



U-I-50/21

17 June 2021

## DECISION

At a session held on 17 June 2021 in proceedings to review constitutionality initiated upon the petition of Sanja Fidler, Ljubljana, and Irfan Beširević, Ljubljana, both represented by Zakonjšek and Zakonjšek Law Firm, d. o. o., Ljubljana, and in proceedings initiated by an order of the Constitutional Court, the Constitutional Court

### **decided as follows:**

**1. The third paragraph of Article 5 of the Ordinance on the Temporary Partial Prohibition of the Movement and Gathering of People in order to Prevent Infection with SARS-CoV-2 (Official Gazette RS, Nos. 27/21, 30/21, and 35/21), the second paragraph of Article 5 of the Ordinance on the Temporary Partial Prohibition of the Movement and Gathering of People in order to Prevent Infection with SARS-CoV-2 (Official Gazette RS, Nos. 27/21, 30/21, 35/21, 40/21, and 43/21), the third paragraph of Article 6 of the Ordinance on the Temporary Partial Prohibition of the Movement and Gathering of People in order to Prevent Infection with SARS-CoV-2 (Official Gazette RS, No. 47/21), the third paragraph of Article 4 of the Ordinance on the Temporary Partial Prohibition of the Movement and Gathering of People in order to Prevent Infection with SARS-CoV-2 (Official Gazette RS, No. 55/21), and Article 3 of**

**the Ordinance on the Temporary Partial Prohibition of the Movement and Gathering of People in order to Prevent Infection with SARS-CoV-2 (Official Gazette RS, Nos. 63/21, 66/21, and 69/21) were inconsistent with the Constitution in the part wherein they prohibited assemblies or limited them to a maximum of ten persons.**

**2. The finding of the preceding Point shall have the effect of abrogation.**

## **REASONING**

### **A**

1. The subject of the review of constitutionality were multiple provisions of the ordinances issued by the Government in the parts thereof that completely prohibited public protests between 27 February and 17 March and between 1 April and 18 April 2021, and then limited public protests to up to ten participants between 18 March and 31 March and between 23 April and 14 May 2021.

2. In the petition, dated 2 March 2021, the two petitioners challenged the third paragraph of Article 5 of the Ordinance on the Temporary Partial Prohibition of the Movement and Gathering of People in order to Prevent Infection with SARS-CoV-2 (Official Gazette RS, Nos. 27/21, 30/21, and 35/21 – hereinafter referred to as Ordinance 27/21), which prohibited all public protests. By a supplement dated 19 March 2021, they expanded the petition so as to also include the modified second paragraph of Article 5 of the Ordinance on the Temporary Partial Prohibition of the Movement and Gathering of People in order to Prevent Infection with SARS-CoV-2 (Official Gazette RS, Nos. 27/21, 30/21, 35/21, 40/21, and 43/21 – hereinafter referred to as Ordinance 40/21), which limited public protests to a maximum of ten participants.

3. As regards the complete prohibition of public protests as determined by Ordinance 27/21, they claim that the challenged regulation is inconsistent with the right of peaceful assembly determined by Article 42 of the Constitution, the right to freedom of expression

determined by Article 39 of the Constitution, and the principle of equality determined by Article 14 of the Constitution. They stress that in the current political situation they wish to publicly express their opinion concerning public matters because they disagree with certain policies and because they are worried about the future of the state. They are also opposed to some governmental measures for limiting the COVID-19 epidemic because they are insufficient. It is of key importance for the petitioners to be able to peacefully gather with those sharing the same ideas and to be critical towards the authorities in power in public places. They opine that the possibility of gathering in public places, in particular in front of the symbolic institutions of the authorities, is one of key elements of democracy. Allegedly, citizens should have the possibility to participate in a public debate that arises in the public space as regards the current and long-term political directions. Only in such a manner would they be enabled to have an influence on the selection of the people's representatives in the National Assembly and on the decision-making of the current representatives of the people during their term of office. The petitioners draw attention to the fact that in comparison to the holders of political power, "normal" citizens have significantly less access to the mass media, and also the reach of their opinions on social media is allegedly significantly weaker. In this regard, they also refer to Articles 10 and 11 of 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), Article 21 of the International Covenant on Civil and Political Rights (Official Gazette RS, No. 35/92 – MP, No. 9/92), and General Commentary No. 37 of the United Nations Human Rights Committee on such Article.<sup>[1]</sup>

4. The petitioners draw attention to the fact that in order to prevent the spread of infection, the Government prescribes the ways in which different forms of the association of people can be carried out, e.g. shopping, business meetings, sport and recreational activities, or the collective exercise of freedom of religion. Allegedly, the Government continuously seeks solutions to reduce to the greatest extent possible the possibility of the transmission of infection. On the other hand, it entirely and for a long period prohibited public protests. The forms of association that entail a peaceful meeting [i.e. gathering] of people for the purpose of jointly expressing political opinions hence enjoy less judicial protection than some other admissible forms of gatherings. The petitioners draw attention to the practice of minor offence authorities, which allegedly impose fines on those who express their political positions in a public space, even if it is just two persons carrying a bicycle on their shoulders. On the contrary, it is admissible to stand in line for the purposes of shopping or

testing or to be in a crowd for other purposes, even in closed spaces such as shopping malls and religious institutions. The petitioners refer to several documents from which it allegedly follows that preventing public protests does not significantly contribute to preventing infection. It is allegedly also important that public protests are usually held in open spaces outside, where the possibility of infection is lower. In its documents, the Government allegedly did not substantiate why the complete prohibition of public protests is indispensable to prevent the spread of infection. It allegedly also failed to explain why religious adherents are treated more favourably than those expressing a political opinion. The petitioners opine that proportionality would be ensured if public protests were allowed, provided that the hygienic instructions and recommendations of the National Institute of Public Health (hereinafter referred to as the NIPH) concerning social distancing, wearing masks, and disinfection are complied with.

5. The petitioners opine that also limiting the number of participants at public protests to a maximum of ten persons as determined by Ordinance 40/21 was not proportionate. There allegedly exist milder measures by which the Government could prevent the spread of communicable diseases such that it would still allow public protests with more than ten participants. Allegedly, the Government equates the right of assembly within the meaning of Article 42 of the Constitution with all other gatherings of people, which are only protected within the framework of the general freedom to act. The Government allegedly also failed to take into consideration the epidemiologically relevant differences between the spread of the virus in closed and open spaces. The limitations of the right of assembly are allegedly stricter than is applicable for other occurrences where more people gather, possibly even in closed spaces. The petitioners draw attention to the limitations then in force regarding shops (one customer per 30 sq. meters in closed spaces and per 10 sq. meters in open markets), bars and restaurants (a distance of 1.5 meters between persons and at least 3 meters between the edges of tables), and for the exercise of freedom of religion (30 sq. meters per participant or family in a closed space). They also draw attention to the fact that in accordance with General Commentary No. 37 of the United Nations Human Rights Committee, Member States must not limit the number of participants at peaceful public protests, unless there exists a clear connection to a justifiable reason for the limitation. The intensity of interferences allegedly also depends on how rights are constitutionally protected, and the authorities should do everything in their power to ensure that rights ranked higher are observed. In foreign case law, only limitations allowing gatherings of a very large number of people are allegedly admissible.

Limiting gatherings to ten people allegedly entails such a low number of participants that it interferes not only with the form of freedom of expression, but also with its substance. Namely, a message conveyed by ten people is substantially weaker than a message expressed by a greater number of people.

6. In its reply to the petition, dated 2 March 2021, and its expansion, dated 19 March 2021, the Government alleges that the measure of the temporary prohibition of all public protests is based on point 3 of the first paragraph of Article 39 of the Communicable Diseases Act (Official Gazette RS, No. 33/06 – official consolidated text and 142/20 – hereinafter referred to as the CDA). The measure is allegedly a constitutionally consistent concretisation of the limitation determined by the third paragraph of Article 42 of the Constitution. It was allegedly prepared and adopted in conformity with the latest findings of the epidemiological and infectiological expert communities, and was allegedly directed towards limiting social contacts among the population. It allegedly pursued the legitimate aim of protecting public health. The findings and opinions of the expert health care community have allegedly been presented a number of times at press conferences and in different statements for the media. In the opinion of the expert health care community, such measures are the only effective means of preventing the spread of the COVID-19 epidemic. A summary of a study on the effectiveness of the measures of states published in December 2020 in the journal *Nature Human Behaviour* allegedly showed that the most effective measures for containing an epidemic are the following: (1) the limitation of small private gatherings; (2) the closure of educational institutions; (3) measures at the borders; (4) the general accessibility of protective equipment; (5) limitation of the movement of individuals; and (6) a general lockdown. Furthermore, the expert advisory group at the Ministry of Health (hereinafter referred to as the advisory group) allegedly assessed, on 11 October 2020, that it was imperative to immediately introduce the measure of the prohibition of all public and cultural events, as well as religious ceremonies and marriages, and on 11 November 2020 it assessed that it was imperative to limit gatherings to [only] household members, with the exception of the provision of services in the event of an emergency. By the adopted ordinances, the Government allegedly prohibited not only public protests, but also all other forms of gathering that in the opinion of the expert community represented a risk of the transmission of a communicable disease.

7. The Government opines that the measure of the temporary prohibition of public protests is not of such nature as to be classified among the most intensive interferences of the

state with human rights. Allegedly, it only entails a temporary limitation of rights in conformity with Article 15 of the Constitution. The Government opines that in a collision of the right to health and life of individuals [on the one hand], and the right of assembly and association [on the other], the former has priority (*salus populi suprema lex esto*). An equal orientation allegedly also follows from the first paragraph of Article 4 of the CDA. The experiences of some states that are allegedly already in the midst of the third wave of infections (i.e. Japan, South Korea, Indonesia) also allegedly show that the number and restrictiveness of measures have an effect on curbing the COVID-19 epidemic. An additional easing of measures at this moment could allegedly turn the curve [of infections] upwards, which would allegedly entail the need to intensify the measures in other fields (schooling, the economy, the limitation of movement to one's region or municipality). The decision on the admissibility of events and gatherings attended by a maximum of ten people was allegedly adopted by taking into consideration the trend in the number of infections, which was slightly decreasing at the time. The mentioned measure was allegedly eased subsequently because there was allegedly a greater risk of the transmission of infection at events, gatherings, celebrations, and marriages due to the greater number of participants, which is more difficult to control. The limitation of the number of participants to a maximum of ten persons allegedly entails a limitation to such a number that does not yet represent an additional risk of the exacerbation of the epidemiological situation. The Government also draws attention to the spread of new, more infectious, variants of the virus and to the dynamics of the supply of vaccines. Allegedly, the adopted ordinances do not interfere even with the right to equality before the law, because, as regards business, religious, and other activities progressively permitted by the Government, they allegedly concern different situations that require a different regulation. In this respect, the Government reiterates that at public protests it is more difficult to control the number of participants, and the likelihood that an appropriate distance between the participants at a public protest will be maintained is allegedly low. Experiences in some other European states such as Croatia, Austria, and Sweden have also shown this, as have experiences in Slovenia. In this respect, the Government draws attention to 13 public protests that were held in different cities in Slovenia and at which, despite the prohibition of public protests or the limitation thereof to ten people, between 20 and 200 participants gathered.

8. By Order No. U-I-50/21, dated 15 April 2021 (Official Gazette RS, No. 60/21), the Constitutional Court accepted for consideration a petition to initiate proceedings to review

the constitutionality and legality of the challenged provisions of Ordinance 27/21 and Ordinance 40/21. It initiated, *ex officio*, proceedings to review the constitutionality and legality of the third paragraph of Article 6 of the Ordinance on the Temporary Limitation of the Movement and the Prohibition of Gathering of People in order to Prevent Infection with SARS-CoV-2 (Official Gazette RS, No. 47/21 – hereinafter referred to as Ordinance 47/21) and of the third paragraph of Article 4 of the Ordinance on the Temporary Limitation of the Movement and the Prohibition of Gathering of People in order to Prevent Infection with SARS-CoV-2 (Official Gazette RS, No. 55/21 – hereinafter referred to as Ordinance 55/21), which completely prohibited public protests. The Constitutional Court temporarily suspended the implementation of the challenged provision of Ordinance 55/21. It determined the manner of the suspension of the implementation of the regulation such that it imposed on the Government the obligation to adopt a new regulation on public protests in which the importance of public protests for the functioning of a democratic state and various possibilities for limiting adverse consequences for public health would be taken into consideration to a greater degree. In doing so, it stressed that within the framework of such regulation, it is possible to prescribe, for instance, a greater maximum number of participants at a public protest, the minimal distance between such, and the use of masks and disinfection products, similarly as the Government has previously regulated the collective exercise of religious freedom (paragraph 27 of the reasoning of Constitutional Court Order No. U-I-50/21).

9. The Minister of the Interior also submitted his opinion on the petition, which was accepted for consideration by Order No. U-I-50/21, dated 15 April 2021. He opines that Articles 39 and 42 of the Constitution do not protect freedom of expression and the right of assembly and association if the exercise of these rights is politically motivated. The motive for filing the petition at issue was allegedly the political orientation of the petitioners, which is disputed. The expression of political positions at public protests allegedly does not have greater weight than the health of citizens.

10. By a supplement dated 4 May 2021, the petitioners expanded the petition so as to also include Articles 2 and 3 of the Ordinance on the Temporary Prohibition of the Gathering of People in order to Prevent Infection with SARS-CoV-2 (Official Gazette RS, Nos. 63/21, 66/21, and 69/21 – hereinafter referred to as Ordinance 63/21) in the part where it limited public protests; however, also this Ordinance has in the meantime already ceased to be in force.<sup>[2]</sup> They explain that on the basis of the instructions of the Constitutional Court in

Order No. U-I-50/21, dated 15 April 2021, the Government adopted the Ordinance Supplementing the Ordinance on the Temporary Limitation of the Movement of People and the Prohibition of the Gathering of People in order to Prevent Infection with SARS-CoV-2 (Official Gazette RS, No. 62/21 – hereinafter referred to as Ordinance 62/21). The mentioned Ordinance allegedly limited the number of participants at organised public protests to 100 participants and was only in force for three days. By Ordinance No. 63/21, the Government allegedly regulated anew the number of participants at public protests to ten persons, and, differently than for other forms of gathering, it introduced additional conditions (social distancing and the maximum allowed density of participants). Ordinance 63/21 also completely prohibited spontaneous public protests. In such manner, the Government allegedly treats public protests worse than private gatherings for entertainment purposes, because such additional conditions are allegedly not required for the latter. The petitioners draw attention to the fact that contact between more than ten people is allowed in shops, at open markets, the terraces of bars and restaurants, when business entities perform activities, and in work environments. For the majority of the second wave of the epidemic, the Government allegedly did not encourage work from home, although studies allegedly showed that workplaces were an important source of infection. Conversely, by paying bonuses, it allegedly even promoted workers' presence at workplaces. The opinion of the expert group allegedly lacked sufficient argumentation, as it allegedly failed to take into consideration studies that clearly show that the probability of contracting the SARS-CoV-2 virus outside is minimal, and if social distancing and the wearing of masks are observed, it is virtually zero. The limitation of the number of participants at a public protest to ten people is allegedly arbitrary and disproportionate. The maximum number of participants allowed at a protest should allegedly be sufficiently high for the right of peaceful assembly to not be hollowed out. A study of the European Centre for Parliamentary Research and Documentation (ECPRD) from November 2020 allegedly listed the following examples of limitations on the number of participants at public protests: Belgium (400), the Czech Republic (500), Finland (50), France (5,000), Germany (5,000 in the Land of Berlin), Latvia (3,000), Poland (150), and Sweden (150).

11. In its reply to the expansion of the petition, dated 4 May 2021, the Government alleged that it had adopted Ordinance 63/21 by taking into consideration the findings of the epidemiological and infectiological expert communities. The plan for easing the measures for containing the epidemic of COVID-19, a communicable disease, allegedly prescribed that the assembly and association of up to ten people would be permitted in the orange



phase. Ordinance 63/21 was allegedly adopted in conformity with the proposal of the expert group, which allegedly stressed that also the temporary prohibition of mass public protests would contribute to reducing the number of infected persons if [other] measures are not observed, and that the measures must not be eased too quickly. In fact, when the number of participants is so low, in the event of violations the Police can allegedly still effectively prevent an uncontrolled escalation and thus a more extensive wave of the spread of infection. The Government allegedly also took into consideration the allowed number of participants at gatherings in Germany and France, and appropriately reduced it in view of the lower number of inhabitants and the higher incidence of infections in Slovenia. The Government allegedly also observed the instruction of the Constitutional Court that it should regulate the gathering [of people] at public protests in the same way as is regulated the collective exercise of freedom of religion. By Ordinance 63/21, the Government prohibited unorganised public protests because at such protests, as was the case on 27 April 2021, when 10,000 participants attended a public protest, the rules of the NIPH are allegedly regularly violated. It is allegedly not possible to predict the number of participants at unorganised public protests, or their behaviour. Allegedly, in view of the [high] number of participants at public protests, the Police are unable to prevent mass violations of epidemiological measures. When singing, calling, and speaking, aerosols are formed, by means of which the virus can allegedly be spread. The virus allegedly does not distinguish between different forms of gathering, despite the fact that some of them enjoy a higher level of constitutional protection. At commercial gatherings, the specificity of people's behaviour in a crowd is completely different; therefore, a comparison therewith is allegedly not appropriate.

12. The replies of the Government and the opinion of the Minister of the Interior were served on the petitioners, who replied thereto. They draw attention to the fact that unorganised public protests are still not allowed and that the current regulation still enables the sanctioning of individuals due to the expression of opinions. Prior to adopting Order of the Constitutional Court No. U-I-50/21, dated 15 April 2021, allegedly not a single discussion of the expert group was focused on peaceful protests. The statutory basis for limiting the right to peacefully protest is allegedly not sufficient.

**B – I**

## Procedural Requirements

13. The Constitutional Court has already adopted a position as to the procedural requirements for a substantive assessment of the challenged provisions of Ordinance 27/21 and Ordinance 40/21 in Order No. U-I-50/21, dated 15 April 2021, by which the petition was accepted for consideration.<sup>[3]</sup> As regards Ordinance 63/21, the petitioners allege substantively the same as with respect to the provisions of Ordinance 27/21 and Ordinance 40/21. Article 3 of Ordinance 63/21 contains a substantively equivalent regulation of public protests as the second paragraph of Article 5 of Ordinance 40/21, because it also limits the number of participants at public protests to a maximum of ten persons, and also determines additional conditions as regards the maximum density and [minimum] distance between participants. Therefore, for the same reasons as are mentioned in Order of the Constitutional Court No. U-I-50/21, dated 15 April 2021, also the procedural requirements for a substantive assessment of the allegations of the petitioners that refer to Article 3 of Ordinance 63/21 are fulfilled. The petitioners do not substantively challenge the general limitation of gatherings to ten persons, which was determined by Article 2 of Ordinance 63/21. The Constitutional Court accepted for consideration the petition for the initiation of proceedings to review the constitutionality of Article 3 of Ordinance 63/21 as regards public protests and, since the conditions determined by the fourth paragraph of Article 26 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) were fulfilled, it proceeded to decide on the case.

14. By Order No. U-I-50/21, dated 15 April 2021, the petition for a review of constitutionality was accepted for consideration by the Constitutional Court only as regards public protests that do not require a decision by an administrative authority. In the proceedings to decide on the accepted petition, it transpired that it is not possible to unambiguously draw a line between the two subgroups of public protests in view of the regulation in the Public Assembly Act (Official Gazette RS, No. 64/11 – official consolidated text – hereinafter referred to as the PAA). A decision by an administrative authority is not required in any case for unorganised public protests (Article 32 of the PAA). For other forms of public protests, it is required that they be registered in advance at the competent police station, which, however, does not initiate specific administrative decision-making unless it is established that prior authorisation is required for that particular public protest (Article 15 of the PAA). In accordance with point 1 of Article 13 of the PAA, an authorisation

must only be requested for a public protest if an exceptional use of a road is at issue. An administrative decision is not even required for participation in a public protest, which is protected in the framework of Article 42 of the Constitution. In the proceedings for reviewing the petition, the Constitutional Court established that there are no particular differences in the upper premises of both groups of public protests, and the substantiations of the petitioners and the replies of the Government and of the Minister of the Interior refer to all forms of public protests as determined in point 2 of the first paragraph of Article 4 of the PAA.<sup>[4]</sup> Also the European Court of Human Rights (hereinafter referred to as the ECtHR) has already allowed an appeal directly against the implementing act by which the Police prohibited public protests in England for a longer period of time without requiring that the petitioners exhaust the path of attempting to acquire a permit for a public protest regarding which it is evident in advance that it will be unsuccessful.<sup>[5]</sup> For the above reason, the Constitutional Court, in view of fulfilment of the conditions determined by the fourth paragraph of Article 26 of the CCA, expanded the review of legality and constitutionality to the challenged provisions of the ordinances insofar as they refer to public protests.

## **B – II**

### **As Regards the Statutory Basis for Limiting the Right Determined by Article 42 of the Constitution**

15. In the part that was the subject of the review by the Constitutional Court (i.e. the regulation of public protests), the provisions of the ordinances were adopted on the basis of point 3 of the first paragraph of Article 39 of the CDA. This point determines that 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 prohibit the gathering of people in schools, cinemas, bars and restaurants, and other public places until the threat of the spread of the communicable disease ceases. By Decision No. U-I-79/20, dated 13 May 2021 (Official Gazette RS, No. 88/21), the Constitutional Court assessed that point 3 of the first paragraph of Article 39 of the CDA does not contain a sufficient substantive basis for the Government's decision-making on interferences with the right of assembly and association and that therefore it is inconsistent with the third paragraph of Article 42 of the Constitution.

The above-mentioned entails that also the third paragraph of Article 5 of Ordinance 27/21, the second paragraph of Article 5 of Ordinance 40/21, the third paragraph of Article 6 of Ordinance 47/21, the third paragraph of Article 4 of Ordinance 55/21, and Article 3 of Ordinance 63/21 were inconsistent with this provision of the Constitution in the parts in which they prohibited public protests or limited them to ten participants.[\[6\]](#)

16. Since the mentioned provisions of the ordinances were inconsistent with the Constitution already due to a lack of a sufficient substantive statutory basis, it was not necessary to assess the other alleged violations of human rights. Nevertheless, the Constitutional Court decided to review the petition also as regards the question due to which it accepted the petition for consideration by the Order dated 15 April 2021 – namely how and under which conditions it is admissible, during an epidemic, to interfere with the right of peaceful assembly and public meeting, as determined by the first paragraph of Article 42 of the Constitution. It also determined such because there has not been any constitutional case law that refers precisely to public protests as a form of the collective expression of opinions on public matters.

### **The Content of the Right of Peaceful Assembly and Public Meeting**

17. The first paragraph of Article 42 of the Constitution guarantees the right of peaceful assembly and public meeting. This right protects the possibility of multiple persons associating for the purpose of participating in the public expression and exchange of ideas and opinions.[\[7\]](#) Within the framework thereof, the right to organise gatherings and to participate in gatherings is protected.[\[8\]](#) Although this is a right of individuals, it can only be exercised collectively due to its specific nature.[\[9\]](#) The right not only protects gatherings at which public discussions and polemics are presented, but also various forms of collective actions, including non-verbal forms thereof. These forms include gatherings in the form of public protests at which the participants express their opinions in an illustrative or some other manner that attracts the attention of third persons. However, entertainment or commercial events do not entail meetings within the meaning of Article 42 of the Constitution, as they are intended to merely connect people or to provide entertainment without the common goal of participating in a public form of expressing opinions.[\[10\]](#)

18. The right of peaceful assembly and public meeting protects all gatherings, unless the intention of the organisers or participants is to perform or incite violence or to deny the

foundations of a democratic society.<sup>[11]</sup> However, a gathering at which isolated instances of violence occur is not considered to be violent.<sup>[12]</sup> The possibility that persons who are not members of the group of organisers join a gathering with the intention of performing violence does not eliminate the peaceful character of such gathering.<sup>[13]</sup>

19. The right of peaceful assembly and public meeting, in the same way as the right to the general freedom of action determined by Article 35 of the Constitution, ensures the development of an individual's personality, and is more special in relation to the latter.<sup>[14]</sup> In a similar manner as personality rights, the right of peaceful assembly and public meeting is above all a defensive right (i.e. a right that has a negative status) that also and primarily benefits minority social groups with a different opinion.<sup>[15]</sup> As a defensive right, it ensures individuals the right to independently decide on the location, time, manner, and content of a gathering, and at the same time prohibits the state from forcing an individual to gather or from preventing an individual to participate in a gathering.<sup>[16]</sup> From this perspective, the right of peaceful assembly and public meeting holds special importance in a free society, as the possibility of gathering without limitations and without the obligation to obtain prior authorisation has always been considered a symbol of the liberty, independence, and sovereignty of conscious citizens.<sup>[17]</sup>

20. When ensuring the right of peaceful assembly and public meeting, the state not only has the negative obligation to refrain from interferences therewith, but it also has the positive obligation to promote and protect the exercise thereof. The state must also proceed from the presumption *in favorem* of the organisation of public protests.<sup>[18]</sup> The positive obligations of the state include the duty to cooperate and to seek agreement with the organisers of a gathering in order to realise the smooth as possible realisation thereof.<sup>[19]</sup>

21. The question of the admissibility of interferences with the right of peaceful assembly determined by the first paragraph of Article 42 of the Constitution has not yet been addressed in the hitherto constitutional case law. However, when reviewing interferences with the right to the freedom of expression of opinions determined by Article 39 of the Constitution, the Constitutional Court has already stressed a number of times that the public and open discussion of matters of general interest entails an indispensable component of a free democratic society.<sup>[20]</sup> In the same way as freedom of expression entails a constitutive element of a free democratic society, that holds no less true for the

right of peaceful assembly and public meeting as a form of the collective expression of opinions.<sup>[21]</sup> In a democratic society, opinions clash and positions are confronted with each other and expressed in an open discussion also by exercising the right of peaceful assembly and public meeting.<sup>[22]</sup> At gatherings within the meaning of Article 42 of the Constitution, participants express their beliefs not only orally (by holding speeches) or in writing (banners), but also by being physically present, by their behaviour, by interacting with one another, and also by choosing the location of the public protest.

22. The constitutional protection of gatherings for the purpose of expressing political opinions – i.e. opinions on the regulation of social situations and decision-making by the authorities in power – exceeds mere protection against state interferences with the development of an individual's personality. In the literature, the position has been established that the right of peaceful assembly and public meeting, in the same way as the right of association, stems from the principle of democracy (Article 1 of the Constitution) and this has a strong political component because thereby individuals, together with others, express their beliefs and opinions on social matters.<sup>[23]</sup> By Decision No. Up-301/96, dated 15 January 1998 (Official Gazette RS, No. 13/98, and OdlUS VII, 98), the Constitutional Court stressed that the right of assembly and association determined by Article 42 of the Constitution is a fundamental human right that enables not only the free expression of opinions but also the formation of political will and self-organisation. It characterised free democratic society as a constitutional regulation that, by excluding any violence and arbitrariness, represents the social order of a state governed by the rule of law on the basis of the self-determination of the people in view of the will of the majority, as well as liberty and equality. The functioning of free democratic regulation is ensured by the system of legally determined rules of conduct, which, on the basis of the mentioned principles, have developed throughout the long historical development in conformity with the democratic tradition of the European legal civilisation. Freedom of opinion, of expression, and of forming one's political will and association are ensured in various ways and lead to a multi-party system and to an organised political opposition.<sup>[24]</sup>

23. The second paragraph of Article 3 of the Constitution determines that in Slovenia power is vested in the people. Citizens exercise this power directly and through elections, consistent with the principle of the separation of legislative, executive, and judicial powers. Article 3 of the Constitution is tightly connected with exercise of the right to vote (Articles 43 and 80 of the Constitution), the right to participate in the management of public affairs

(Article 44 of the Constitution), and the right to a referendum (Article 90 of the Constitution).<sup>[25]</sup> The right of citizens to participate in the process of formulating the political will is thereby not exhausted, but is also realised by exercising the right of peaceful assembly and public meeting as determined by Article 42 of the Constitution.<sup>[26]</sup> The influence of holding public protests on the process of forming the political will is all the more important because, in contrast to large associations and financially strong actors, the access of individuals to the media is usually limited, as is, consequently, also their access to the public expression of opinions on public matters. Public protests in the form of gatherings are particularly important when the representatives of the authorities do not see the possibly wrong tendencies and irregularities in their decision-making or they consciously allow such by only taking into account the interests of a certain more influential social group. From such a perspective, the free exercise of the right of peaceful assembly and public meeting acts as a stabiliser in society that allows individuals to publicly express and discuss their discontentment, anger, and criticism. Through protests, the representatives of the authorities are, at the very beginning, warned of potential irregularities and deficiencies as regards the intended political decisions, by which a possibility is given to them to not make such disputed decisions.<sup>[27]</sup> Therefore, the allegation of the Minister of the Interior that it is questionable whether the right of peaceful assembly and public meeting determined by Article 42 of the Constitution also encompasses politically motivated public protests is not true. Gatherings intended to collectively express political opinions enjoy particularly high constitutional protection.<sup>[28]</sup>

24. Within the context of the right of peaceful assembly, non-organised (i.e. spontaneous) public protests are particularly important; their development has also been enabled by the development of new technologies and communication channels. At spontaneous public protests, participants gather without planning and without an organiser, in order to express opinions and positions on questions of public or joint importance. As such, they are an expression of free gathering without any limitations or preconditions imposed by the state, and in such manner they enable the immediate and direct response of individuals to recent events of public importance. The Venice Commission draws attention to the fact that spontaneous demonstrations are an element of a healthy democracy and that states must ensure appropriate and reasonable measures to enable and protect them, in the same manner as for gatherings that are planned in advance.<sup>[29]</sup>

## **The Admissible Limitations of this Right**

25. Despite the exceptional importance of the right of peaceful assembly and public meeting for the development of an individual's personality and for democratic society, this right is not absolute. In conformity with the third paragraph of Article 42 of the Constitution, statutory limitations of this right are permissible where so required for national security or public safety and for protection against the spread of communicable diseases. The general limitation reason determined by the third paragraph of Article 15 of the Constitution, in accordance with which human rights may be limited due to the protection of the rights of others, must also be taken into consideration. When determining limitations of the right of peaceful assembly and public meeting, the legislature when determining the statutory framework, and the executive branch of power and courts when applying laws, must take into account the special importance of this right in a free democratic society. As regards interferences, such must be limited to what is necessary to protect equivalent legal values. Exceptions to the right of peaceful assembly must be interpreted restrictively; any prohibition of assembly must be the last resort, the final measure.

26. Among the admissible grounds for limiting the right of freedom of assembly, the second paragraph of Article 11 of the ECHR includes national security or public safety, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others, with regard to which the limitation must be "necessary in a democratic society." When reviewing whether limitations of rights and freedoms ensured by the ECHR are "necessary in a democratic society," the states signatories have a determined, but not unlimited, margin of appreciation.[\[30\]](#)

27. In view of the above, protection from the spread of communicable diseases entails constitutional grounds due to which the right of peaceful assembly and public meeting may be limited. In Decision No. U-I-83/20, the Constitutional Court already explained that in the event of the emergence of a communicable disease, state authorities have the duty to appropriately protect the health and life of people. Its positive obligations include protection of 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). These positive obligations of the state also stem from the International Covenant on Economic, Social and Cultural Rights (Official Gazette SFRY, No. 7/71, and Official Gazette RS, No. 35/92, MP, No. 9/92). In a situation of crisis due to an epidemic,



every individual is obliged to also protect the health of other people in addition to his or her own health.<sup>[31]</sup> Also in the opinion of the United Nations Human Rights Committee, the protection of public health in the event of an outbreak of a communicable disease can exceptionally justify limitations of peaceful gatherings.<sup>[32]</sup> When balancing the right to health and life, on the one hand, and the right of peaceful assembly and association, on the other, the two rights are in opposition, and they both enjoy a high level of constitutional protection.<sup>[33]</sup>

### **The Content of the Reviewed Ordinances and the Intensity of the Interference with the Right Determined by Article 42 of the Constitution**

28. From 27 February until 17 March 2021, public protests were completely prohibited by the third paragraph of Article 5 of Ordinance 27/21. Prior to that, the measure of the complete prohibition of public protests was in force from 20 October 2020 onwards, i.e. a further four months. From 18 March until 31 March 2021, the second paragraph of Article 5 of Ordinance 40/21 allowed public protests of up to ten people. From 1 April until 11 April 2021, the third paragraph of Article 6 of Ordinance 47/21 again completely prohibited public protests, and the measure of the complete prohibition of public protests remained in force in accordance with the third paragraph of Article 4 of Ordinance 55/21. By its Order dated 15 April 2021, the Constitutional Court temporarily, until 18 April 2021, allowed the regulation determined by Ordinance 55/21 to remain in force.

29. After learning of Order of the Constitutional Court No. U-I-50/21, dated 15 April 2021, the Government adopted Ordinance 62/21. Thereby, the Government increased the allowed number of participants at public protests to 100 persons, and it also determined additional limitations as regards the allowed [minimum] number of square meters per person, social distancing, and the use of protective masks.<sup>[34]</sup> Furthermore, the Government determined the additional obligation of presenting proof of registration of the public protest or authorisation therefor upon the request of the competent supervisory authority. The constitutionality and legality of the mentioned Ordinance are not the subject of this review by the Constitutional Court because the petitioners do not challenge them.

30. By Article 3 of Ordinance 63/21, which entered into force on 23 April 2021, public protests with more than 10 participants were once again prohibited. The challenged regulation read as follows:

"(1) Irrespective of the preceding Article, the gathering of people at organised public events and public protests shall be allowed under the conditions determined by the law regulating public gatherings, with regard to which, due to the epidemiological situation, the number of persons in closed spaces shall be limited to one participant per 30 square meters in closed premises or more participants from the same household, but no more than 10 participants. The number of persons outside shall be limited to one participant per 10 square meters or more participants from the same household, but no more than 10 participants. The social distance between the participants must be at least 1.5 meters, except between persons from the same household. For participants at events or public protests in closed spaces, the use of protective masks is mandatory. (2) The organiser of a public event or public protest shall present proof of registration thereof or authorisation for the event or public protest upon the request of the competent supervisory authority."

31. By Decision No. U-I-83/20, dated 27 August 2020 (Official Gazette RS, No. 128/20), the Constitutional Court explained that measures adopted to prevent the spread of communicable diseases must be in conformity with the general principle of proportionality (paragraph 37 of the reasoning). In this respect, it is stressed that the longer the measure lasts, the more invasive the interference becomes (paragraph 56 of the reasoning). In the assessment of the Constitutional Court, the complete prohibition of public protests, as determined by the challenged Ordinances, entailed an exceptionally severe interference with the right of peaceful assembly and public meeting determined by the first paragraph of Article 42 of the Constitution. For two weeks and a half, Ordinance 27/21 determined the general prohibition of public protests after they had already been prohibited for four months before that. Two weeks after Ordinance 27/21 ceased to be in force, Ordinance 47/21 again completely prohibited public protests. The general complete prohibition of public protests applied to the entire territory of the Republic of Slovenia, and for five months completely prevented such constitutionally protected form of the collective expression of opinions. The prohibition of unorganised public protests determined by Ordinance 63/21 also entailed a severe interference with the right of peaceful assembly determined by Article 42 of the Constitution, as it is precisely unorganised public protests that most [effectively] enable the immediate and direct response of individuals to current events.

32. Furthermore, the general limitation of the number of participants at public protests to ten persons, which was in force for a full month, severely interfered with the right of peaceful assembly and public meeting. The number of persons thus determined so restrictively in advance namely strongly limits both the right of organisers to independently decide on the manner and the content of the public protest, as well as the possibility of participants at an unorganised public protest jointly expressing their reasons for protesting regarding current matters of a public nature. A message conveyed by ten persons is so much weaker than a message expressed by a greater number of people that such a limitation also interferes with the fundamental character of peaceful gatherings, which may be carried out freely and independently of the state, thereby contributing to the formation of political positions and political will.

### **Review of the Admissibility of an Interference with the Right of Peaceful Assembly and Public Meeting**

33. Below, the Constitutional Court must assess whether such an interference was admissible. Under the established constitutional case law, the limitation of a human right is admissible if it pursues a constitutionally admissible objective and if the limitation is consistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), i.e. with those principles that prohibit excessive measures of the state (the general principle of proportionality). The Constitutional Court carries out an assessment of whether the interference at issue is not perhaps excessive on the basis of the so-called strict test of proportionality, which encompasses an assessment of the appropriateness, necessity, and proportionality of the interference in the narrower sense.

34. The challenged provisions of the ordinances were adopted, as is evident from Article 1 of the individual ordinances, in order to prevent infection with SARS-CoV-2 and contain and manage COVID-19, a communicable disease. As already explained in paragraph 27 of the reasoning of this Decision, the right to life and health enjoys high constitutional protection. Prevention of the spread of communicable diseases entails constitutionally admissible grounds for limiting the right of peaceful assembly and public meeting.

35. Within the framework of the review of the proportionality of an interference, the Constitutional Court assesses the appropriateness, necessity, and proportionality of the interference. The assessment of the appropriateness of the measure encompasses

establishing whether the pursued objective can be attained by the measure, i.e. whether the measure alone or in combination with other measures can contribute to attaining that objective. According to the general scientific findings, the COVID-19 communicable disease is transmitted through contacts between people. The probability of the transmission of the disease outside is indeed significantly lower than in closed spaces, but it is not entirely excluded either.<sup>[35]</sup> The prohibition of public protests or the limitation thereof to up to ten persons is, like other forms of reducing contacts between people, an appropriate measure for preventing the spread of the COVID-19 communicable disease.

36. An interference with a human right or fundamental freedom is necessary if the pursued objective cannot be attained without an interference or by a milder, but equally effective, measure. Due to the importance of the right of peaceful assembly and public meeting determined by Article 42 of the Constitution, the assessment of the necessity of interferences therewith is stricter than in instances of other forms of the limitation of contacts between people. The Venice Commission and the United Nations Human Rights Committee draw attention to the fact that general prohibitions of gatherings are, as a general rule, disproportionate and entail a violation of the right of assembly because they do not take into consideration either the differences in the manner of exercising the right to freedom of assembly or the circumstances of the concrete case.<sup>[36]</sup> The general and antecedent prohibition of protests is only necessary in a democratic society if there exists a real threat that public protests will cause consequences for protected legal values that cannot be prevented by other, less strict, measures, such as by limiting the prohibition to a certain territory and to a certain duration.<sup>[37]</sup> In order for peaceful gatherings to be prohibited in advance, the mere assumption that due thereto protected legal values will be jeopardised does not suffice.<sup>[38]</sup> States signatories to the ECHR must also not limit the number of participants at peaceful public gatherings, unless there exists a clear connection to the legitimate objective of the limitation.<sup>[39]</sup> In its recent case law, the ECtHR has stressed that in order for an interference with the right to freedom of assembly and the right to freedom of expression to be in conformity [with the ECHR], it usually does not suffice that such an interference is merely substantiated on the basis of a legal regulation of general validity; instead, it must always be assessed whether the interference with the right was necessary in the circumstances of the concrete case.<sup>[40]</sup>

37. As regards the question of whether a certain interference with the right of peaceful assembly was necessary in order to prevent the spread of communicable diseases, also

the joint effect of the adopted measures must be taken into consideration. According to the position of the Venice Commission, in exceptional instances, where reasons of public health could justify a limitation of one or more public gatherings, such limitations cannot be imposed without similar measures also applying for other mass contacts, such as in shopping centres and at events.<sup>[41]</sup> Such holds true irrespective of the possible different specificities of the behaviour of people as regards the different forms of contact.

38. In view of the above-described practice of the ECtHR and the positions of international bodies, antecedent general prohibitions on exercise of the right of peaceful assembly determined by Article 11 of the ECHR are admissible – even during an epidemic – only exceptionally. There must exist weighty and clear reasons why the constitutionally admissible objective of preventing the spread of a communicable disease could not be attained by milder measures that would interfere to a lesser extent with the right of peaceful assembly and public meeting determined by Article 42 of the Constitution or that would not entirely prevent the exercise thereof.

39. In fact, the allegation of the Minister of Justice that the expression of political positions at public protests does not have priority over the health of citizens holds true. However, as Human Rights Watch warns, it is particularly important to ensure that the COVID-19 epidemic is not used to prevent the collective expression of critical opinions as regards the policies of the ruling authorities.<sup>[42]</sup> Therefore, in order to justify the necessity of interferences with the right of peaceful assembly, reference to the general epidemiological situation and the number of infected persons does not suffice; instead, the authorities must particularly carefully assess the possibility of balancing these two rights.

40. From a comparison of the regulations in other states, it is apparent that there exists a whole set of measures by which it is possible to prevent the spread of communicable diseases at public protests and which interfere to a lesser extent with the right of peaceful assembly and public meeting than the complete prohibition of public protests or the limitation thereof to a maximum of ten people. In comparative law, reasonable measures include, for instance, the distribution of face masks and hand sanitizers to protesters, the closing of public spaces and roads to ensure sufficient space to maintain appropriate social distancing between protesters, and the issuance of clearly determined permits for public protests that are in conformity with epidemiological recommendations. Participants at a public protest can organise in multiple smaller groups from ten to twenty

people.<sup>[43]</sup> The European Union Agency for Fundamental Rights and the European Centre for Parliamentary Research and Documentation established that for public protests numerous EU Member States, such as Austria, Belgium, the Czech Republic, France, Germany, Latvia, the Netherlands, Poland, Portugal, and Spain, enacted exceptions to limitations on the gathering of people that would otherwise apply. Often, limitations allowing a higher number of participants were imposed, from several hundred to even several thousand, as well as the obligation to wear a mask, and mandatory maintenance of social distancing. In Bavaria, every public protest that more than 100 people wished to attend had to be registered, whereas the wearing of masks was not obligatory for the organiser when moderating the public protest or for speakers when giving speeches, or for participants at the protest in vehicles.<sup>[44]</sup> Belgium introduced a “corona model” for obtaining a permit for a public protest.<sup>[45]</sup> In some German federal states such as Schleswig-Holstein, as well as in the city of Berlin, the organiser of a public protest had to submit a hygienic measures plan (*Hygienekonzept*). Therein, the planned measures as regards ensuring the minimum social distance had to be presented, as well as hygienic rules such as wearing a mouth and nose covering or a surgical mask, or the participants refraining from the usual chanting, and also as regards ensuring that the allowed number of participants is not exceeded in view of the area that the public protest may use during its realisation. In Estonia, at public protests where the participants stayed in their cars it was allowed to exceed the general requirement that gatherings be limited to one hundred persons. In Denmark, the authorities appealed to the protesters to test themselves. In the city of Berlin, negative test result certificates were required for those wishing to participate in public protests in closed spaces. In Luxembourg, volunteers distributed guidelines for hygienic measures to the participants at public protests.<sup>[46]</sup> In Italy, during the second wave [of infection], public gatherings were allowed in a static form under the condition that an appropriate social distance be maintained between the participants (at least 1 meter) and that the other measures for preventing the spread of infection be observed.<sup>[47]</sup>

41. Therefore, when reviewing the challenged provisions of the ordinances, the Constitutional Court verified whether the Government had ascertained prior to their entry into force whether the objective of ensuring public health could be attained by such milder measures. For this purpose, it called on the Government to submit documents on the basis of which the measures of the complete prohibition of public protests or the limitation thereof to up to ten persons were adopted and prolonged. In the replies that refer to the ordinances adopted prior to Order of the Constitutional Court No. U-I-50/21, dated 15 April

2021, the Government referred to the opinions of the expert advisory group dated 11 October and 11 November 2020. In the first one, the expert advisory group suggested that it was imperative to immediately introduce the measure of the prohibition of all public and cultural events, as well as of religious ceremonies and marriages, and in the second one that it was necessary to introduce the limitation that only household members may gather, with the exception of the provision of services in the event of an emergency. From neither the replies of the Government nor the minutes of the mentioned two meetings of the expert advisory group [at which the opinions were issued] can it be seen that in the procedure for the adoption of the ordinances adopted before 15 April 2021 the position of public protests and their importance in a democratic society were specifically addressed. There was no assessment of whether alternative measures exist by means of which the exercise of the constitutional right of peaceful assembly and public meeting could be allowed at least to some extent also during the COVID-19 epidemic. Such entails that in the adoption of these measures [the Government] also did not take into consideration the positive duty of the state to ensure to a reasonable degree, in view of the circumstances, the exercise of the right of peaceful assembly, as well as the duty to cooperate with organisers [of public protests].

42. The general allegation that the risk of the transmission of infection is greater at public protests than at other forms of gatherings of people, without providing any evidence, does not suffice [to justify] such a severe and long-lasting interference with the right of peaceful assembly and public meeting determined by Article 42 of the Constitution. A prohibition must be based on facts and concretely established circumstances, not on assumptions. Furthermore, the abstract fear that measures could be violated at public protests also does not suffice.<sup>[48]</sup> Also the fact that some participants at a public protest who are not connected with the organisers could violate the rules as to wearing a mask or maintaining a safe social distance does not in and of itself suffice for the further complete prohibition of public protests. The Government also cannot refer to the fact that despite the prohibition, several public protests with 20 to 200 participants were held, or even one with 10,000 participants. In fact, it is not possible to merely predict in advance that the organisers and participants at a public protest would act contrary to measures if the measures were such that they would ensure to a reasonable degree, in view of the circumstances, the exercise of the right of peaceful assembly. The Government did not provide compelling reasons as to why it would be impossible at public protests with up to several hundred participants to prevent the spread of infection by ensuring a sufficient

social distance between protesters, by wearing masks, and by using disinfectants. The organisation of public protests on public premises such that social distancing is maintained can indeed be particularly challenging because it is difficult to control the access, participation, and movement of the crowd. Nevertheless, such organisation is not impossible.[\[49\]](#)

43. Reference to mass protests in other states where epidemiological measures were allegedly violated does not suffice to justify the necessity of the measure. The course of public protests in individual states is culturally dependent, and violations of measures at a particular public protest can have very specific reasons that cannot be generally applied to all public protests. The number of participants also depends on the number of inhabitants, which is significantly lower in Slovenia. Limitations as regards the number of protest participants in other EU Member States can be taken into consideration when determining the highest permitted number of participants at public protests in Slovenia. However, there does not exist any reasonable connection with the objective of protecting public health if the highest permitted number of participants at public protests were decreased only because the number of inhabitants in Slovenia is lower.

44. Ordinance 27/21 was adopted at a time when the measures were being gradually eased. Under the conditions of testing employees and observance of the instructions of the NIPH, it was allowed to carry out virtually all commercial activities, personal care activities, and some other forms of offering goods and services to consumers.[\[50\]](#) Gatherings of up to ten people were allowed.[\[51\]](#) By ensuring minimum contact between participants, the wearing of masks, the disinfection of hands, and ventilation, also the collective exercise of religious freedom was allowed already from 19 December 2020 onwards, which in closed premises was limited to one person or household per 30 square meters.[\[52\]](#) By Ordinance 40/21, the Government equalised limitations with regard to public protests, celebrations, and marriages with the general limitation of private gatherings to up to ten persons that otherwise applied. Concurrently, it allowed additional easing of measures, such as the opening of the terraces of bars and restaurants in three statistical regions.[\[53\]](#)

45. The purpose of the ordinances published in the Official Gazette RS, No. 47/21, was to completely halt public life (i.e. a so-called “lockdown”). In the assessment of the Constitutional Court, the short-term prohibition of public protests at the same time as the



complete prohibition of other gatherings and a lockdown of public life in order to prevent the spread of a communicable disease can fulfil the condition of necessity and proportionality in the narrower sense. However, while the supposed “lockdown” was in force, public life was not completely halted. In fact, under the condition of testing shop assistants and 30 square meters of space per customer, the majority of shops and even large shopping centres remained open.<sup>[54]</sup> Since public life was not completely halted, the Government cannot justify the complete prohibition of protests by there being a “lockdown” in effect.

46. By the ordinances published in the Official Gazette RS, No. 55/21, after the “lockdown” period the Government at least partially eased the [restrictions on the] majority of activities at which contacts between people occur, such as participation in religious activities and schooling at primary and high schools. Public protests, in contrast, still remained completely prohibited.

47. Ordinance 63/21 reduced the allowed number of participants at public protests from 100 to 10 persons. When adopting this Ordinance, the Government referred to the opinion of the expert advisory group, which allegedly proposed stricter limitations as regards public protests. Upon being called upon to do so by the Constitutional Court, the Government sent [to the Constitutional Court] the minutes of the meeting that was held on 19 April 2021. At that meeting, the expert advisory group specifically addressed the issue of public protests for the first time, and in such context explained:

“Currently, the epidemiological situation as regards Covid-19 is still bad and by additionally easing measures we might nullify the good results as regards limiting the spread of infection with SARS-CoV-2 that we achieved by a ‘lockdown’ between 1 April and 11 April 2021. Article 42 of the Constitution of the Republic of Slovenia also determines that legal [i.e. statutory] restrictions of these rights are permissible in order to protect against the spread of communicable diseases. Also the temporary prohibition of mass public protests, where the possibility of infection is significantly higher if measures are not observed, significantly contributes thereto.”<sup>[55]</sup>

48. In the assessment of the Constitutional Court, an opinion with such content did not substantiate the necessity of reducing the [allowed] number of participants at public

protests from 100 to 10 persons. The opinion advises against an additional easing of measures and does not recommend that the measures in force be made stricter. It is also evident from the opinion that the prohibition of mass public protests contributes to limiting [infection], but at the same time it is not defined what a mass public protest is. Mass public protests generally mean public protests with a very high number of participants, even several thousand.<sup>[56]</sup> The opinion does not make a connection between the possibility of the spread of the disease and mere participation at public protests, but above all with non-observance of the measures and the recommendations of the NIPH such as social distancing and the wearing of masks. As already explained, an abstract fear that measures could be violated at protests does not suffice for such a restrictive limitation of the right of peaceful assembly. In the opinion, not even possibilities for ensuring the observance of epidemiological measures at public protests such as were already in force at the time in comparative legal regulations were assessed.

49. It is reasonable to require that public protests with a higher number of participants be registered in advance. In such manner, cooperation between the organisers and the Police is enabled with a view to ensuring as smooth a realisation of the public protest as possible and to raising awareness of the necessity to observe epidemiological measures as much as possible. Due to the special constitutional importance of unorganised public protests, in the circumstances of easing measures and the allowed gathering of up to ten people, it must be permitted at least that a smaller circle of people publicly expresses positions about current matters of public importance at spontaneous public protests.<sup>[57]</sup>

50. In view of the above, it is not demonstrated with respect to any of the challenged ordinances that the general complete prohibition of public protests or the limitation thereof to up to ten persons was necessary. Similarly, the necessity of the complete prohibition of unorganised public protests is also not demonstrated. In fact, the Government did not ascertain the possibility of imposing milder measures known in comparable legal regulations, including the possibility to seek an agreement with organisers as regards the manner of carrying out a public protest as epidemiologically safely as possible. Concurrently, it eased the measures in other fields due to the improved epidemiological situation. After merely three days of limiting participation to up to 100 persons, it again limited public protests to up to 10 persons and even prohibited unorganised public protests, although the expert advisory group substantiated such a limitation merely by the fear of violations of the epidemiological recommendations of the NIPH.

51. Since the Constitutional Court established that the Government failed to demonstrate the necessity of the measures imposed by the challenged Ordinances as regards public protests, it did not assess the proportionality of the measures in the narrower sense.

52. Since the mentioned provisions of the ordinances ceased to be in force, the Constitutional Court merely established, on the basis of the second paragraph in conjunction with the first paragraph of Article 47 of the CCA, that they were inconsistent with the Constitution in the part wherein they prohibited all public protests or limited them to a maximum of ten participants (Point 1 of the operative provisions).

53. In conformity with the first paragraph of Article 47 of the CCA, the Constitutional Court decides whether the finding of the unconstitutionality of an invalid implementing regulation with the Constitution has the effect of abrogation or annulment. The Constitutional Court decided that the finding of the inconsistency of the challenged Ordinances with the third paragraph of Article 42 of the Constitution shall have the effect of abrogation (Point 2 of the operative provisions).

## C

54. The Constitutional Court adopted this Decision on the basis of Article 47 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. Dr. Klemen Jaklič (Oxford, UK; Harvard, USA), Dr Špelca Mežnar, Dr Marijan Pavčnik, Marko Šorli, and Dr Katja Šugman Stubbs. The Decision was adopted by six votes against two. Judges Jaklič and Šorli voted against.

Dr Rajko Knez  
President

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[1] UN Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (Article 21), 17 September 2020 (hereinafter referred to as General Comment No. 37).

[2] It ceased to be in force on 15 May 2021, when it was replaced by a new ordinance that was published in the Official Gazette RS, No. 73/21.

[3] See Points 14 and 15 of the reasoning of the mentioned Order.

[4] In accordance with this provision, a public protest is every organised gathering of people for the expression of opinions and positions on questions of public or general importance, outside or in a closed space where everyone is allowed access.

[5] The Decision of the European Commission for Human Rights in *Christians against Racism and Fascism v. United Kingdom*, dated 16 July 1980.

[6] See Paras. 106 and 107 of the reasoning of Decision of the Constitutional Court No. U-I-79/20.

[7] Cf. points 19 and 20 of the reasoning of Decision of the Constitutional Court No. U-I-218/07, dated 26 March 2009 (Official Gazette RS, No. 27/09, and OdlUS XVII, 12).

[8] The ECtHR Judgment in *Djavit An v. Turkey*, dated 20 February 2003, Para. 56 of the reasoning.

[9] Vatovec, K., in: Avbelj, M. (Ed.), *KURS 2019* [Commentary on the Constitution of the Republic of Slovenia 2019], p. 409; United Nations Human Rights Committee, General Commentary No. 37, Para. 4.

[10] See Para. 20 of the reasoning of Decision of the Constitutional Court No. U-I-218/07. Also in accordance with the case law of the ECtHR, an assembly within the meaning of Article 11 of the ECHR is characterised in particular by the common intention of the participants. In such manner, a gathering differs from coincidental contacts between individuals where each person pursues his or her own goal, such as a queue for entering a public building; see ECtHR, Guide on Article 11 of the Convention – Freedom of Assembly and Association, p. 8. URL: [https://www.echr.coe.int/Documents/Guide\\_Art\\_11\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf).

[11] Cf. Vatovec, K., *op. cit.*, p. 409. Such was also stated by the ECtHR in *Kudrevičius and Others vs. Lithuania*, dated 15 October 2015, Para. 92 of the reasoning.

[12] The ECtHR Judgment in *Ezelin v. France*, dated 26 April 1991, Para. 53 of the reasoning.

[13] The ECtHR Judgment in *Primov and Others v. Russia*, dated 12 June 2014, Para. 155

of the reasoning.

[14] Cf. Pieroth, B. and Jarass, H. D., Art. 8 – Versammlungsfreiheit, in: Grundgesetz für die Bundesrepublik Deutschland – Kommentar, 11<sup>th</sup> edition, Beck, Munich 2011, p. 275.

[15] Cf. Venice Commission, Guidelines on Freedom of Peaceful Assembly, 3<sup>rd</sup> edition, 8 July 2019, Para. 1.

[16] The ECtHR Judgment in *Sáska v. Hungary*, dated 27 November 2012, Para. 21 of the reasoning.

[17] Cf. Decision of the German Federal Constitutional Court No. 1 BvR 233, 341/81, dated 14 May 1985, Para. 61 of the reasoning.

[18] Venice Commission, *op. cit.*, Para. 21.

[19] Cf. the ECtHR Judgment in *Frumkin v. Russia*, Paras. 128 and 129 of the reasoning, and Venice Commission, *op. cit.*, Para. 22.

[20] Cf. Decision of the Constitutional Court No. U-I-226/95, dated 8 July 1999 (Official Gazette RS, No. 60/99, and OdlUS VIII, 174).

[21] According to the case law of the ECtHR as well, the right to freedom of assembly ensured by Article 11 of the ECHR is a fundamental right in a democratic society and is, in the same way as the right to [freedom of] expression determined by Article 10 of the ECHR, one of the foundations of such society; therefore, it must not be interpreted restrictively; see Paras. 91 and 92 of the reasoning of the ECtHR Judgment in *Kudrevičius and Others v. Lithuania* and the case law cited therein. The ECtHR also stresses that the purpose of the right of peaceful assembly is precisely to protect opinions and their expression; see the Judgment in *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Para. 37 of the reasoning. The ECtHR also attributed special importance to the fact that participants not only wish to express their opinion, but they also wish to do so together with others; see the Judgment in *Primov and Others v. Russia*, dated 12 June 2014, Para. 91 of the reasoning.

[22] Vatovec, K., *op. cit.*, p. 405.

[23] From this perspective, public gatherings are a supplement to the existing forms of direct democracy; Vatovec, K., *op. cit.*, p. 405; Pieroth, B., and Jarass, H. D., *op. cit.*, p. 275; Venice Commission, *op. cit.*, Para. 7; UN Committee on Human Rights, General Comment 25, "The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service," 12 July 1996, Para. 8.

[24] Decision of the Constitutional Court No. Up-301/96, Paras. 11–13 of the reasoning. As regards the fact that the intellectual, cultural, and political freedom is a necessary basis for rule by the people, see also L. Pitamic, *Država* [The State], a reprint of the book from

1927, GV Založba, Ljubljana 2009, pp. 207 *et seq.*

[25] For more on this, see Avbelj, M., in: L. Šturm (Ed.), *op. cit.*, p. 62.

[26] On this, see also Vatovec, K., *op. cit.*, who defines public protests – as is established in comparative law (Pieroth, B., and Jarass, H. D., *op. cit.*, p. 275) – as a form of participative democracy.

[27] *Cf.* Decision of the German Federal Constitutional Court No. 1 BvR 233, 341/81, Para. 66 of the reasoning.

[28] UN Human Rights Committee, General Comment No. 34, "Article 19: Freedoms of opinion and expression," 12 September 2011, Paras. 34, 37–38, and 42–43; General Comment No. 37, Para. 32.

[29] Venice Commission, *op. cit.*, Para. 23.

[30] The ECtHR Judgment in *Galstyan v. Armenia*, dated 15 November 2007, Para. 114 of the reasoning.

[31] Decision of the Constitutional Court No. U-I-83/20, Paras. 42 and 43 of the reasoning.

[32] United Nations Human Rights Committee, General Comment No. 37, Para. 45.

[33] Kersten, J., and Rixten, S., *Der Verfassungsstaat in der Krise*, 2<sup>nd</sup> edition, Beck, Munich, 2021, p. 122.

[34] By the mentioned Ordinance, a new Article 4a was inserted into Ordinance 55/21, which read as follows: "Irrespective of the third paragraph of the preceding Article, the gathering of people at organised public protests is allowed under the conditions determined by the law regulating public gatherings, with regard to which, due to the epidemiological situation, the number of persons at organised public protests in closed spaces shall be limited to one participant per 30 square meters of closed premises or more participants from the same household, but to no more than 100 participants. The number of persons at organised public protests outside shall be limited to one participant per 10 square meters or more participants from the same household, but to no more than 100 participants. The social distance between the participants must be at least 1.5 meters, except between persons from the same household. For participants at public protests in closed spaces, the use of protective masks is mandatory. (2) The organiser of a public protest shall present proof of the registration thereof or authorisation of the public protest upon the request of the competent supervisory authority."

[35] *Cf.* D. Chirizzi, M. Conte, M. Feltracco, A. Dinoi, E. Gregoris, E. Barbaro, G. La Bella, G. Ciccarese, G. La Salandra, A. Gambaro, and D. Contini, SARS-CoV-2 concentrations and virus-laden aerosol size distributions in outdoor air in north and south of Italy, *Environment International*, Vol. 146 (2021); H. Qian, T. Miao, L. Liu, X. Zheng, D. Luo, and

Y. Li, Indoor transmission of SARS-CoV-2, <https://doi.org/10.1101/2020.04.04.20053058doi>, 2020, quoted from Gesellschaft für Aerosolforschung, Position paper of the Gesellschaft für Aerosolforschung on understanding the role of aerosol particles in SARS-CoV-2 infection, [https://ae00780f-](https://ae00780f-bbdd-47b2-aa10-)

[e1dc2cdeb6dd.filesusr.com/ugd/fab12b\\_0b691414cfb344fe96d4b44e6f44a5ab.pdf](https://ae00780f-bbdd-47b2-aa10-e1dc2cdeb6dd.filesusr.com/ugd/fab12b_0b691414cfb344fe96d4b44e6f44a5ab.pdf), p. 15.

[36] Venice Commission, *op. cit.*, Para. 133. United Nations Human Rights Committee, General Comment No. 37, Para. 38.

[37] For instance, in its Decision dated 16 July 1980, the European Commission for Human Rights established that the two-month general prohibition of public protests in England, which followed a number of incidents of unrest and violent protests at which it was not possible to prevent the occurrence of significant damage to property and persons even with the activation of several thousand police officers, was in conformity with Article 11 of the ECHR; Decision of the Commission in *Christians against Racism and Fascism v. the United Kingdom*, dated 16 July 1980, p. 150.

[38] Venice Commission, *op. cit.*, Para. 134; see also the ECtHR Judgment in *Primov and Others v. Russia*, Para. 155 of the reasoning.

[39] The ECtHR Judgment in *Primov and Fromkin v. Russia*, Para. 107 of the reasoning.

[40] See Para. 84 of the reasoning of the ECtHR Judgment in *Elvira Dmitriyeva v. Russia*, dated 30 April 2019, and Para. 275 of the reasoning of the ECtHR Judgment in *Perinçek v. Switzerland*, dated 15 October 2015.

[41] Venice Commission, *op. cit.*, Para. 141.

[42] <https://www.hrw.org/news/2021/02/11/covid-19-triggers-wave-free-speech-abuse>.

[43] <https://www.hrlc.org.au/protest-rights-covid19>.

[44] See Article 7 of the 12<sup>th</sup> Ordinance of the Free State of Bavaria on the Prevention of the Spread of Infection with SARS-CoV-2 (*Bayerischen Infektionsschutzmaßnahmenverordnung*), <https://www.verkuendung-bayern.de/baymb/2021-171/>

and <https://www.nuernberg.de/internet/stadtportal/coronavirus.html>.

[45] [http://www.epgencms.europarl.europa.eu/cmsdata/upload/06be697d-6cd8-4542-bf42-c2798376f908/No.30\\_Restrictions\\_on\\_the\\_right\\_to\\_demonstrate\\_in\\_the\\_context\\_of\\_the\\_right\\_against\\_Covid-19.pdf](http://www.epgencms.europarl.europa.eu/cmsdata/upload/06be697d-6cd8-4542-bf42-c2798376f908/No.30_Restrictions_on_the_right_to_demonstrate_in_the_context_of_the_right_against_Covid-19.pdf).

[46] [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-july\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-july_en.pdf), p. 18.

[47] See point (i) of the ninth paragraph of Article 1 of the Ordinance of the Prime Minister

on Restrictive Measures for Containing the Epidemic dated 24 October 2020 – *DECRETO DEL PRESIDENTE DEL CONSIGLIO DEI MINISTRI 24 ottobre 2020: Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, convertito, con modificazioni, dalla legge 25 maggio 2020, n. 35, recante “Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19”, e del decreto-legge 16 maggio 2020, n. 33, convertito, con modificazioni, dalla legge 14 luglio 2020, n. 74, recante “Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19”.* (20A05861) (GU Serie Generale n. 265 del 25-10-2020): [pdf \(gazzettaufficiale.it\)](https://www.gazzettaufficiale.it).

[48] Also in comparative constitutional law it is established that the antecedent assumption of violations without concrete evidence does not suffice to limit the right of peaceful assembly (Austrian Constitutional Court (VfGH) in Judgments No. B 491/03, dated 30 June 2004, and No. B 663/08, dated 30 August 2008). The European Union Agency for Fundamental Rights also established that the majority of public protests during the first wave of the epidemic were peaceful, although at some of them also police measures were necessary due to the non-observance of epidemiological measures; [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-july\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-july_en.pdf), p. 18.

[49] The same was also stated by the French National Council in Order No. 440846, 440856, 441015, dated 13 June 2020, accessible at: <https://www.conseil-etat.fr/ressources/decisions-contentieuses/dernieres-decisions-importantes/conseil-d-etat-13-juin-2020-manifestations-sur-la-voie-publique>.

[50] Ordinance on the Temporary Prohibition of Offering and Selling Goods and Services to Consumers in the Republic of Slovenia (Official Gazette RS, No. 27/21).

[51] The first paragraph of Article 5 of Ordinance 27/21.

[52] Ordinance on the Temporary Limitation of the Collective Exercise of Freedom of Religion in the Republic of Slovenia (Official Gazette RS, No. 190/20).

[53] Article 4 of the Ordinance on the Temporary Prohibition of Offering and Selling Goods and Services to Consumers in the Republic of Slovenia (Official Gazette RS, No. 40/21).

[54] Ordinance on the Temporary Prohibition of Offering and Selling Goods and Services to Consumers in the Republic of Slovenia (Official Gazette RS, No. 47/21). It is [not] negligible that the epidemiologist Dr Mario Fafangel, a member of the expert advisory group, warned that the “lockdown” was not carried out as the expert advisory group and the committee of epidemiologists had advised and that therefore it allegedly did not have a sufficient effect on improving the epidemiological situation; see the minutes of the meeting of the expert advisory group dated 19 April 2021.



[55] In fact, three of the ten members of the expert advisory group did not concur with the opinion, including the only epidemiologist in the group. They stressed that the risk of infection outside has been proven to be incomparably lower than in closed spaces, and that therefore also the association of a greater number of people outside is safe, and that it would be unusual to state that strictly regulated public protests would worsen the epidemiological situation at the same time as activities in closed spaces are almost unrestricted. See the minutes of the meeting of the expert advisory group that was held on 19 April 2021.

[56] According to *Slovar slovenskega knjižnega jezika* [The Dictionary of the Slovene Literary Language], a crowd is “a large, dense group of people,” therefore the participation of 11 persons at a public protest does not fall within the meaning of this term.

[57] Cf. the regulation in Bavaria mentioned in Para. 40 of the reasoning of this Decision, in accordance with which spontaneous public protests of up to 100 persons were allowed, while public protests of greater proportions were only allowed if they were organised and registered in advance.

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