Article is to protect the population from the communicable diseases that are expressly determined by the CDA and other communicable diseases that could jeopardise the health of the population. Hence, the intention of the limitations is sufficiently clearly evident from the Act.

85. In the mentioned part, the Act also gives the government the clear instruction that it may only impose the measures determined by this Article if it cannot prevent the introduction or spread of a communicable disease by other, more lenient measures envisaged in the CDA. As the National Assembly states in its reply, these more lenient measures are, in particular, isolation (Article 18 of the CDA), quarantine (Article 19 of the CDA), compulsory medication (Article 20 of the CDA), compulsory vaccination (Article 22 of the CDA), disinfection (Article 26 of the CDA), and compulsory medical checks (Articles 31 and 32 of the CDA). Hence, in conformity with the first paragraph of Article 39 of the CDA, the Government may not limit or prohibit the movement and gathering of people if it is possible to prevent the introduction or spread of a disease by other, more lenient measures. Thereby, the legislature in this part embedded in the Act one element of the general principle of proportionality (which follows from the principle of a state governed by the rule of law determined by Article 2 of the Constitution), i.e. the element of urgency, in accordance with which interferences with human rights and fundamental freedoms are only admissible if the pursued objective cannot be attained without an interference or by a more lenient measure.[47]

86. Further on, the first paragraph of Article 39 of the CDA lists the possible limitations and prohibitions. Point 2 of the first paragraph determines that the Government may "prohibit or limit the movement of the population in infected or directly jeopardised areas." The second paragraph of Article 7 of the CDA defines an infected area as "an area in which one or multiple sources of infection are established and where there is a possibility of the spread of the infection." The meaning of "a directly jeopardised area" is not defined in the CDA; however, the third paragraph of Article 7 of the CDA does determine the meaning of "a jeopardised area", namely in the following manner: "A jeopardised area in accordance with this Act is an area to which a communicable disease can be transmitted from an infected area and where there are possibilities for the spread of the infection." The syntagm "a directly jeopardised area" can thus be understood as an area with regard to which there exists a direct threat that a communicable disease will be transmitted thereto from an infected area and where there is a possibility of the spread of the infection. The fourth paragraph of Article 7 of the CDA also determines that the Minister declares an area to be infected or jeopardised. In instances when the entire territory of the Republic of Slovenia is infected or threatened therewith, it is the Government that declares the epidemic. It follows from these definitions that, in accordance with point 2 of

[47] See Decision of the Constitutional Court No. U-I-83/20, Para. 37 of the reasoning.

the first paragraph of Article 39 of the CDA, the Government can prohibit or limit the movement of the population in an area where there is at least a direct threat that a communicable disease will be transmitted thereto from an area where one or multiple sources of infection have already been established, with regard to which there has to be a possibility of the spread of the infection in both areas.

87. By Decision No. U-I-83/20 (paragraph 58 of the reasoning), in which the Constitutional Court assessed the conformity of the prohibition of movement outside the municipality of one's residence determined by Ordinance/38 and Ordinance/52, the Constitutional Court stated that the terms infected and jeopardised area from the second and third paragraphs of Article 7 of the CDA are legal standards whose content is filled anew upon every interpretation of these statutory provisions in view of the circumstances of a precisely determined communicable disease, even when the concretisation is made by executive regulations. However, such does not entail that the Act did not give the Government too wide a margin of appreciation by such legal regulation. From the position of the Constitutional Court in case No. U-I-83/20 it only follows that – in view of the broad statutory definition of the terms infected and jeopardised area – by imposing measures in the entire territory of the Republic of Slovenia the Government acted in accordance with the law (meaning that it did not overstep the possible interpretation thereof). The Constitutional Court also did not adopt a position as to the question of whether the Government also acted on a sufficiently precise statutory basis (see point 69 of the reasoning of this Decision, in which it is explained that acting *within the framework* of the law and acting *on the basis* of the law are two distinct requirements of the principle of legality).[48]

88. The use of indeterminate or conceptually open legal terms in the law is in and of itself not inconsistent with Article 120 of the Constitution; however, the indeterminacy of a legal term must not be such so as to prevent the executive branch of power from regulating statutory matter in an originary manner. The requirement of precision is particularly emphasised when the regulation of measures by which human rights and fundamental freedoms are interfered with is concerned (see paragraph 71 of the reasoning of the Decision). When assessing whether the statutory terms infected and directly jeopardised area exceed the degree to which they can be conceptually open, it is important that the Act does not define the term "area". The Act also does not provide anchors that could be of help in defining this term more precisely. Hence, "a jeopardised area" can be understood very narrowly, e.g. by including merely the close neighbourhood of the source of infection. On the other hand, it could also be construed as meaning a wider or even

[48] In paragraph 58 of the reasoning of Decision No. U-I-83/20, the Constitutional Court expressly stated that in the case at issue it did not take a position as to the constitutional consistency of the statutory bases for the adoption of the challenged ordinances. In the case at issue, the decision on the merits only includes a review of the consistency of the measure of the prohibition of movement outside the municipality of one's residence with those requirements of the Constitution regarding which such measure was challenged in this case.

very wide area, such as a village, city district, city, municipality, or even the broader area in the state (i.e. the region) where the source of infection is located. Similar holds true for the term “directly jeopardised area”. On the one hand, this term can be interpreted as a very narrow band encircling the infected area, but by taking into consideration how small the state is and daily commuting, it could also be interpreted as the whole state being affected as a result of a single source of infection. Hence, the legislature defined the terms infected and directly jeopardised areas so loosely that it granted the Government unlimited discretion in determining the scope of the territory in which a prohibition or limitation of movement is declared.

89. Furthermore, it must be assessed whether the manner (i.e. types) of admissible interferences with the freedom of movement are sufficiently precisely determined in the Act. Point 2 of the first paragraph of Article 39 of the CDA only determines that the Government may prohibit or limit the movement of people in infected and directly jeopardised areas, without further concretising such limitation or prohibition. Hence, it does not follow from the CDA that the legislature in any manner determined the types of admissible interferences with the freedom of movement. The statutory provision “to limit the movement of people” is identical to the second paragraph of Article 32 of the Constitution, which in the relevant part determines that the freedom of movement may be limited by law. Hence, such statutory text does not concretise the [mentioned] constitutional provision in any way, although the movement of people can be prohibited or limited in numerous ways. For instance, the prohibition or limitation of movement can include the prohibition of access to certain areas (which can be public or private, open or closed), the prohibition of movement outside a certain area (e.g. the limitation of movement to a local community, municipality, or region), but possibly also very intensive interferences with the freedom of movement that can come close to a revocation of this freedom, such as the general prohibition of movement during certain hours of the day (during a shorter or longer part of the day) or a prohibition on leaving home, with certain exceptions (which can vary significantly). Furthermore, the mentioned types of limitations of movement can refer to all individuals or to only some groups of individuals (which, again, can be determined in various ways). It has already been stated that the degree to which the required statutory authorisation is precise and accurate can vary depending on the envisaged intensity of the interference with human rights and fundamental freedoms. This means that the limitations that entail a milder interference with the freedom of movement can also be regulated by a general clause in the law (naturally only if all the other requirements that follow from Article 32 of the Constitution are observed). If the legislature desires to enable the executive branch of power to also introduce more intensive limitations, it must expressly regulate these measures and at least in general also determine the conditions for their introduction. Conversely, the challenged statutory regulation does not expressly regulate any of the numerous and very intensive interferences with the freedom of movement that it enables in view of its exceptionally broad diction, and as a result also does not determine the conditions for imposing them. The Act does not determine either the substantive basis for exceptions or other safeguards against excessive interferences with the freedom of movement or other

human rights, e.g. the right to private and family life. It leaves it to the Government to assess by itself, in view of the circumstances of the concrete situation, which methods of limiting the freedom of movement of people are appropriate, necessary, and proportionate. Thereby, the legislature left it to the executive branch of power to carry out the key assessment that, in accordance with the Constitution, it should perform by itself.

90. The legislature also leaves it to the Government to assess how long the prohibitions or limitations of movement determined by the implementing regulation in force [in a certain situation] shall last. In fact, the Act does not contain the substantive basis for limiting in time the prohibitions or limitations determined by point 2 of the first paragraph of Article 39 of the CDA, and also does not impose on the Government the obligation to periodically check whether the imposed measures are justified. In the Act, the imposition and duration of the measures determined by Article 39 of the CDA are not conditional upon either the declaration of an epidemic or the time when an epidemic is declared. The National Assembly opines that the measure of the prohibition or limitation of movement is also limited in time, as the measure allegedly loses its substantive statutory basis if the area for which it was ordered is no longer infected or directly at risk. However, this criterion does not entail an appropriate limitation of measures in time, as it allows the Government to introduce and maintain measures at its own discretion for as long as there exists another source of infection or as long as there exists a direct risk that a communicable disease will be transmitted to a certain area. Such a statutory regulation is not only contrary to the second paragraph of Article 32 of the Constitution, in accordance with which only a law can limit the freedom of movement, but is also inconsistent with the first paragraph of Article 32 of the Constitution, as it allows disproportionate interferences with the freedom of movement. In Decision No. U-I-83/20 (paragraph 56 of the reasoning), the Constitutional Court already explained that measures to prevent the spread of a communicable disease that interfere with the right to the freedom of movement are only consistent with the first paragraph of Article 32 of the Constitution if they are limited in time. Namely, the longer a measure lasts, the more invasive the interference becomes.

91. Point 3 of the first paragraph of Article 39 of the CDA determines that the Government may “prohibit the gathering of people in schools, cinemas, bars, and other public places until the threat of the spread of a communicable disease passes.” As regards the determination of the manner of limiting rights, this measure is more precise than the measure determined by point 2 of the same paragraph, as the authorisation given to the Government is limited to public places (hence, on the basis of such authorisation the Government does not have the right to prohibit the gathering of people in private places), and also such public places are non-exhaustively listed. The fact that the Act lists the public places where the Government can prohibit the gathering of people allows for the deduction that the Act does not give the Government the authorisation to prohibit gatherings in all public places but merely in those that are essentially similar to the listed ones, which are, in particular, closed public places where a higher density of people can be expected and where the probability of getting infected is higher. It must be taken into

consideration that the prohibition of gathering in the various listed public places interferes very differently with human rights (for instance, the prohibition of gathering in schools has a much more powerful effect on the rights of a significantly higher number of people than the prohibition of gathering in cinemas). In such instances, the law must determine the limits of the Government's margin of appreciation by prescribing substantive criteria.[49] In the case at issue, however, the legislature leaves it entirely to the Government to assess in which public places and under which circumstances the gathering of people should be prohibited.

92. Furthermore, the CDA does not determine in which area the Government may order the measure determined by point 3 of the first paragraph of Article 39. The Government does not limit the authorisation of the Government to prohibit gathering in public places to either infected or directly jeopardised areas such as it determines (in a significantly too general manner) with respect to the prohibition or limitation of movement.

93. As regards the duration of the validity of the measures, point 3 of the first paragraph of Article 39 of the CDA determines that the prohibition of gathering may only last as long as the threat of the spread of a communicable disease lasts. However, this requirement, which follows already from the purpose of Article 39 of the CDA, does not give the Government a sufficient substantive basis for prescribing the duration of measures. It allows the Government to completely independently determine the duration of the prohibition of gathering in the entire period of the threat of the spread of the communicable disease and to determine in advance the validity of measures for the entire duration of the threat of the spread of the communicable disease without being obliged to periodically check, appropriately adapt, or prolong the measures.

94. The legislature also did not embed in Article 39 of the CDA any other safeguards by which it could limit the Government's margin of appreciation, such as the duty to consult the expert community and cooperate therewith. It must namely be taken into consideration that the decisions that the CDA leaves to the Government in points 2 and 3 of the first paragraph of Article 39 do not fall only into the field of political assessment, but also into medical, epidemiological, psychological, sociological, and other domains. In Decision No. U-I-83/20 (paragraph 50 of the reasoning), the Constitutional Court stressed that when introducing measures by which, in order to prevent the spread of communicable diseases, people's freedom of movement is interfered with, state authorities must take into account the findings of the relevant expert communities that are accessible at the time when the measures are introduced, and they must actively strive to reduce to the greatest extent possible the possible uncertainty as to the risk assessment and appropriateness of the chosen measures also after the measures are introduced.

[49] For instance, the law could limit the Government's margin of appreciation by classifying the prohibitions of gathering in various public places into groups according to the intensity of the interference with the rights of people and by determining the conditions for introducing measures from an individual group.

The above-mentioned is all the more true when a regulation by which human rights and fundamental freedoms are interfered with is not adopted by the legislature but by the executive branch of power, as the duty of the executive branch of power to assess the appropriateness of measures in light of expert findings significantly reduces the possibility of arbitrary interferences with human rights and fundamental freedoms. However, when limiting or prohibiting the movement and gathering of people, the CDA does not limit the assessment of the Government in such a way so as to require that it cooperate with and consult experts from the relevant fields of expertise who could guide it in the assessment of numerous questions, such as whether the introduction or spread of a disease could not be prevented by other measures referred to in the CDA, which types of the limitation of [the freedom of] movement and [the right of] assembly are appropriate for preventing a certain communicable disease, in what scope the measures introduced would be able to contribute to the protection of the health and life of people, and what the consequences would be in the field of mental health, material well-being, family life, and in numerous other fields. The third paragraph of Article 5 of the CDA determines that the NIPH and the regional health care institutions monitor and examine the epidemiological circumstances of communicable diseases in conformity with the obligations adopted by international agreements and in conformity with WHO programmes, and on such basis and, in conformity with the health care plan of the Republic of Slovenia, prepare programmes for preventing, managing, eliminating, and eradicating communicable diseases. Furthermore, the first paragraph of Article 46 of the CDA determines that monitoring the performance of the general and special measures referred to in this Act and the prevention and management of nosocomial infections are carried out by the NIPH and the regional health care institutions. However, these provisions do not refer to deciding on the measures determined by Article 39 of the CDA. The programmes determined by the third paragraph of Article 5 of the CDA are not at all intended to study the measures determined by Article 39 of the CDA, and the first paragraph of Article 46 of the CDA only refers to monitoring the performance of already adopted measures.

95. An important safeguard against arbitrary interferences with human rights and fundamental freedoms in such instances is also the clear, precise, and comprehensive informing of the public of the (expert) findings that are important for imposing the measures determined by points 2 and 3 of the first paragraph of Article 39 of the CDA, and the positions of the expert community as regards these measures. In fact, the public cannot effectively monitor the measures of the Government if it does not possess information as regards the spread and level of threat of the communicable disease at issue, if it does not know the positions of the expert community as regards the most appropriate methods to prevent the communicable disease, and if it is not informed of the reasons due to which the Government imposed the measures. The second paragraph of Article 39 of the CDA determines that the Government must notify the public of the measures that it introduces on the basis of the first paragraph of this Article, but it does not envisage informing the public of the circumstances and expert positions that are important for deciding on these measures.

96. It follows from the above that the legislature granted the Government a significantly too wide margin of appreciation in deciding on the measures determined by points 2 and 3 of the first paragraph of Article 39 of the CDA. Given that the instructions as to the spatial limitation of measures and the lack of the determination of the methods of responding (i.e. types of response), the criteria [for determining] the admissible duration of measures, the duty to consult and cooperate with the expert community, and the appropriate informing of the public are substantively empty, the legislature leaves it to the Government to select, at its own discretion, the manners (types) of taking action, the scope and duration of the limitations by which the freedom of movement of (possibly all) inhabitants of the territory of the Republic of Slovenia can (also very intensively) be interfered with. The legislature 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 it will prohibit the gathering of people in those public places where, according to the Government's assessment, there exists a heightened risk of spreading the communicable disease. It only obliges the Government to assess, prior to introducing measures, whether the introduction or the spread of a communicable disease cannot be prevented by other measures referred to in the CDA.

97. By the substantively empty points 2 and 3 of the first paragraph of Article 39 of the CDA, the legislature waived its exclusive constitutional power to decide on limitations of human rights and fundamental freedoms on a general and abstract level by taking into account the general principle of proportionality. It must be taken into consideration that the principle of proportionality (which encompasses the requirement of the appropriateness, necessity, and proportionality in the narrower sense of the measures by which human rights and fundamental freedoms are interfered with)[50] binds not only the legislature but also all state authorities who use the law (such that they adopt implementing regulations, adopt individual and concrete legal acts, or perform material acts on the basis of the law). Due to its general and abstract nature (which ensures the equality of treatment and predictability),[51] statutory text can never have one single meaning such that a solution to a concrete problem could be derived therefrom without further interpretation. Therefore, the assessment of the appropriateness, necessity, and proportionality in the narrower sense of measures that interfere with human rights and fundamental freedoms is always left, at least to some extent, also to other state authorities. However, the legislature must always carry out at least the initial review and

[50] The appropriateness of a measure means that the pursued objective can indeed be attained therewith. The necessity of a measure means that the pursued objective cannot be achieved without the measure or by a milder measure. Proportionality in the narrower sense means that the weight of the consequences of the measure is proportionate to the value of the pursued objective or the expected benefits that will ensue due to the interference. See Para. 25 of the reasoning of Decision of the Constitutional Court No. U-I-18/02, dated 24 October 2003 (Official Gazette RS, No. 108/03, and OdlUS XII, 86.

[51] See M. Pavčnik, *op. cit.,* p. 119.

assessment of the proportionality of measures by which human rights and fundamental freedoms are interfered with, as in accordance with the Constitution the competence to limit human rights and fundamental freedoms is only granted thereto.

98. It follows from the reply of the Government that in the drafting of the CDA a review of proportionality was carried out, as it expressly determines that in the event of balancing between the constitutionally protected values of the life and health of the population, on the one hand, and the freedom of movement and association of individuals on the other, the protection of the life and health of the population has priority. One cannot concur with this thesis. From Article 39 of the CDA (and the Constitution) it only follows that the protection of the life and health of people *can* justify an interference with the freedom of movement and the right of assembly and association. Such entails that it must always be assessed whether a certain measure is at all appropriate and necessary for the protection of the health and life of people and whether the expected benefits as regards the protection of these values outweigh the weight of its interference with the freedom of movement and the right of assembly and association. Such an assessment, which essentially must be carried out by the legislature, is not prescribed by Article 39 of the CDA.

99. In this respect, the National Assembly draws attention to the fact that the CDA regulates different measures for preventing and managing very different communicable diseases. It opines that in such manner the system for protecting the population from communicable diseases appropriately responds and adapts to the actual circumstances and needs. Insofar as the National Assembly indicates by these allegations that a law cannot precisely prescribe in advance all possible modalities of different measures that would correspond to all concrete epidemiological circumstances, one has to concur to a certain extent with this argument. However, the legislature should have and had to determine the criteria for limiting the freedom of movement and the right of assembly and association significantly more precisely than it did in points 2 and 3 of the first paragraph of Article 39 of the CDA. Namely, the Act determines neither an appropriate substantive basis for the temporary and spatial determination of limitations nor the types of admissible limitations, and also does not contain other safeguards against arbitrary interferences with human rights and fundamental freedoms, such as the duty of the executive power to consult and cooperate with the expert community and the duty to inform the public of the circumstances and expert positions on which the limitations are based. Precise knowledge of the outbreak and spread of a particular communicable disease is not decisive for the regulation of these questions. Some communicable diseases for which the special measures determined by Article 39 of the CDA may be prescribed are known in advance, as they are listed in the first paragraph of Article 8 of the CDA. In fact, the CDA also allows for the introduction of measures determined by Article 39 in the event of the emergence of communicable diseases that are not exhaustively listed in the Act if they could jeopardise the health of the population (COVID-19 is such a disease). However, a more precise statutory regulation that could be adapted to already known diseases would not necessarily hinder an appropriate response to a new communicable

disease. If that nevertheless happened, the National Assembly should adopt, in the shortest time possible, (a sufficiently precise) statutory basis that would be adapted to the characteristics of this new disease. In the event this statutory basis could not be adopted sufficiently quickly, the CDA could also determine a regulation in accordance with which in the meantime the Government could exceptionally also prescribe different measures if it assessed that the measures prescribed in the Act are not appropriate or sufficient to respond to such disease, but only by also taking into account strict temporary limitations and the obligation to consult the expert community.

100. In view of the above, the Constitutional Court concludes that by points 2 and 3 of the first paragraph of Article 39 of the CDA the legislature authorised the Government, in order to prevent communicable diseases, to decide on interferences with the freedom of movement and the right of assembly and association without also determining a sufficient substantive basis for the exercise of such authorisation. The challenged points 2 and 3 of the first paragraph of Article 39 of the CDA are thus inconsistent with the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution.

101. The established unconstitutionality requires that the challenged statutory regulation be abrogated. However, the Constitutional Court had to take into consideration that by abrogating points 2 and 3 of the first paragraph of Article 39 of the CDA, the executive branch of power would lose the statutory basis to limit [the freedom of] movement and [the right of] assembly in order to prevent communicable diseases, including COVID-19. Until the legislature adopts a new statutory regulation, the state would perhaps be unable to fulfil its positive constitutional obligation to protect the health and life of people. Since the right to health and life are fundamental constitutional values, the abrogation of the challenged statutory regulation could lead to an even worse unconstitutional situation than in the event the unconstitutional regulation remains in force for a certain period of time. For such reason, the Constitutional Court was unable to abrogate the challenged statutory regulation. Since the questions that the challenged regulation should address include complex expert questions, the Constitutional Court was also unable to establish that the challenged statutory regulation was unconstitutional, and, on the basis of the second paragraph of Article 40 of the CCA, by means of the manner of implementing the Decision, determine a transitional statutory regulation that is in conformity with the Constitution. In view of the above, on the basis of Article 48 and the second paragraph of Article 40 of the CCA, the Constitutional Court decided that points 2 and 3 of the first paragraph of Article 39 of the CDA are inconsistent with the Constitution (point 1 of the operative provisions), that the National Assembly must remedy the established inconsistency within two months of the publication of this Decision in the Official Gazette of the Republic of Slovenia (point 2 of the operative provisions), and until the established inconsistency is remedied, points 2 and 3 of the first paragraph of Article 39 of the CDA shall apply (point 3 of the operative provisions). Hence, in order to protect the health and life of individuals, the Constitutional Court prevented the application of unconstitutional statutory provisions until the established unconstitutionality is remedied. Thereby, it established for the future a statutory basis for the adoption of implementing regulations

that regulate the measures determined by points 2 and 3 of the first paragraph or Article 39 of the CDA, and at the same time also for all implementing regulations adopted on the basis of the challenged statutory provisions that are still in force. As a result, courts must not deny the validity of the mentioned implementing regulations as regards relations that arise following the publication of this Decision in the Official Gazette of the Republic of Slovenia due to the unconstitutionality established in this Decision.

102. In determining the length of the time limit needed to remedy the established unconstitutionality, the Constitutional Court took into consideration that, on the basis of the challenged unconstitutional statutory regulation, interferences with the freedom of movement and the right of assembly and association of all individuals in the territory of the Republic of Slovenia have been occurring for more than a year. Therefore, the further application of these unconstitutional statutory provisions must be limited to the shortest time period necessary for the adoption of a statutory regulation that is in conformity with the Constitution. In the assessment of the Constitutional Court, the two-month time limit is sufficiently long to enable the elimination of the unconstitutional situation. In relation thereto, the National Assembly may remedy the established unconstitutionalities with the Constitution in various ways. The National Assembly may appropriately substantively supplement the general regulation determined by points 2 and 3 of the first paragraph of Article 39 of the CDA, it may adopt a special statutory regulation that is adapted to COVID-19,[52] but it can also order by itself measures that limit the movement and gathering of the population in order to prevent [the spread of] COVID-19 if it assesses that thereby it will be able to sufficiently quickly adapt the statutory regulation to the changing circumstances.

B – III

The review of Ordinance/30, Ordinance/38, Ordinance/52, Ordinance/60, and Ordinance/69

103. Ordinance/30, Ordinance/38, Ordinance/52, and Ordinance/60 were adopted with reference to points 2 and 3 of the first paragraph of Article 39 of the CDA, while Ordinance/69 was adopted with reference to point 3 [of the first paragraph] of Article 39 of the CDA. Furthermore, in the introductions of Ordinance/30 and Ordinance/38 also Article 2 and the eighth paragraph of Article 20 of the GRSA are listed as the statutory basis.

104. Article 2 of the GRSA determines the competences of the Government. The first paragraph of the mentioned Article determines that the Government determines, directs, and harmonises the performance of the state's policies in accordance with the

[52] See Article 28a of the German Prevention and Control of Communicable Diseases Act (*Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen*), which was adopted specifically for the prevention of the spread of COVID-19.

Constitution, laws, and other general acts of the National Assembly. To this end, it issues regulations and adopts other legal, political, economic, financial, organisational, and other measures necessary to ensure the development of the state and the regulation of circumstances in all fields of the state's competence. The remaining paragraphs of Article 2 of the GRSA refer to the initiative function of the Government (the second paragraph) and the budget memorandum (the third paragraph). The third paragraph of Article 21 of the GRSA determines that "[t]he Government regulates by an ordinance individual questions or adopts individual measures of general importance and adopts other decisions for which a law or decree determines that the Government regulates such by an ordinance." Hence, the mentioned provisions of the GRSA on the general level define the competences of the Government and determine the type of act by which the Government regulates questions of general importance. As such, they do not provide a substantive basis for the regulation of measures by means of implementing regulations by which human rights and fundamental freedoms are interfered with in order to prevent the spread of communicable diseases. Not even the eighth paragraph of Article 20 of the GRSA, which determines that decisions on the implementation of crisis management and leadership in a complex crisis are to be adopted by the Government upon a reasoned proposal of the competent minister, provides such a basis. The substantive basis for governmental measures adopted in order to prevent the spread of communicable diseases must be sought in the law that regulates the field of the prevention of communicable diseases, i.e. in the CDA.

105. In view of the above, the Constitutional Court deemed that Ordinance/30, Ordinance/38, Ordinance/52, and Ordinance/60, insofar as they regulated the limitation of movement and/or gathering, were adopted on the basis of points 2 and/or 3 of the first paragraph of Article 39 of the CDA.

106. The Constitutional Court assessed that points 2 and 3 of the first paragraph of Article 39 of the CDA do not contain a sufficient substantive basis for the Government's decision-making as regards interferences with the freedom of movement and the right of assembly and association; therefore, they are inconsistent with the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution (point 1 of the operative provisions). The above-mentioned entails that also Ordinance/30, Ordinance/38, Ordinance/52, Ordinance/60, and Ordinance/69 are inconsistent with these two constitutional provisions in the part in which they were adopted on the basis of these statutory provisions.

107. Since the mentioned ordinances ceased to be in force, on the basis of the second paragraph in conjunction with the first paragraph of Article 47 of the CCA, the Constitutional Court established that they were inconsistent with the Constitution in the part in which they were adopted on the basis of points 2 and 3 of the first paragraph of Article 39 of the CDA (Point 6 of the operative provisions).

108. In conformity with the first paragraph of Article 47 of the CCA, the Constitutional Court decides whether the establishment of the unconstitutionality of an invalid implementing regulation with the Constitution has the effect of abrogation or annulment. In point 3 of the operative provisions of this Decision, the Constitutional Court decided that points 2 and 3 of the first paragraph of Article 39 of the CDA shall apply despite their inconsistency with the Constitution. Thereby, for the [immediate] future, it enabled the adoption of implementing regulations on the basis of points 2 and 3 of the first paragraph or Article 39 of the CDA, and at the same time ensured a statutory basis for all implementing regulations adopted on the basis of the challenged statutory provisions that are still in force. It decided so in order to protect the health and lives of people who, due to the absence of a statutory basis for the limitation of [the freedom of] movement and gathering in order to prevent [the introduction or spread of] communicable diseases could be at risk in the future, and thus prevented the occurrence of an even graver unconstitutional situation. The above-mentioned cannot be a reason for the Constitutional Court to not abrogate or annul the challenged ordinances that ceased to be in force prior to the adoption of this Decision. The sole effect that these ordinances still have is that they apply for disputes concerning the questions that they regulated when they were in force. However, such application has no effect on the spread of COVID-19 and cannot contribute to the protection of the health and lives of people. Hence, the Constitutional Court had no reason to not abrogate or annul the challenged ordinances due to the finding that they were inconsistent with the Constitution. The Constitutional Court decided that the establishment of the inconsistency of the challenged ordinances with the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution shall have the effect of abrogation (Point 7 of the operative provisions).

109. In view of such decision, the Constitutional Court did not assess the other allegations that refer to Ordinance/30, Ordinance/38, Ordinance/52, Ordinance/60, and Ordinance/69.

C

110. The Constitutional Court adopted this Decision on the basis of Article 48, the second paragraph of Article 40, the third paragraph of Article 25, Article 47, and the third paragraph of Article 38a of the CCA, and the third indent of the third paragraph in conjunction with the fifth paragraph of Article 46 of the Rules of Procedure of the Constitutional Court (Official Gazette RS Nos. 86/07, 54/10, 56/11, 70/17, and 35/20), composed of: Dr Rajko Knez, President, and Judges Dr Matej Accetto, Dr Rok Čeferin, Dr Dunja Jadek Pensa, Dr Špelca Mežnar, Dr Marijan Pavčnik, Marko Šorli, and Dr Katja Šugman Stubbs. Points 1, 2, 3, 6, and 7 [of the operative provisions] were adopted by five votes against three. Judges Jadek Pensa, Knez, and Šorli voted against. The Constitutional Court unanimously adopted Points 4, 5, 8, 9, and 10 of the operative provisions. Judges Jadek Pensa, Knez, and Šorli submitted partially concurring and

partially dissenting opinions. Judges Mežnar, Šugman Stubbs, and Pavčnik submitted concurring opinions.

Dr Rajko Knez
President