

SAMO BARDUTZKY¹

Limits in Times of Crisis: on Limitations of Human Rights and Fundamental Freedoms in the Slovenian Constitutional Order

- **ABSTRACT:** *The purpose of this article is to discuss the issue of limitations of human rights and fundamental freedoms in the 1991 Constitution of the Republic of Slovenia. The discussion is set in the context of a large-scale health crisis, i. e. the SARS-CoV-2 (the virus) and COVID-19 (the disease) epidemic. The article first describes the position of human rights and fundamental freedoms in the Slovenian constitutional order, and discusses the possibilities to limit human rights and fundamental freedoms. In this section, the article introduces the concept of ‘limitations on limitations’ (similar to the German Schranken-Schranken) and presents the requirements of such limitations in Slovenian constitutional law. It then turns to the mechanism of temporary suspension and restriction of human rights and fundamental freedoms during a war or state of emergency as foreseen in Article 16 of the Constitution. In the third part, the article discusses the limitations of human rights and fundamental freedoms enacted brought forward by the government measures intended to tackle the epidemic, i.e. the concrete substatutory norms passed between March and October 2020. This article presents selected issues and affected human rights such as freedom of movement, personal liberty, right to health, and freedom of assembly. The final part of the article discusses the concept of ‘limitations on limitations’ that has demonstrated its relevance for the protection of a meaningful level of human rights in the period of the epidemiological crisis.*
- **KEYWORDS:** human rights and fundamental freedoms, Constitution of Slovenia, limitation of human rights, epidemic, COVID-19 pandemic, state of emergency.

¹ Assistant professor, Faculty of Law, University of Ljubljana, Slovenia, samo.bardutzky@pf.uni-lj.si, ORCID: 0000-0002-7549-6683. The author thanks Kristina Sajovic and Anže Medičevc for attentive research assistance and the linguistic editor whose services were employed by the editorial team for careful proofreading – the responsibility for all errors, however, is the author’s.



Introduction

The purpose of the present text is to discuss the issue of limitations of human rights and fundamental freedoms in the Constitution of the Republic of Slovenia adopted in 1991 (Constitution).² The discussion is set in the context of a large-scale health crisis, the SARS-CoV-2 (the virus) and COVID-19 (the disease). In Slovenia, the epidemic was first declared in March 2020 and the then again in October 2020.³

In contrast with a number of other European countries, Slovenia never declared a state of emergency in response to the epidemic. Instead, it remained in a state of normalcy, but as the facts soon became abnormal, also the constitutional framework was stretched to its extreme boundaries.⁴ The task of the present account is to study the limitations on human rights and fundamental freedoms in this unusual context.

The article consists of four parts. First, it focuses on the day-to-day functioning (in other words, in 'ordinary' times when there is no crisis) of human rights and fundamental freedoms in the Slovenian constitutional system. It describes the position of human rights of fundamental freedoms in the Constitution, and discusses the exercise of human rights and fundamental freedoms directly based on the Constitution and the regulation by legislature of areas where human rights and fundamental freedoms can be invoked. It then focuses on limitations of human rights, elaborating the general limitations clause (art. 15, para. 3 Constitution) and special limitations clauses. Finally, this part of the article is devoted to the issue of 'limitations on limitations'. An understanding of the day-to-day regime of human rights and fundamental freedoms is the necessary backdrop for the evaluation of the limitations introduced during the epidemic.

The second part of this article presents the mechanism of temporary suspension and restriction of human rights and fundamental freedoms during a state of emergency or war as laid down in art. 16 Constitution. It dissects the elements of this mechanism and concludes by discussing the difference between the limitations of human rights and fundamental freedoms in art. 15, para. 3 Constitution on one hand, and temporary suspension and restriction of human rights and fundamental freedoms in art. 16 Constitution on the other. The purpose of the presentation of the art. 16 Constitution mechanism, despite that it was not (yet?) deployed during the COVID-19 epidemic, is to demonstrate the alternative possibilities available to the Government and National Assembly during crises. Without an awareness of alternative approaches made possible by the constitution-maker, an evaluation of the limitations introduced during the COVID-19 cannot be complete.

The third part of the article discusses the limitations of human rights and fundamental freedoms as experienced in the Slovenian legal system during and after the

2 Ustava Republike Slovenije (URS, Eng. 'Slovenian Constitution'), Official Gazette RS, No. 33/91-I.

3 Ordinance 19/20, Official Gazette RS, No. 19/20, 12.3.2020; Ordinance 146/2020, Official Gazette RS, No. 146/2020, 18.10.2020.

4 Something Saša Zagorc and I referred to as 'business as usual, but to the unusual extremes'; see Zagorc and Bardutzky, 2020.

COVID-19 epidemic. This part is organised into subsections, each discussing one of the individual human rights and fundamental freedoms that were limited during and after the epidemic.

The fourth part of this text purports to identify the lessons learnt from the limitations of human rights and fundamental freedoms adopted during the epidemic. In part, the constitutional experience of the COVID-19 epidemic confirms the relevance of the limitations-on-limitations as established in the case law of the Slovenian Constitutional Court. But also, with regard to the measures taken to combat the epidemic, we observed requirements that are perhaps not commonly considered crucial limitations on limitations, but on which this particular crisis has shed new light.

1. Limitations on human rights and fundamental freedoms in the day-to-day functioning of the Slovenian Constitutional Order

■ 1.1. Position of human rights and fundamental freedoms in the Slovenian Constitutional Order

Pursuant to art. 15, para. 1 Constitution, human rights and fundamental freedoms are to be exercised directly based on the Constitution. The inclusion of this provision in the text of the 1991 Constitution resolves the dilemma authoritatively: human rights and fundamental freedoms are not conceived of merely as guidelines for the legislature, but are tangible legal guarantees that can be invoked by their bearers in judicial and other proceedings.⁵ Furthermore, there is an explicit guarantee in art. 15 para. 4 Constitution of the judicial protection of human rights and fundamental freedoms, further cementing the status of human rights and fundamental freedoms and directly invocable legal arguments in judicial and other proceedings.

That said, the legislative power is not barred from regulating areas where human rights and fundamental freedoms can be invoked. The attempts of the legislature to set rules in these areas will be considered either as *limitations* on human rights and fundamental freedoms, the basis for which is in art. 15, para. 3 Constitution, or as 'regulation of the manner in which human rights and fundamental freedoms are exercised', the basis for which is in art. 15 para. 3 Constitution. Pursuant to art. 15, para. 2 Constitution, the legislature will be allowed to regulate the manner in which rights are exercised in two situations: first, 'whenever the Constitution so provides', and second, 'where this is necessary due to the particular nature of an individual right or freedom'.⁶

⁵ Constitutional Court RS, case U-I-25/95, 27.11.1997. See also Testen, 2002, on art. 15, para. 3 Constitution, in Šturm et al., 2002.

⁶ An example of the former scenario is art. 44 Constitution: 'Every citizen has the right, *in accordance with the law*, to participate either directly or through elected representatives in the management of public affairs' (emphasis added). An example of the former is the right to an impartial judge, art. 23, para. 1 Constitution.

Not all human rights and fundamental freedoms can be meaningfully exercised simply on the basis of the constitutional provision. This will normally only be possible for rights of negative status (e.g. the prohibition of torture, protection of human life). Given that the state is barred from action, it does not need to set up a legislative framework barring itself from action.⁷

In contrast, rights of positive status will usually require legislative action for the bearers of the rights to be able to meaningfully exercise and enjoy them (e.g. right to be judged by an independent and impartial judge, and many social rights such as the right to health care).

Whether a certain legislative provision under review should be considered a para. 3 limitation or para. 2 regulation will depend on a case-by-case assessment. Certain legislative solutions might appear to be limiting a right enshrined in the Constitution. However, a review of constitutionality might show that the legislature was merely regulating the manner in which the right is to be exercised.⁸

■ 1.2. *The general limitations clause (art. 15, para. 3 Constitution)*

According to art. 15, para. 3 Constitution, human rights and fundamental freedoms shall be limited only in two situations: (a) by the rights of others, and (b) whenever that is explicitly provided in the text of the Constitution.

The former is a limitation clause that could hypothetically apply to any of the individual human rights and fundamental freedoms in the Constitution, excepting rights recognised as absolute (e.g. prohibition of torture, inhuman and degrading treatment in art. 18 Constitution). Thus, it is of general character.

The latter, however, refers to instances where the constitution-maker has decided to provide an express authorisation in the text of the relevant constitutional clause for the legislature to limit the right in question (see 1.3. Special limitations clauses, paras. 1-3).

Already in the mid-1990s, the Constitutional Court added the third situation that justifies a limitation: the pursuit of public interest (Slov. 'javni interes or javna korist').⁹ It thus allowed for a wider margin of appreciation of legislative action. While in the beginning, the Constitutional Court permitted limitations justified by 'public interest that protects the rights of others', this third, judicially created basis for human rights limitations expanded even further to public interest, which protects other constitutional categories, and in the last stage, public interest that does not need to be derived from a constitutional clause.¹⁰ In a 2017 decision, the Court commented on public interest as a 'separate, independent constitutionally accepted objective of human rights limitations'.¹¹

7 This may become more complicated when positive obligations enter the picture.

8 E.g. in Constitutional Court RS, case U-I-218/04-31, 20.4.2006.

9 Testen, 2002, on art. 15, para. 3 Constitution, in Šturm et al., 2002.

10 Štefanec, 2018, pp. 317-332.

11 Constitutional Court RS, case U-I-52/16, 12.1.2017, para. 26, footnote 23.

By introducing a clause laying down the conditions under which a limitation of a human right or fundamental freedom can be permitted, the Constitution introduced a distinction between permissible and impermissible limitations.¹² We refer to the latter as violations (Slov. 'kršitev') and thus a breach of the Constitution. In this way, the Slovenian human rights law follows the two-stage approach to the understanding of human rights.¹³ The first phase is supposed to establish whether the statutory norm under review is covered by the human right in question, for example, that the statutory norm encroaches upon the right in question. The conclusion that it is does not immediately lead to the conclusion that the constitution has been violated. This will be determined in the second stage, when the permissibility of the limitation is decided on.

■ 1.3. *Special limitations clauses*

In many instances, the text of a particular constitutional clause will contain an authorisation to the legislature to limit the right. The term of art commonly used in Slovenian constitutional law is 'zakonski pridržek' (statutory reservation), most probably a translation of the German term 'Gesetzesvorbehalt'.¹⁴

This can either be more generally formulated (e.g. 'Except in such cases as are provided by law, everyone has the right to obtain information of a public nature in which he has a well founded legal interest under law', art. 39, para. 2 Constitution) or the reasons that can serve as justifications for limiting the particular human right or fundamental freedom can be expressly listed. An example of the latter is the text of art. 32 Constitution (freedom of movement), which in para. 2 contains a special limitations clause with a list of reasons for justification: 'This right may be limited by law, but only where this is necessary to ensure the course of criminal proceedings, to prevent the spread of infectious diseases, to protect public order, or if the defence of the state so demands'.

The relevance of the special limitations clauses has diminished since the judicial creation of the third possible justification ground (i.e. the protection of public interest).

Notably, when the Constitution does not include a list of grounds that justify a limitation on an individual human right or fundamental freedom, but another document protecting human rights does, the Slovenian Constitutional Court will 'import' the list of justifying grounds and only permit limitations justified by the grounds listed in international human rights law. An example is the list of grounds capable of justifying a limitation on freedom of religion in art. 9, para. 2 European Convention on Human Rights (ECHR).¹⁵ The Slovenian constitutional clause protecting freedom of conscience

12 The Slovenian term for limitation being 'omejitev' (the terminology of the 1991 Constitution) or 'poseg' ('encroachment').

13 On the two-stage approach, see for example, Gardbaum, 2007, pp. 789-854.

14 For the definition of *Gesetzesvorbehalt* in the German system of fundamental rights, see Sachs, 2017, p. 148.

15 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others', art. 9, para. 2 ECHR.

and religion (art. 41 Constitution) does not contain a similar list. However, limitations on art. 41 Constitution rights are only acceptable if they can be justified by one of the grounds listed in art. 9, para. 2 ECHR.¹⁶ This position is founded on the ‘minimum protection clause’ of art. 15, para. 5 Constitution.¹⁷

■ 1.4. *Limitations on limitations*

The centre of this account is the idea that the constitutional system with a two-stage approach to human rights protection, wherein human rights and fundamental freedoms can be limited, requires a mechanism that will prevent the limitations from becoming a conduit for the obliteration of human rights protection altogether. In the German literature, this mechanism is usually called ‘Schranken-Schranken’, or ‘limitations on limitations’.¹⁸ Alternatively, these limitations can be referred to as a set of ‘general requirements’ on the human rights limiting norm.¹⁹ In the next subsections, a set of requirements are presented that may be considered such limitations on limitations under the Slovenian constitution.

1.4.1. *Demand for legitimacy and proportionality of the limitation*

When the Slovenian Constitutional Court finds that the exercise of power (most commonly by the legislative branch) is a limitation of a human right or fundamental freedom and therefore, art. 15, para. 3 Constitution is applicable, the established practice is to submit the contested limitation to first, a legitimacy test (Slov. ‘test legitimnosti’), and second, to a strict proportionality test (Slov. ‘strogi test sorazmernosti’).²⁰ The strict proportionality test is further divided into three prongs: necessity (Slov. ‘nujnost’), appropriateness (Slov. ‘primernost’), and proportionality in the stricter sense of the word (Slov. ‘sorazmernost v ožjem smislu’²¹).

The question the Court asks itself when performing the legitimacy test is whether the contested measures are pursuing a constitutionally legitimate test. Logically, the exercise of the legitimacy test will be closely connected to art. 15, para. 3 Constitution, which lists the possible grounds that can justify a limitation of a human right, and to the third, judicially created justification (see 1.2. The general limitations clause (art. 15, para. 3 Constitution), para. 4).

The (strict) proportionality test does not have that clear an anchor in the text of the Constitution. As per Constitutional Court case law, the principle of proportionality

16 Constitutional Court RS, case U-I-140/14, 23.5.2018, para. 20.

17 ‘No human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that this Constitution does not recognise that right or freedom or recognises it to a lesser extent’, art. 15, para. 5 Constitution.

18 Marsch, Vilain, Wendel, 2015, p. 365.

19 Sachs, 2017, p. 179.

20 Constitutional Court judge Accetto describes this division of the proportionality review into two (sub-)tests as a Slovenian peculiarity, see Concurring Opinion to Constitutional Court RS, case Up-320/14, U-I-5/17, 14.9.2017, para. 4.

21 Lovro Šturm also uses the Slovenian word of Latin origin ‘proporcionalnost’. See also Šturm, 2011 on art. 2 Constitution, in Avbelj et al., 2011.

is a foundational principle of Slovenian constitutional law stemming from the principle of the state governed by law (Slov. 'pravna država') in art. 2 Constitution.²² However, at least in the earlier case law of the Constitutional Court, the Court cites as the legal basis for performing a strict proportionality test the norm in art. 15, para. 3 Constitution.²³

Essentially, the three prongs of the strict proportionality test are three questions the Constitutional Court poses: (a) is the contested measure such that it can attain a constitutionally legitimate goal? ('appropriateness'); (b) is the contested measure at all necessary for the attainment of the constitutionally legitimate goal, and if so, is it the least invasive alternative with which the constitutionally legitimate goal can be attained? ('necessity'); and (c) is the weight of the consequences of the contested limitation proportional to the value of the constitutionally legitimate goal or to the benefits arising from the limitation? ('proportionality stricto sensu').²⁴

1.4.2. Demand for clarity and precision in the norms that limit human rights and fundamental freedoms

Case law of the Constitutional Court confirms that one of the limitations on limitations of human rights and fundamental freedoms is also that the statute that limits a human right (on the requirement to follow the correct form see 1.4.4. *Requirement to follow the correct legal form*) is sufficiently clear and defined.²⁵ The purpose of this requirement is to on one hand ensure that the individual or legal person can ascertain his rights and obligations from the legal form and be certain of the consequences of potential breach of the norm. On the other, this requirement protects the individual from potential illegitimate encroachments upon his rights and legal interests²⁶; in other words, the purpose is to protect the addressee from the arbitrary exercise of public power.

1.4.3. Requirement to preserve, despite the limitations, the core of the human right or fundamental freedom

This requirement is not frequently invoked before or by the Constitutional Court, at least not in comparison to the tests of legitimacy and proportionality, which are a staple of constitutional review in Slovenia. There is no express legal basis for this requirement, as for example, in the 'Wesensgehaltgarantie' in art. 19, para. 2 Grundgesetz.²⁷ It is likely that the intellectual impact of the German doctrine also manifested in (some) Slovenian Constitutional Court judges' conception of human rights and fundamental freedoms. The most detailed conception was proposed by Judge Zobec in his separate opinion to Constitutional Court RS, case Up-360/05. According to him, every constitutionally protected right has three layers. The first is its firm, inaccessible existential *nucleus*.

22 Šturm, 2011 on art. 2 Constitution, in Avbelj et al., 2011.

23 See *supra*.

24 See *supra*.

25 Constitutional Court RS, case U-I-220/03-20, 13.10.2004, para. 14.

26 Constitutional Court RS, case U-I-220/03-20, 13.10.2004, para. 15. See also Constitutional Court RS, case U-I-145/03, 23.6.2005, para. 25.

27 See for example, Sachs, 2017, p. 189 or Marsch, Vilain, Wendel, 2015, p. 367.

It is surrounded by the second, less firm layer, prone to art. 15, para. 3 Constitution limitations. The third, most porous layer is where human rights are prone to art. 15, para. 2 Constitution regulations of the manner in which they are exercised.²⁸ However, in some instances, it seems that—to use Judge Zobec’s terminology—the Constitutional Court conflates the first and second layer. The *nucleus* is the layer prone to art. 15, para. 3 Constitution limitations, and thus distinguishable from the layer where the right will only be regulated pursuant to art. 15, para. 2 Constitution.²⁹

1.4.4. Requirement to follow the correct legal form

The text of art. 15, para. 3 Constitution does not prescribe the legal form in which a human right or fundamental freedom can be limited. This is in contrast with the text of para. 2 Constitution. The manner in which rights are exercised can only be regulated in a parliamentary statute (Slov. ‘zakon’).³⁰ At first sight, this makes little sense. By definition, a para. 3 limitation of a human right is an activity where the norm-giver should be exposed to stricter scrutiny and heightened procedural guarantees than for a para. 2 regulation.³¹ Was the omission of a requirement of form on the part of the constitution-maker intentional? Possibly, the constitution-maker anticipated that human rights and fundamental freedoms would be limited not only abstractly by lawmakers, but also in concrete cases by courts.

Regardless of the omission described in the preceding paragraph, in its early years, the Slovenian Constitutional Court nevertheless insisted on ‘zakon’ as the only acceptable form for limitations of human rights and fundamental freedoms.³² Later, references to this requirement rarely appear in the Court’s argumentation. The last reference—in the majority judgment—is possibly in 2005.³³ The requirement has not disappeared completely from the minds of the judges, however, and is occasionally mentioned in their separate opinions.³⁴

At the same time, the Constitutional Court has on occasion accepted a limitation of a human right and fundamental freedom enacted in a substatutory norm, and proceeded to perform a strict proportionality test. For example, the Constitutional Court did not require for a limitation of a human right or fundamental freedom to come in

28 Dissenting Opinion of Judge Zobec to Constitutional Court RS, case Up-360/05, 12.11.2008, para. 5.

29 Constitutional Court RS, case U-I-74/14, 17.6.2015, para. 11. With regard to right to private property, see Constitutional Court RS, case U-I-47/15, 24.9.2015, para. 15.

30 See *supra*.

31 Concurring Opinion of Judge Sovdat to Constitutional Court RS, case Up-2530/06, 15.4.2010, para. 5.

32 Constitutional Court RS, case U-I-158/95, 2.4.1998, para. 15.

33 Constitutional Court RS, case U-I-145/03, 23.6.2005, para. 25.

34 Dissenting Opinion of Judge Zobec to Constitutional Court RS, case Up-360/05, 12.11.2008, para. 5. Most recently, it seems this happened in the Dissenting opinion of Judge Korpič-Horvat to Constitutional Court RS, case U-I-289/13, 14.3.2016. The dissenting opinion cites the Constitutional Court RS, case U-I-123/11, 8.3.2012, as the authority, but Constitutional Court RS case U-I-123/11 does not clearly lay down the requirement to follow the form of statute.

the form of a statute when it was enacted in an act of local self-government regulating the original competence of the local government.³⁵

1.4.5. Prohibition of discrimination

Pursuant to art. 14, para. 1 Constitution, ‘everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance’.

Prohibition of discrimination may not be customarily conceived of as a limitation on limitations of human rights and fundamental freedoms. In the sense of the methodology of the review of constitutionality, the approach is that an applicant aggrieved by a discriminatory law will invoke the constitutional prohibition of discrimination (art. 14, para. 1 Constitution) in conjunction with the individual constitutional right that he alleges is not respected in a manner that respects equality regardless of personal circumstances.

Review of constitutionality employs a different optic. However, a claim can still be made on a conceptual level of a limitation of human rights and fundamental freedoms. The consequence that human rights would not be equally guaranteed because of a personal circumstance would be unacceptable. In that sense, prohibition of discrimination represents a conceptual limitation of limitations.

2. Temporary suspension and restriction of rights during a war or state of emergency (art. 16 Constitution)

As discussed, in the Slovenian constitutional system, limitations of human rights and fundamental freedoms occur on a day-to-day basis as the result of the legislative branch seeking a compromise between the rights of addressees of statutory norms, public interest, and the will of the democratic majority. As long as the requirements of art. 15, para. 3 and art. 2 Constitution are respected, such limitations do not constitute a violation of the Constitution. However, a further possibility of the creation of legal norms in the fields protected by human rights and fundamental freedoms is foreseen by the Constitution. This latter possibility is strictly limited to two potential extraordinary situations. As per art. 16, para. 1 Constitution, ‘[h]uman rights and fundamental freedoms [...] may exceptionally be temporarily suspended or restricted during a war and state of emergency’.

However, as art. 16 Constitution has not been invoked to this day, the working of the mechanism it sets up has not yet been observed. Hence, attempts to interpret this constitutional clause are somewhat speculative, and in the future might turn out to have been wrong. Notwithstanding, art. 16 contains numerous elements that define

³⁵ Constitutional Court RS, case U-I-313/96, 8.4.1999. See also Testen, 2002, on art. 15, para. 3 Constitution, in Šturm et al., 2002.

the parameters of interpretation of the ‘temporary suspension or restriction’ of human rights and fundamental freedoms. These elements are briefly discussed below.

■ 2.1. Elements

2.1.1. Declaration of a State of Emergency as a Precondition

First, as a precondition for the invocation of art. 16 Constitution, a state of war (‘vojno stanje’) or emergency (‘izredno stanje’) must be *declared*. First, art. 92 Constitution lays down the material condition under which a state of emergency can be declared, that is: when a great and general danger threatens the existence of the state.³⁶ (The constitution-maker did not deem it necessary to define ‘war’.³⁷) Second, there needs to be an act of declaration by the competent state organ for the state of emergency to begin. In the first line, the competent organ is the National Assembly acting upon the proposal of the Government (art. 92, para. 1 Constitution). Only if the National Assembly is unable to convene does the President of the Republic decide. Even if the decision-making power is transferred to the President of the Republic, he or she can only act upon the proposal of the Government.³⁸

2.1.2. Institutional Setting

Similarly, pursuant to art. 92 Constitution, the National Assembly enacts and repeals urgent measures during a state of emergency or war.³⁹ If it is unable to convene, however, this power passes to the President of the Republic, who in accordance with art. 107 Constitution, is thus empowered to issue decrees with statutory power (Slov. ‘uredbe z zakonsko močjo’), turning into a ‘substitute legislature’.⁴⁰ Both the National Assembly and President of the Republic act upon the proposal of the Government.

2.1.3. Proportionality

The temporary suspension or restriction of human rights and fundamental freedoms during a state of emergency or war can be adopted ‘only for the duration of the war or state of emergency, but only to the extent required by such circumstances’ (art. 16, para. 1 Constitution).

36 Compare this to the formulation in art. 15 ECHR: ‘...public emergency threatening the life of the nation...’. The standard translation of ECHR to Slovenian uses the word ‘narod’ to translate ‘nation’, which usually denotes a group of people with a common ethnic identity. For example, in the standard English translation of art. 3, para. 2 Constitution is ‘Slovenia is a *state* (Slov. ‘država’) of all its citizens and is founded on the permanent and inalienable right of the Slovene *nation* (Slov. ‘narod’) to self-determination’ (emphasis and explanations in parentheses added).

37 A definition of the ‘state of war’ (‘vojno stanje’), however, is in the Defence Act, Official Gazette RS, No. 103/04, 20.12.1994, pursuant to art. 5, para. 5, ‘a state of war shall be declared in the case of a military attack on the country, or a military attack on an ally of Slovenia’.

38 Žgur, 2016, p. 446.

39 The provisions of Chapter VII of the Rules of Procedure of the National Assembly, Official Gazette RS, No. 92/07, 2.4.2002, regulate the work of the NA during a state of emergency or war.

40 Žgur, 2016, p. 446.

The general idea of proportionality, i.e. as adjusting the response of the public power to the events in the life of the society to the gravity of these events, is thus articulated through two explicit orders of the constitution-maker to the emergency legislature (be it the National Assembly or President of the Republic). First, as it is only possible to introduce a temporary suspension/restriction pursuant to art. 16 Constitution, it will also lapse as the state of emergency or war finishes.

Second, the intensity and invasiveness of the measures must not exceed whatever is necessary to combat the adverse events that threaten the existence of the state. The equilibrium between what the situation requires and the measures adopted to react to the situation is the essence of proportionality. In addition, art. 16 Constitution rule has to be read in conjunction with art. 92 Constitution, which enables the National Assembly/President of the Republic to adopt *necessary* (Slov. 'nujne') measures. The word 'nujne' is the same as that used in one prong of the strict proportionality test. It implies that the necessity test is to be used when temporarily restricting or suspending human rights and fundamental rights during a state of emergency.

2.1.4. Prohibition of Discrimination

One requirement of art. 16 Constitution is also that measures temporarily restricting or suspending human rights and fundamental freedoms 'do not create inequality based solely on race, national origin, sex, language, religion, political, or other conviction, material standing, birth, education, social status, or any other personal circumstance'. This builds an explicit prohibition of discrimination into the art. 16 Constitution mechanism.

Note that the list of protected grounds no longer mirrors that in the general prohibition of discrimination in art. 14 Constitution.⁴¹ In 2004, the constitution-maker amended art. 14 to explicitly list disability as a protected ground, but did not amend art. 16. It was not disputed before 2004 that disability is a protected ground covered by 'other personal circumstance'.⁴² Hence, disability is certainly also a protected ground as far as art. 16 is concerned.

2.1.5. Absolute rights

Art. 16, para. 2 Constitution contains a list of rights⁴³ that cannot be temporarily suspended or restricted during a period of war or state of emergency, which in that sense, represents an exception from the rule established in art. 16, para. 1 Constitution. The literature commonly refers to these rights as 'absolute' as they cannot be limited during a state of emergency or war.⁴⁴ The question as to whether the absolute status protected during a state of emergency or war by art. 16, para. 2 Constitution extends to 'everyday'

⁴¹ See *supra*.

⁴² Šturm, 2011, on art. 14, para. 1 Constitution, in Avbelj et al., 2011.

⁴³ Art. 17, inviolability of human life; art. 18, prohibition of torture; art. 21, protection of human personality and dignity; art. 27, presumption of innocence; art. 28, principle of legality in criminal law, art. 29, legal guarantees in criminal proceedings, art. 41, freedom of conscience.

⁴⁴ Čerňič, 2019, on art. 16, paras. 1-2, in Avbelj et al., 2019.

situations when human rights and fundamental freedoms can be limited based only on art. 13, para. 3 Constitution does not yet have a definitive answer. On one hand, the conclusion is that the absolute rights in art. 16, para. 2 should not be limited based on art. 15 Constitution. Simply, if the constitution-maker wished to keep them intact even when the existence of the state is threatened, then they are undoubtedly off-limits when no such danger lurks.

Simultaneously, the Constitutional Court permits an art. 15, para. 3 limitation on the freedom of conscience that occurs in the normal life of the constitutional system outside a state of emergency or war. The status of this right is far from absolute, as the Constitutional Court performed a strict proportionality case when it reviewed a law that introduced the compulsory stunning of animals before slaughter and thus prevented animal slaughter in accordance with the teachings of Islam.⁴⁵ At the same time, the Constitutional Court recognizes the absolute character of prohibition of torture (art. 18 Constitution) and prohibits limitations pursuant to art. 15, para. 3.⁴⁶ It does not, however, cite the list of absolute rights in art. 16, para. 2 to support its position.⁴⁷ Thus, a position on the art. 16, para. 2. list does not necessarily guarantee an absolute character to an individual human right or fundamental freedom in relation to the limitations in art. 15, para. 3. In fact, even whether this position could serve as an argument for immunity from art. 15, para. 3 is not entirely clear.

■ 2.2. *Difference between art. 15, para. 3 limitations and art. 16 temporary suspension and restriction*

Art. 16 Constitution foresees the possibility of the ‘temporary suspension’ (Slov. ‘začasna razveljavitev’) and/or ‘restriction’ (Slov. ‘omejitev’) of human rights and fundamental freedoms. In the Slovenian text, the verb ‘omejiti’ (English ‘to limit’) in art. 16 is the same as the one used in art. 15, para. 3 Constitution. In the standard English translation of the Constitution, however, two different words are used. Regardless, the constitution-makers did not only foresee an ‘omejitev’ during a war and state of emergency. They added ‘začasna razveljavitev’. The standard English translation of the Constitution uses the word ‘suspension’ here, although a more standard equivalent of ‘razveljavitev’ is ‘repeal’ or ‘revocation’. This leads to the conclusion that the art. 16 regime enables deeper encroachments upon human rights and fundamental freedoms than the day-to-day regime of art. 15, para. 3.

This understanding was recently confirmed by the Constitutional Court.⁴⁸ In U-I-83/20, the Slovenian Constitutional Court did not apply art. 16, as a state of emergency had not been declared. Nevertheless, as the applicant claimed that the restrictive measures adopted during the COVID-19 epidemic were potentially only acceptable during a

45 Constitutional Court RS, case U-I-140/14-21, 25.4.2018. See also Constitutional Court RS, case U-I-68/98, 22.11.2001.

46 Constitutional Court RS, case U-I-292/09-9, Up-1427/09-16, 20.10.2011, para. 18.

47 Constitutional Court RS, case U-I-238/06, 7.12.2006, para. 14.

48 Constitutional Court RS, case U-I-83/20-36, 27.8.2020, para. 62.

state of emergency, the Court had the opportunity to indicate its understanding of the difference between art. 15, para. 3 and art. 16 is. All the court said in U-I-83/20 was that the temporary suspensions in art. 16 can encompass ‘more invasive’ measures than those acceptable under art. 15, para. 3. It did not pronounce its position on what test it would use to review these measures, for example.

3. Government measures to tackle the COVID-19 epidemic from the perspective of the limitations of human rights and fundamental freedoms

■ 3.1. Freedom of movement

According to art. 32, para. 1, Constitution, ‘[e]veryone has the right to freedom of movement, to choose his place of residence, to leave the country, and to return at any time’. Para. 2 allows for limitations of this right, *inter alia*, ‘to prevent the spread of infectious diseases’. Art. 39, para. 1, point 2 ZNB⁴⁹ provides a legal basis for the ‘prohibition or limitation of movement of people in infected or directly endangered areas’. On this basis, on 19 March 2020, the Government instituted a temporary ‘general prohibition of movement’ (and of assembly, see below 3.3.) on public places and surfaces, and access to public places and surfaces.⁵⁰ This was an unprecedented decision in the history of independent Slovenia, as the country had never before experienced a nearly total ban on movement with the broadest scope *ratione personae* imaginable (only movement for the purpose of the exercise of public power was excluded) and a general scope *ratione loci*. The ordinance in art. 3 contained a number of exceptions, for example, commuting to work, traveling to access medical services, traveling to access car mechanics, providing help to persons in need, and access to the limited number of shops and services that remained open (see below 3.5.). Very importantly, the list of exceptions included ‘access to parks and other surfaces for walks’.

This last exception provided for modest possibilities of relaxation in contact with nature, and limited outdoor physical activity (e.g. running or cycling), both very important to the Slovenians. The remaining exceptions enabled the people to satisfy only their most essential needs (e.g. acquiring food and medications) while remaining productive members of society by being able to commute to their workplace. The ‘parks and surfaces for walks’ exception made possible the only activity that helped people remain something beyond mere labourers-consumers and participants in the economy. As for the people who are not active in the economy (e.g. old-age pensioners, the unemployed, children who at that time participated in classes via videoconference),

49 Zakon o nalezljivih boleznih (ZNB, Eng. ‘Communicable Diseases Act’), Official Gazette RS, No. 69/95, 1.12.1995.

50 Ordinance 30/20, Official Gazette RS, No. 30/20 and 38/20, 19.3.2020.

their ‘right’ to move around would have been practically annulled if it was not for the parks exception.

Only 10 days later, on 29 March 2020, the general prohibition of movement was expanded to also ban movement that would cross municipality boundaries.⁵¹ This additional limitation on the right to freedom of movement was triggered by reports of sun-seekers, hikers, and picnickers who allegedly flooded popular Slovenian tourist spots in March 2020.⁵² It was still possible, for example, to commute to work by crossing municipality borders, but art. 1 explicitly banned access to parks and walking surfaces in another municipality.

While the list of exceptions was progressively expanded with consecutive government ordinances, the general ban on movement was in force until 18 May 2020, a couple of weeks after the official end of the pandemic.⁵³

With an increasing number of cases and pressure on the health system, on 14 October 2020, the Government prohibited or limited movement between statistical regions,⁵⁴ again with a list of exceptions.⁵⁵ On 19 October 2020, a 9 pm–6 am curfew was introduced, with a modest list of exceptions.⁵⁶

■ 3.2. *Right to personal liberty*

The Constitution guarantees everyone the right to personal liberty (art. 19, para. 1), and additionally prohibits deprivation of liberty ‘except in such cases and pursuant to such procedures as are provided by law’ (para. 2).

There are two noteworthy phenomena in this regard. The first was the issuing of quarantine decisions by the Ministry of Health to those citizens and residents of Slovenia that returned from countries included on the so-called ‘red list’.⁵⁷ Persons submitted to the obligation to quarantine for 14 days are effectively deprived of their liberty as they are not allowed to leave the address specified in the quarantine decision.⁵⁸ The ZNB foresees that persons can be put in (involuntary) quarantine when ‘there is a suspicion that they were in contact with someone who has fallen ill’ with one of certain communicable diseases (art 19, para. 1).⁵⁹ With this formulation, art. 19 ZNB sets a standard of proof (‘suspicion’) and instructs the Ministry of Health to establish a certain set of facts (e.g. who has the person in question been in contact with). The government ordinance disregards all statutory requirements and instructs

51 Art. 1, Ordinance 38/20, Official Gazette RS, No. 38/20, 51/20, 52/20, 29.3.2020.

52 Constitutional Court RS, case U-I-83/20-36, 27.8.2020, paras. 2, 24.

53 Ordinance 60/20, Official Gazette RS, No. 60/20 and 69/20, 29.4.2020.

54 Slovenia does not have regions or units of local self-government larger than the aforementioned municipalities. Until this point, statistical regions were not used beyond statistics.

55 Art. 3, Ordinance 143/20, Official Gazette RS, No. 143/20, 14.10.2020.

56 Ordinance 147/20, art. 1, Official Gazette RS, No. 147/20, 19.10.2020.

57 Art. 9, Ordinance 83/20, Official Gazette RS, No. 83/20, 7.6.2020.

58 In that sense, quarantine is comparable to or potentially even a harsher measure than house arrest (Slov. ‘hišni pripor’) pursuant to art. 199.a, Criminal Procedure Act (Slov. ‘Zakon o kazenskem postopku’), Official Gazette RS, No. 32/12, 29.9.1994.

59 A person that has fallen ill, conversely, can be ordered to isolate under art. 18 ZNB.

the Ministry of Health to issue quarantine decisions automatically upon arrival from a red list country.

Second is the deprivation of liberty of the residents of senior citizens' homes. With the appearance of the first confirmed cases of COVID-19 in Slovenia, many senior citizens' homes declared that visits to residents were no longer allowed, but often also that residents were not allowed to leave the home.⁶⁰ To be prohibited from leaving the senior citizens' home, usually a building housing a few hundred people that is perhaps surrounded by a park, is certainly tantamount to a deprivation of liberty. For example, this would be the case if we were to apply the criteria from the ECHR Guzzardi case.⁶¹ It is not entirely clear how the decision to deprive residents of senior citizens' homes of liberty was made, but it seems that it was simply a decision of the directors of the homes. Senior citizens' homes are generally public institutions of social care.⁶² The legal basis that would empower the director of a senior citizens' home seems non-existent.⁶³

■ 3.3. Freedom of assembly

In art. 42, para. 1, the Constitution guarantees 'the right of peaceful assembly and public meeting'. The ZNB foresees a ban of assembly in schools, cinemas, public establishments, and other public places until the danger of spreading a communicable disease ceases (art. 39, para. 1, point 3). Limitations on the constitutionally guaranteed freedom of assembly were adopted in the form of a ministerial decree (Slov. 'odredba') on 10 March 2020, before the declaration of the epidemic, on 10 March 2020 (a limitation of sporting and other events with more than 500 participants in open public spaces).⁶⁴ Simultaneously with the temporary general prohibition of movement described *supra*, the government ordinance of 29 March also instituted a temporary general prohibition on assembly. In contrast with the prohibition of movement, no exceptions were foreseen.⁶⁵ On 18 May 2020, the government ordinance annulling the general prohibition of movement also changed the situation regarding assembly. Assembly was no longer prohibited, only 'temporarily limited', and only prohibited if there were more than 50 people assembling or if safety measures could not be complied with.⁶⁶ During the summer, assemblies of more than 10 and less than 50 people were permitted under the condition that the organiser maintained a list of participants and their contact

60 See for example, the Notification of the director of the Rakičan Senior Citizen's Home of 8 September 2020 (on file with the author).

61 Case of Guzzardi v. Italy (Application no. 7367/76), Judgement, Strasbourg, 6 November 1980, para. 95.

62 Art. 50, Zakon o socialnem varstvu (ZSV, Eng. 'Social Assistance Act'), Official Gazette RS, No. 3/07, 4.11.1992.

63 Newspaper Article in 'Dnevnik', quoting from the Slovenian Human Rights Ombudsman, 4.7.2020.

64 Art. 1, Decree 17/20, Official Gazette RS, No. 17/20 and 30/20, 10.3.2020.

65 Art. 1, Ordinance 38/20.

66 Arts. 1-3, Ordinance 69/20, Official Gazette RS, No. 69/20, 15.5.2020.

information.⁶⁷ The rising number of confirmed cases in September and October 2020 brought about stricter limitations on assembly, bans on certain types of events, and a general ban of assembly for groups exceeding 10—and later 6—people.

Noteworthy is that on a normative level, government ordinances have never provided an exception from the limitation of assembly that would cover assemblies, the purpose of which is expression of political opinion (presumably with a requirement to respect safety measures). This did not even occur as the restrictions on freedom of movement and assembly significantly loosened in May 2020 to enable access to the majority of services and economic activities. This is connected to the facts on the ground: Since the second half of April, and despite the ban on movement, anti-government protests were held in the centre of Ljubljana and other cities. The protestors' discontent was not necessarily with measures to tackle the pandemic, but with what was considered the corrupt handling thereof and other government moves perceived as taking advantage of the crisis to consolidate its power.⁶⁸ The police have mostly refrained from issuing fines to protesters that (most probably) violated the general prohibition of movement. Thus, *de facto*, there was room for the collective expression of political opinion, not on the normative level, but as per the decision of individual police commanders.

■ 3.4. Family life and the rights of children

Until the 22 October 2020 amendments⁶⁹ to the 19 October 2020 government ordinance banning travel between statistical regions,⁷⁰ which added 'maintaining contact with children' to the list of exceptions, the list of exceptions to bans on free movement consistently excluded family unity as a justified reason, with the exception of providing assistance to persons in need. The matter here is not visits to distant relatives, which surely was a difficult limitation for a number of Slovenians, but maintaining contact between children and their parents that do not live together. (This was also not among the exceptions for the strict quarantining regime in place when re-entering Slovenia after a stay in a foreign country,⁷¹ ignoring the fact that there are also children whose parents live across the border.) A prolonged inability to maintain contact with a parent may have detrimental effects on the well-being of a child,⁷² especially because chil-

67 This was problematic as it contains an obligation to collect and process personal data. Personal data can be collected and processed either on the basis of a statute or personal consent: art. 8, para. 1, Zakon o varstvu osebnih podatkov (ZVOP-1, Eng. 'Personal Data Protection Act'), Official Gazette RS, No. 94/07, 15.7.2004. This is based on the Constitutional right of protection of personal data (art. 38). An obligation to collect personal data enacted in a substitutory legal act such as the government ordinance violates the ZVOP-1 rule.

68 Newspaper Article on BBC: 'Slovenia cyclists hold anti-government protest', 9.5.2020; newspaper article on Reuters: M. Novak, 'Slovenian cyclists stage anti-government coronavirus protest', 8.5.2020.

69 Art. 2, Ordinance 151/20, Official Gazette RS, No. 151/20, 22.10.2020.

70 Art. 1, Ordinance 147/20.

71 Art. 10, Ordinance 83/20.

72 The text contains a number of resources linked to the detrimental effect of parent-child separation. See D.-M. Ordway, 'Family separation', 27.6.2018.

dren were also unable to spend time with their school friends and other peers during the period of the general prohibition of movement. After all, children are expressly protected from separation from their parents by virtue of the 1989 Convention on the Rights of the Child (art. 9).⁷³

■ 3.5. *Free economic initiative*

In its third chapter, entitled 'Economic and Social Rights', the Constitution guarantees free economic initiative. This right has been recognized as one of the human rights and fundamental freedoms by the Constitutional Court.⁷⁴ The ZNB foresees the possibility of a 'limitation or ban on the sale of individual products' (Art. 39, para. 1, point 4). Between mid-March and mid-May, however, a government decree enacted a general ban on the sale of goods and services to consumers, combined with a list of the types of shops that were still allowed to operate. The list of exceptions was progressively expanded until finally, in mid-May, the government decree only prohibited certain economic activities (e.g. night clubs).⁷⁵ The October 2020 measures again closed restaurants, cafes, and bars.⁷⁶

■ 3.6. *Right to health*

The right to health care (under conditions set down by a statute) is a human right and fundamental freedom guaranteed in art. 51 Constitution. The ZNB (art. 37, para. 1) foresees the power of the health minister/government to react to an epidemic, by enacting a duty of medical workers to perform their duties and limiting their right to strike (point 1), as well as attributing 'special tasks to natural and legal persons that perform medical activities' (point 3). These loosely formulated powers of the executive branch of power were cited as the legal basis for measures that practically halted the country's health system (with the exception of treating patients with COVID-19 and the aforementioned exceptional cases) for almost two months. Thus, on 16 March 2020, a government decree cancelled all preventive, specialist, surgical, and dental services until further notice with limited exceptions.⁷⁷ On 20 March, the exceptions were further limited and included only urgent services and the treatment of pregnant women, for example.⁷⁸ This measure was in force until 9 May 2020.⁷⁹ This meant that the significant number of people suffering from illnesses and medical conditions unrelated to COVID-19 could not receive any medical attention as they were not in immediate danger.

73 UNTS Volume Number: 1577 (p. 3).

74 Constitutional Court RS, case U-I-40/12-31, 11.4.2013, paras. 17-18; Pernuš-Grošelj, 2002, on art. 74 Constitution, in Šturm et. al., 2002.

75 Arts. 1-2, Ordinance 25/20, Official Gazette RS, No. 25/20, 15.3.2020; art. 2, Ordinance 67/20, Official Gazette RS, No. 67/20, 13.5.2020.

76 Art. 4, Ordinance 143/20.

77 Decree 22/20, Official Gazette RS, No. 22/20, 13.3.2020.

78 Art. 2, Ordinance 32/20, Official Gazette RS, No. 32/20, 20.3.2020.

79 Art. 1, Ordinance 65/20, Official Gazette RS, No. 65/20, 8.5.2020.

A special case of limitations of the right to health care was the treatment of elderly residents of senior citizens' homes. These institutions were among the most affected by COVID-19.⁸⁰ Often, a decision was made not to transfer residents that had fallen ill to hospitals, but to set up a 'red zone' in the senior citizens' home. There are indications that the level of medical care available in senior citizens' homes was not equivalent to that provided in hospitals.⁸¹

4. Revisiting the doctrine of limitations on human rights and fundamental freedoms: what really matters?

■ 4.1. Proportionality

The approach of the Slovenian executive branch of government in designing measures to tackle the spread of the disease has often resonated with the popular 'Law of the instrument' adage according to which to someone holding a hammer, everything looks like a nail.⁸² The enacted prohibitions were often of extremely broad application, with apparently little thought put into the consequences for different addressees. The differences between the Spring 2020 approach and Autumn 2020 approach are striking. In Spring, one of the first measures was a general prohibition on movement. In Autumn, the government first limited movement between statistical regions, then temporally (curfew), then across municipality borders. While the Autumn measures are also far from perfect, this illustrates how much room for manoeuvre there is if the norm-giver is prepared to consider reactions that while appropriate for attaining a legitimate goal, seek to limit individual freedoms as little as possible. Still, the introduction of the curfew, for example, remains questionable from the standpoint of proportionality. The justification for the curfew according to the Minister of the Interior was that many infections stemmed from private gatherings at night. However, private gatherings (with more than six participants) were *per se* prohibited at the time the curfew was introduced. This leads to the conclusion that movement during the night by itself is not dangerous. A curfew is needed as it is difficult for the state to enforce the other prohibitions. At face value, this approach is dangerous from the perspective of ensuring the proportionality of government action. Why would we, COVID-19 or not, not simply ban cars, thus making sure nobody exceeds the speed limit or drives inebriated? On the other hand, it is clear that a curfew might be unavoidable to preserve lives in cases of endemic violence or looting during riots. The line separating the two sets of situations

80 In April 2020, one-fifth of all infected Slovenians were residents of senior citizens' homes: see V. Jager, 'Zakaj tako s starejšimi?' (V. Jager), 10.4.2020, para. 2. According to data available in mid-April 2020, of the 197 residents and 127 members of staff of the Šmarje pri Jelšah Senior Citizens' Home, 149 residents and staff members were infected, and 22 residents had died: newspaper article in 'Delo', Malovrh and Kuralt, 15.4.2020.

81 V. Jager, paras. 6, 8.

82 A definition of 'Law of the instrument' is accessible via Wikipedia.

is not clear and was not discussed by the executive branch. We therefore remain in a 'proportionality grey zone'.

This unfortunate situation is not aided by the lacklustre approach of the Constitutional Court when it reviewed the April 2020 ban on movement across municipal borders.⁸³ The Court posited that as this ban helped limit contact among people and thus, the spreading of the disease, and as the government was not in a position to forecast whether the individual (milder) measures would stop the spread, the measure successfully passed the necessity test.⁸⁴ The Court did not, as is common, discuss possible milder alternatives to ascertain whether a less invasive measure was available. It is not surprising that the Court decision did not curtail the 'hammer-nail' approach of the government in preparing the measures after the decision of the Court.

In the situation of a communicable disease crisis or epidemic, proportionality as perhaps the most important limitation on the limitations of human rights and fundamental freedoms remains important. Clear is how it can prevent excessive limitations, but at the same time, permit properly balancing rights and freedoms on one hand, and the protection of health on the other. Unfortunately, this was not thanks to the reaction of the Constitutional Court.

■ 4.2. *Temporal limits*

In the *ad interim* order issued in case U-I-83/20 in mid-April 2020, the Constitutional Court temporarily stopped the application of one of the articles of the government decree banning movement across municipal borders within Slovenia, which foresaw the validity of this measure 'until further notice'. According to the Constitutional Court, this clause would mean that these measures become permanent, which is not necessary in attaining the goal pursued by the decree. The government has to periodically verify the proportionality of the measures and only extend their validity if based on the situation and opinion of health experts, it concludes that they continue to be necessary in attaining goals.⁸⁵

Since the *ad interim* order of the Constitutional Court, the government has indeed systematically periodically verified the measures, most commonly on a weekly basis.⁸⁶ Certainly, this simple requirement as posited by the Constitutional Court, 'reduces the possibility of disproportionate encroachments on human rights and fundamental freedoms, and does not put the health and life of people at greater risk due to the spreading of the epidemic.'⁸⁷ In addition, this approach has the potential to prevent the regime adopted to tackle the crisis to simply perpetuate beyond the crisis situation and become the new normal. Its potential to prevent disproportionate encroachments is also severely limited if the accountability of the government that

83 Constitutional Court RS, case U-I-83/20, 27.8.2020.

84 *Ibid.*, paras. 52-54.

85 Order U-I-83/20-10, Constitutional Court RS, case U-I-83/20-10, 16.4.2020, para. 26.

86 See for example, art. 6, Ordinance 92/20, Official Gazette RS, No. 92/20, 29.6.2020.

87 Order U-I-83/20-10, para. 26.

is under the requirement of periodical verification is not strong enough to dissuade it from simply automatically renewing the measures week after week. If the courts, or citizenry, or legislative branch, or independent institutions do not put the government under sufficient pressure to engage in serious consultations with the experts before renewing, this requirement may serve for little more than presenting the executive branch with a veneer of legality.

■ 4.3. *Clarity, precision, and quality of legislative drafting*

Many government decrees that limited human rights and fundamental freedoms were written in an unclear manner that made it difficult for the addressees of the legal norms to be certain whether they are acting in line with the law or not. In a situation where measures are temporary and change relatively rapidly, lawyers cannot count on their usual 'fix' for poorly written law, namely that the courts with the development of case law will find the correct interpretation and restore legal certainty. Instead we learnt that the *de facto* power to interpret the law in such a situation ends up with the drafters or makers of this law. An important role is played by the media, who may or may not correctly transmit the message to the public. If neither the responsible government official nor the journalists have legal training, chances are something will go wrong. On a few occasions in press conferences, the Slovenian Interior Minister, confronted with journalists' questions, interpreted the freshly adopted government ordinance *contra legem*, mostly by adding new exceptions to a prohibition enacted in an ordinance. Clearly, in a state governed by the rule of law, this is unacceptable. If the list of exceptions is missing something (e.g. it is a relatively logical exception that a person walking their dog can stay outside during the curfew), the government needs to change the text of the ordinance and publish the new ordinance. This will enable the courts to not only analyse the culpability of the citizens charged with violation, but also the proportionality of the measures and application thereof when seized with appeals against fines for violating the curfew.

■ 4.4. *Justification and scientific rationality*

It seems clear that when the executive branch of the government adopts measures to protect public health, these need to be based on the findings and recommendations of public health experts.⁸⁸ This requirement can legitimately be considered a limitation on limitations of human rights and fundamental freedoms when the decision to adopt limitations is linked to scientific rationality. This does not mean that the executive branch has to completely relinquish its decision-making power. The final choice of the available alternative measures, assessment of the restrictive or invasive effect they have on individuals, feasibility of the enforcement, and so on are all questions best answered by the executive branch (and then, if it comes to that, subsequently controlled by the judicial branch).

88 Constitutional Court RS, case U-I-127/01, 12.2.2004, para. 19.

The separate opinions in U-I-83/20 reveal the discontent of a minority of judges with the assurances put forward by the government that the measures were adopted based on expert recommendations.⁸⁹ The revelation that the Constitutional Court actually required some time and energy to establish the facts—in other words, whether and in what way expert recommendations reached government decision-making—is disconcerting. If this is a demanding task for the Constitutional Court, how is the public supposed to confirm that the measures befalling them are justified from an expert viewpoint.

This is aggravated when limiting measures are adopted in the form of sub-statutory (executive) norms. When a norm that limits human rights and fundamental freedoms is adopted in the form of a statute, the Rules of Procedure of the National Assembly apply. The latter require (for every statute) a thoroughly justified proposal (a ‘Bill’) supported by arguments.⁹⁰ There are similar requirements in place for the proposal of a substatutory act (e.g. a government ordinance) in the Rules of Procedure of the Government,⁹¹ but as this is an internal procedure, parliament cannot hold the Government accountable for a proposal poorly supported with arguments. It would be sensible to consider a requirement for substatutory norms to include a short preamble. In addition to stating the legal basis, which happens already, it could follow the example from EU law (art. 296, para. 2 Treaty on the Functioning of the European Union) and cite the written opinions or recommendations of all the institutions or experts consulted in the process. These could easily be made available through the government website.

■ 4.5. *Statutory basis*

The preceding discussion on the correct form of limitation of a human right or fundamental freedom was left open. Is it possible that the epidemic has changed that? In U-I-83/20, the majority of the Court saw no issue with the limitation of a human right or fundamental freedom in the form of a government ordinance.⁹² The majority of the Court decided not to check whether the government ordinances went beyond the statutory authorisation in ZNB or not. Overstepping the statutory authorisation boundaries was perhaps not striking in the case at hand; however, in the general ban on the sale of goods and services discussed earlier, an average lawyer will probably find it difficult to find a loyal interpretation of the ZNB clause that envisages the ‘ban or limits on the sale of specific products’ that can then support such an all-encompassing measure as a general ban, which also covers services not mentioned in the ZNB. In the first round

89 Dissenting Opinion of Judge Čeferin to Constitutional Court RS, case U-I-83/20, 27.8.2020, paras. 12-20; Dissenting Opinion of Judge Accetto, *ibid.*, paras. 27-33.

90 Art. 115, Poslovnik državnega zbora (PoDZ-1, Eng. ‘Rules of Procedure of the National Assembly’), Official Gazette RS, No. 92/07, 2.4.2002.

91 Art. 8.c, Poslovnik Vlade Republike Slovenije (Eng. ‘Rules of Procedure of the Government of the Republic of Slovenia’), Official Gazette RS, No. 43/01, 10.5.2001.

92 Constitutional Court RS, case U-I-83/20, para. 37.

of the 2020 epidemic, the National Assembly amended the ZNB.⁹³ However, it refrained from expanding the list of powers given to the executive branch in art. 39. One cannot help but wonder why. With such a permissive attitude of the Constitutional Court, the legislative branch may not feel remorse for omitting a reform of the authorisations pursuant to the ZNB. Indeed, the decision in U-I-83/20 has struck a painful blow to the requirement to follow the correct form when limiting human rights.

However, does that not mean we should not, as a matter of a normative claim, insist on respect for this requirement? The case of the epidemic and ZNB illustrates its value very well. An expansion of powers of the executive branch in the statutory text will have to undergo parliamentary scrutiny and a transparent debate, in the course of which the proportionality of the potential new measures will also be discussed. To simply stretch the measures enacted in substatutory acts to the limits of and beyond the statutory authorisation might only come under scrutiny in procedures before the courts. There, the executive and legislative branch will keep their fingers crossed for a deferential approach, and ultimately, 'get away with it'.⁹⁴

■ 5. *Final thoughts*

The epidemic and measures to tackle it have proven to be a remarkable test for the mechanism of limitations on limitations in the Slovenian system of protection of human rights and fundamental freedoms. We see that the need to react quickly has eroded many of these limitations and highlighted others that may not have been in the limelight before. It is hoped that rather than leading towards a twilight of the Slovenian *Schranken-Schranken*, the COVID-19 episode will in its aftermath motivate Slovenian constitutional lawyers to vigorously discuss the role of human rights and fundamental freedoms, and the limitations thereof.

93 Art. 1, Zakon o interventnih ukrepih za zajezitev epidemije COVID-19 in omilitev njenih posledic za državljane in gospodarstvo (ZIUZEOP, Eng. 'Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy'), Official Gazette RS, No. 49/20, 10.4.2020.

94 Zagorc and Bardutzky, 2020, para. 17.

Bibliography

- Avbelj, A. et al. (2011) *Komentar Ustave Republike Slovenije: dopolnitev – A*. 1st. Kranj: Fakulteta za državne in evropske študije.
- Avbelj, A. et al. (2019) *Komentar Ustave Republike Slovenije: [znanstvena monografija]*. 1st. Nova Gorica: Nova univerza, Evropska pravna fakulteta.
- Bardutzky, S., Zagorc, S. (2020) *Business as Usual, but to the Unusual Extremes: Slovenia and Covid-19* [Online]. Available at: <https://verfassungsblog.de/business-as-usual-but-to-the-unusual-extremes-slovenia-and-covid-19/> (Accessed: 29 October 2020).
- BBC 'Slovenia cyclists hold anti-government protest', [Online]. Available at: <https://www.bbc.com/news/world-europe-52597748> (Accessed: 30 October 2020).
- Dnevnik 'Varuh človekovih pravic ne vidi pravnih podlag za omejitve izhodov v domovih starejših', [Online]. Available at: <https://www.dnevnik.si/1042933402> (Accessed: 30 October 2020).
- Gardbaum, S. (2007) 'Limiting Constitutional Rights', *UCLA Law Review*, 54, pp. 789-854.
- Jager, V. (2020) *Zakaj tako s starejšimi? Čeprav je v bolnišnicah dovolj postelj in respiratorjev, država starostnike, okužene s koronavirusom, zadržuje v domovih za starejše*. 10.4.2020 Ljubljana: Mladina (15).
- Malovrh, P., Kuralt, Š. (2020) *Številu žrtev iz domov statistika ne sledi*. 15.4.2020 Ljubljana: Delo.
- Marsch, N., Vilain, Y., Wendel, M. (2015) *Französisches und Deutsches Verfassungsrecht – Ein Rechtsvergleich*. 1st. Berlin: Springer-Lehrbuch.
- Novak, M. (2020) *Slovenian cyclists stage anti-government coronavirus protest*. 8.5.2020 Ljubljana: Reuters.
- Ordway, D.-M. (2018) *Family separation: How does it affect children?* [Online]. Available at: <https://journalistsresource.org/studies/society/public-health/family-separation-child-health-research/> (Accessed: 30 October 2020).
- Sachs, M. (2017) *Verfassungsrecht II – Grundrechte*. 3rd. Köln: Springer-Lehrbuch.
- Štefanec, I. (2018) *Kolizija človekovih pravic v ustavnosodni presoji: o dejavnih omejitvah človekovih pravic: doktorska disertacija*. 1st. Ljubljana: Univerza v Ljubljani, Pravna fakulteta.
- Šturm, L. et al. (2002) *Komentar Ustave Republike Slovenije*. 1st. Ljubljana: Fakulteta za podiplomske državne in evropske študije.
- Žgur, M. (2016) 'Izredno stanje: pristojnosti in odgovornosti predsednika Republike Slovenije po slovenski ustavi' in Kavčič, I. (ed.) *Ustavni položaj predsednika republike*. 1st. Maribor: Inštitut za lokalno samoupravo in javna naročila, pp. 439–456.