

# The Right to Life During the Covid-19 Epidemic in Slovenian Society

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## ABSTRACT

The outbreak of the COVID-19 epidemic led to a state of emergency and put countries around the world to the test. In this regard, Slovenia was no exception. As a response to the rapid spread of infection, countries introduced containment measures to prevent the spread of the new virus as quickly and effectively as possible, to prevent the collapse of healthcare systems and, above all, to save as many lives as possible. Human rights were at the heart of all this, especially the right to life, as it was the most at risk. The measures adopted by countries during the state of emergency had to have a relevant legal basis and had to be proportionate and limited in duration, as any interference negatively affects human rights and fundamental freedoms relative to its duration. This article focuses on the situation in Slovenia and the right to life during the epidemic, as well as presenting statutory options for the adoption of containment measures. The final chapter focuses on three of the most high-profile decisions of the Slovenian Constitutional Court, which had been adopted during the COVID-19 epidemic.

*Keywords:* epidemic, COVID-19, right to life, Slovenian Constitutional Court, proportionality, principle of legality

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# Pravica do življenja v času epidemije v slovenski družbi

## POVZETEK

Izbruh epidemije koronavirusa je prinesel izredno stanje in države po svetu postavil pred velik preizkus. Slovenija pri tem ni bila nikakršna izjema. Na hitro širjenje okužb so se države odzvale z uvedbo zaježitvenih ukrepov, katerih namen je bil čim hitreje in čim učinkoviteje preprečiti širjenje novega virusa, preprečiti razpad zdravstvenih sistemov, predvsem pa rešiti čim več življenj. V središču so bile človekove pravice, še posebej pravica do življenja, saj je bila ta najbolj ogrožena. Ukrepi, ki so jih v času izrednega stanja sprejele države, so morali imeti ustrezno pravno podlago, poleg tega pa so morali biti sorazmerni in časovno omejeni, saj se negativni učinki kateregakoli posega v človekove pravice in temeljne svoboščine stopnjujejo glede na čas trajanja. Članek se osredotoča na situacijo v Sloveniji in na pravico do življenja v času epidemije. Predstavljene so tudi zakonske možnosti, ki omogočajo sprejemanje zaježitvenih ukrepov. Zadnje poglavje se osredotoča na tri odmevnejše odločitve Ustavnega sodišča Republike Slovenije, ki so bile sprejete v času epidemije koronavirusa.

*Ključne besede:* epidemija, koronavirus, pravica do življenja, Ustavno sodišče Republike Slovenije, sorazmernost, načelo legalitete

## 1. Introduction

Life and health are the most important values of a human being. In the modern world, these values are protected by laws (Czechowicz, 2021), with the right to life being among the highest or most protected constitutional rights and fundamental freedoms hierarchically. Its special position also arises from the fact that without its effective protection, the enjoyment of other rights and fundamental freedoms is not possible. The Constitution of the Republic of Slovenia commands an equal valuation of the life of all individuals and opposes the conception of a human being as an object. A human being is the subject of rights and

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fundamental freedoms and must not be reduced to the level of an object or thing (Ivanc, 2011a).

However, diseases have been threatening the lives and health of people for centuries and, consequently, their existence as well. The high mortality rate is mainly due to a lack of knowledge about numerous new diseases and poor early detection systems (Czechowicz, 2021). Precisely because of the uncertainty about what the new virus will bring, the COVID-19 epidemic has deeply impacted our lives and society over the past four years. It has caused many hardships and led to various problems. It has shown us that COVID-19 is not only a medical problem but has also challenged our legislation. (Zorčič, 2021).

By declaring an epidemic, the state faced the challenge of finding appropriate measures to contain the spread of COVID-19, while also having to deal with the lack of adherence to the most basic preventive measures and the low level of vaccination coverage among the adult population (Letnar Černič, 2021). Similarly, the courts faced a challenging task regarding measures to limit COVID-19, as they had to balance between the right to life, human dignity, and health protection on one hand and the right to freedom and security, protection of personal data, freedom of assembly, equality before the law, prohibition of discrimination, consumer protection, and freedom of economic initiative on the other (Jerak, 2021).

The aim of this article is to examine the legal legislation and the legal basis for the state to take measures, as well as the decisions of the Constitutional Court of the Republic of Slovenia, in order to determine how the right to life was protected in the Slovenian society at the time of the epidemic.

## **2. Right to Life**

Human rights can be seen as a fundamental global agreement on rights and freedoms. They apply to every human being and reach shared values, morals, and principles.

The right to life is one of the most fundamental human rights. It is the right that guarantees every individual the right to existence, security, and dignity. It is based on a universal belief that every human life is inviolable and worthy of respect. It holds a special position primarily because, without its effective protec-

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tion, the enjoyment of other rights and fundamental freedoms is not possible (Ivanc, 2019a).

The right to life is protected in both Slovenian and international legal acts, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the Charter of Fundamental Rights of the European Union. All these documents aim to protect the fundamental rights of every individual regardless of their social, economic, or political background (Ivanc, 2019b).

The right to life encompasses multiple aspects. Primarily, it represents a right of negative status, as it ensures protection against arbitrary deprivation of life. This means that no individual, organisation, or state has the right to arbitrarily take away someone's life, excluding exceptional cases. Additionally, it includes ensuring safety and protection against violence. States and institutions have a responsibility to take measures to prevent violence, crimes, and conflicts that could jeopardise people's lives. This includes establishing an effective legal system that punishes those who violate the right to life (Equality and human rights commission, 2021).

The right to life also demands granting decent living conditions for each individual. This includes access to food, water, healthcare, housing, and other basic goods necessary for survival and dignified life. States and other institutions are obliged to create conditions that enable people to live a worthy life. However, the right to life does not only encompass physical security and material goods but also respect for human dignity, equality, and freedom. Every individual has the right to equal treatment before the law, freedom of expression, religious freedom, and privacy. Therefore, the right to life is closely linked to other fundamental human rights that ensure the full realisation and development of the individual (Ivanc, 2019b).

Despite the classification of the right to life as an absolute right, interference with it is permitted, but only under the most severe conditions, by the proportionality test, when necessary to protect a hierarchically equivalent right (Ivanc, 2019b).

The COVID-19 pandemic has made the right to life particularly important worldwide, as millions of lives have been lost and the impact is still felt today. During this period, life and health were

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at the forefront, but the constitutional values of coexistence, mutual respect, human dignity, freedom, and solidarity were also under pressure as a result of the measures taken to protect and safeguard them (Letnar Černič, 2022).

### **3. Legal Regulation of the Right to Life**

The importance of the right is evident from the fact that effective protection of human life has been one of the central demands of international humanitarian law since its inception. Today, the provision protecting the inviolability of human life and prohibiting the death penalty is well established both in the international and Slovenian legal systems.

#### 3.1. Regulation in Slovenian Legal System

In the Slovenian legal system, the right to life is regulated by Article 17 of the Constitution of the Republic of Slovenia and is classified among the fundamental human rights. In the case of an epidemic, the right to life is safeguarded through the right to healthcare, which is also regulated in the Constitution, as well as in the Communicable Diseases Act, the Patients' Rights Act, the Health Services Act and the Health Care and Health Insurance Act. Additionally, we must not forget about the Criminal Code, which includes criminal offences related to endangering life due to communicable diseases.

##### 3.2.1. Constitution of the Republic of Slovenia

Article 17 of the Constitution of the Republic of Slovenia guarantees the right to inviolability of human life. This right is classified among the constitutionally most strongly protected rights and fundamental freedoms (Ivanc, 2011a). However, it holds a special place among these rights and freedoms. Its special position arises from the fact that without its effective protection, the enjoyment of other human rights and fundamental freedoms is not possible (Ivanc, 2019a). The content of Article 17 clearly implies the requirement for a positive valuation of human life since the right to life is an inherent right of every human being, which is not transferable and cannot be waived (Ivanc, 2011a).

The permissibility of interventions or limitations of the right to life must be interpreted extremely restrictively, and it is generally allowed only in cases in which its protection conflicts with the protection of another individual's life. Limitations on the right are permitted by the provisions of the Constitution of the Republic of Slovenia only while considering the principle of proportionality, and any interference must be absolutely necessary (Ivanc, 2011a). This means that the limitation of the right must be necessary to achieve a significant objective and must be proportionate to that objective.

The right to life is closely associated with the right to healthcare, as defined in Article 51 of the Constitution of the Republic of Slovenia. In situations in which the exercise or provision of the right to healthcare is threatened, consequently endangering the right to life, which includes situations such as the COVID-19 epidemic, the Constitution of the Republic of Slovenia allows or permits the possibility for the law, through the principle of proportionality, to limit the enjoyment of the right to freedom of movement (Letnar Černič, 2019) and the right to assembly and association in order to prevent the spread of communicable diseases. While these rights are not absolute, interference with them is only possible in specifically defined cases (Vatovec, 2019).

### 3.1.2. Communicable Diseases Act

The Communicable Diseases Act safeguards the right to life in connection with Article 51 of the Constitution of the Republic of Slovenia, which defines the right to health care (Communicable Diseases Act, 1995). The law comes to the forefront, especially in situations with a high prevalence of communicable diseases. Such a situation arose during the COVID-19 epidemic.

Article 18 defines isolation, Article 19 defines quarantine, Articles 20 and 21 define treatment in cases of infections where the omission of treatment would endanger the health of other people or cause the spread of communicable diseases and Articles 22 through 25 cover mandatory vaccination (Communicable Diseases Act, 1995).

One of the special measures is defined by Article 37, which stipulates that during a severe epidemic of a communicable disease,

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the minister responsible for public health may order healthcare workers and collaborators to work under special conditions and limit their right to strike. They may also allocate certain premises, equipment, medicines, and transportation means for the needs of healthcare activities and assign specific tasks to both natural and legal persons engaged in healthcare activities. (Communicable Diseases Act, 1995).

In recent years, the most significant change occurred in Article 39, to which Articles 39.a and 39.b were added. This change was the result of the decision U-I-79/20 of the Constitutional Court of Slovenia, dated May 13, 2021, which will be discussed further in this article. In this decision, the Constitutional Court found that the second and third points of the first paragraph of Article 39 of the Communicable Diseases Act were in conflict with the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution of the Republic of Slovenia (Constitutional Court of Republic of Slovenia, 2021a).

The purpose of the changes was to limit the Government of the Republic of Slovenia from excessively infringing on the rights of individuals during times when an epidemic is declared to prevent the spread of a dangerous disease.

### 3.1.3. Patients' Rights Act

The Patients' Rights Act adds quality to the existing healthcare system and places patients in a more favourable position compared to healthcare service providers (Brulc, 2008).

Article 6 defines the right of access to healthcare and the provision of preventive services. In this context, preventive services represent a high standard of the healthcare system. Together with the right of access to healthcare services, as defined in Article 51 of the Constitution of the Republic of Slovenia, which is particularly important during epidemics for protecting the right to life, these are typical declaratory or programmatic rights (Brulc, 2008). Furthermore, we can even say that the right to access healthcare does not actually differ from the right to healthcare recognised and defined in the Constitution of the Republic of Slovenia.

#### 3.1.4. Health Care and Health Insurance Act

The Health Care and Health Insurance Act, in the first paragraph of Article 2, stipulates that everyone, meaning every person with compulsory medical insurance or other person who asserts rights from compulsory health insurance, has the right to the highest possible level of health and, at the same time, has an obligation to take care of their health. The first paragraph also specifies that no one may endanger the health of others. The second and third paragraphs further establish that everyone has the right to healthcare and the duty to contribute to its realisation (Health Care and Health Insurance Act, 1992).

#### 3.1.5. Health Services Act

The Health Services Act regulates the content and provision of healthcare services, public healthcare services, as well as the association of healthcare organisations and healthcare workers into chambers and associations (Health Services Act, 1992).

Article 22 defines the scope of public health activities. Furthermore, the first paragraph of Article 23 states that the National Institute of Public Health is responsible for carrying out tasks in the field of public health. Its tasks are defined by Article 23a (Health Services Act, 1992).

In safeguarding the right to life during an epidemic, tasks that primarily involve monitoring communicable diseases, including healthcare-associated infections (Health Services Act, 1992).

#### 3.1.6. Criminal Code

For the protection of the constitutionally guaranteed right to life, especially during an epidemic, Article 177 of the Criminal Code is particularly important, as it criminalises the act of transmitting or spreading communicable diseases (Criminal Code, 2008). Although this concerns an extremely important good, this criminal offence appears very rarely in judicial practice.

Certainly, the intentional spreading of communicable diseases is not only criminalised in Article 177 but also in the criminal offence of causing minor bodily harm (Article 122), causing serious bodily harm (Article 123), or causing grievous bodily harm (Article 124). Additionally, for the protection of the right to life, Arti-

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cle 178 is also important, which addresses the failure to provide medical assistance (Criminal Code, 2008).

We must also not forget to mention Article 314, which criminalises causing general danger and indirectly protects the right to life as well (Criminal Code, 2008).

### 3.2. Regulation in International Legal Order

Standards of international legal protection of the right to life are defined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

#### 3.2.1. Universal Declaration of Human Rights

The right to life is defined in Article 3. The right to health or healthcare is not specifically addressed as an independent right in the declaration; however, certain aspects related to the health or well-being of individuals are highlighted. In the first paragraph of Article 25, it is stipulated that everyone has the right to a standard of living adequate for their health and well-being and that of their family (United Nations, 1948).

#### 3.2.2. International Covenant On Civil and Political Rights

The right to life is recognised and regulated by Article 6, which stipulates that every individual has the right to life, which must be protected by law, and any arbitrary deprivation of life is prohibited. In countries where the death penalty is still permitted, it may only be imposed for the most serious crimes, by a final judgment. When the deprivation of life constitutes the crime of genocide, it is understood that contracting states cannot evade any obligation to prevent and punish the crime of genocide (United Nations (General Assembly), 1996).

The Covenant does not contain a specific provision explicitly recognising the right to health. However, Article 7 defines an individual's right to physical, mental, and moral integrity (United Nations (General Assembly), 1996).

### 3.2.3. European Convention on Human Rights

The right to life is defined in Article 2 of the ECHR, which states that everyone's right to life shall be protected by law and that no one shall be deprived of their life intentionally except in the execution of a sentence of a court following conviction for a crime for which this penalty is provided by law (Council of Europe, 1950).

The provision abolishing the death penalty was subsequently introduced by Protocol No. 6, which entered into force on March 1, 1985, and later amended by Protocol No. 11 (Gogala, 2015).

The right to healthcare is not explicitly included as an independent right in the ECHR. However, the ECHR has ruled in cases related to the right to life (Article 2), the prohibition of torture (Article 3), the right to liberty and security (Article 5), and the right to respect for private and family life (Article 8) that the violation of the right to healthcare can be considered a violation of other human rights if an individual suffers torture or inhuman or degrading treatment due to a lack of health care (Ivanc, 2011b).

### 3.2.4. Charter of Fundamental Rights of the European Union

The right to life in the Charter is defined in Article 2, which states that everyone has the right to respect for their physical and mental integrity and that no one shall be condemned to the death penalty or executed (European Union, 2010).

The Charter also defines health protection in Article 35, which grants everyone the right to preventive health care and medical treatment under the conditions established by national laws and practices (European Union, 2010).

Additionally, it is important to note that health protection is also covered in the primary law treaties, with particular emphasis on the extensive provisions of Article 168 of the Treaty on the Functioning of the European Union (Terstenjak, 2020).

### 3.2.5. American Convention on Human Rights

The right to life is defined in Article 4, stating that every individual has the right to have their life respected, and this right shall be protected by law from the moment of conception onwards (Organization of American States, 1969).

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The Convention does not regulate the right to health or healthcare.

### 3.2.6. African Charter on Human and Peoples' Rights

The right to life is defined in Article 4, which stipulates that human life is inviolable and that every individual has the right to respect for life and integrity. It also states that the right to life must not be arbitrarily taken away from anyone (African Union, African Charter on Human and Peoples' Rights, 1981). Additionally, the Protocol on the Rights of Women in Africa was later adopted as an adjunct to the charter, which, in Article 4, further regulates the right to life, integrity, and security (African Union, 2003).

Both the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women in Africa include the right to health.

The right to life is thoroughly regulated in both Slovenian and international legal systems, as it is a right essential for the realization of other human rights and fundamental freedoms. It is important that states respect and protect the right to life without any distinction or discrimination and take measures to punish violations.

In the connection between the right to life and the right to health or healthcare, discrepancies can be observed between Slovenian and international legal systems. The right to health is not established as an independent right in all international documents (e.g., the ICCPR, the ECHR). However, this right is indirectly included in these documents through provisions that protect the life and physical integrity of individuals. By ensuring these protections, states are obliged to provide appropriate healthcare and safeguard health.

The right to life and the right to health are internationally recognized human rights that states are obligated to respect and protect. The right to life is a fundamental right essential for the realization of other rights, while the right to health involves ensuring adequate healthcare and safeguarding individuals' health. However, since these rights are not absolute, limitations are possible but only under certain circumstances, and such limitations must comply with international legal standards.

## **4. Course of the Covid-19 Epidemic and Measures Taken in Slovenia**

Of the external factors that can influence the situation in a country, an epidemic or pandemic are the most dangerous, as communicable diseases spread rapidly and do not recognise national borders. The problem also lies in the fact that an epidemic of a communicable disease affects not only the health situation of an individual country but also its political circumstances, as well as its economic and social conditions, with the impact depending on the overall economic development, democratic traditions, and the rule of law (Zajc, 2022).

Due to the rapid spread of the COVID-19 infection, most European countries declared an epidemic as a special form of emergency in the spring of 2020. As the situation rapidly deteriorated across Europe, with a sharp increase in the number of deaths, governments responded to the emerging circumstances by introducing measures aimed at containing the transmission of infections and safeguarding the health and lives of people. These measures, more or less, restricted the human rights and fundamental freedoms of citizens and other residents (Flander, 2021).

The outbreak of COVID-19 caught European countries off guard despite warnings from experts for some time. Slovenia was no exception in this regard. As mentioned earlier, the COVID-19 epidemic affected not only health but also economic and social conditions. Particularly affected was the balance of power between the executive and parliamentary branches of government (Flander, 2021).

## **5. Legal Basis of Adopted Measures**

### **5.1. Limitation of Rights Due to the State's Positive Obligations**

The right to life is one of the rights and freedoms that represent a fundamental condition for the existence and realisation of all other rights and freedoms. These are rights that have an *erga omnes* effect, meaning they apply to anyone. These rights have a negative status, as they are rights where the state or any other entity must not interfere. Exceptions only apply when

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interference is permissible for state security, criminal proceedings, or preventing the spread of communicable diseases, as was the case during the COVID-19 epidemic. Furthermore, these rights also have a positive status, meaning that states have a duty of active engagement to protect individual rights. (Kovač, 2022).

The relationship between security and freedom entails a balance between two human rights. In the context of combating the COVID-19 pandemic, it primarily concerned the need to adopt measures whereby the state had to protect the lives and health of people while simultaneously encroaching on some other constitutionally protected rights of individuals. Thus, in the event of an epidemic, the state is obliged to adequately safeguard the health and lives of people. Article 5 of the Constitution of the Republic of Slovenia stipulates that the state must protect human rights and fundamental freedoms. The obligations of the state are greater, and the protected value or right in the hierarchy of human rights is higher. In the case of an epidemic seriously threatening the health and consequently the lives of people, the values that the state must safeguard are the right to life, the right to health care, and the right to physical and mental integrity. Therefore, it involves a balancing act between safeguarding the health and lives of people during a deadly disease on the one hand and restrictions on movement on the other, with these limitations being temporary during the peak period of the epidemic (Velkavrh, 2020).

If we take the main distinction between negative and positive obligations that the state has as a measure of whether the right to life requires action or omission from the state, it is clear that in the case of the COVID-19 pandemic, we are talking about positive obligations that the state had. It was expected from the state and will be expected in similar situations in the future to actively protect the constitutionally guaranteed good of human health and life in relation to third parties who pose a risk due to the transmission of the virus. Furthermore, the state, in such situations, has an operational obligation to ensure access to life-saving healthcare services while also taking measures to prevent the spread of communicable diseases that endanger lives (Kos, 2022).

## 5.2. Limitation of Rights Due to Declaration of State of Emergency

In Article 16 of the Constitution, the state is granted discretionary power to temporarily suspend and limit certain human rights and fundamental freedoms in exceptional situations. This article specifies that human rights and fundamental freedoms may be limited or even suspended for the duration of a state of war or emergency (Turk, 2020).

Furthermore, the second paragraph of Article 16 stipulates that despite the provision of the first paragraph of Article 16, no revocation or limitation of rights from Articles 17, 18, 21, 27, 28, 29, and 41 of the Constitution is allowed, as any such restriction or revocation would constitute an attack on the value system upon which human rights and fundamental freedoms are based (Kos, 2022).

It is important to mention Article 92 of the Constitution, which states that a state of emergency is declared when the existence of the state is endangered due to a significant and widespread threat, although the Constitution does not define what exactly constitutes a threat (Constitution of the Republic of Slovenia, 1991). Typically, in foreign legal systems and legal doctrine, this concept is interpreted to include various natural or human-made phenomena. Natural phenomena may include earthquakes, floods, epidemics, such as the situation with COVID-19, etc., while human-made phenomena may include wars, economic crises, extensive migrations, etc. However, the actual existence of extraordinary circumstances does not necessarily imply that we are already in a state of emergency in a normative sense (Žgur, 2020). Therefore, according to the Constitution, a formal declaration is required, which is detailed in Articles 92 and 108 of the Constitution (Constitution of the Republic of Slovenia, 1991).

## 5.3. Restricting Rights During the Covid-19 Epidemic

Since a state of emergency was not declared in Slovenia during the COVID-19 epidemic, the legal basis for the adoption of measures was provided by the Communicable Diseases Act. It is also important to mention Articles 32 and 42 of the Constitution of the Republic of Slovenia, which allow for the possibility of restricting the right to freedom of movement and the right to

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assembly and association in situations where the provision of healthcare is endangered, consequently jeopardising the right to life (Ivanc, 2011c).

During the COVID-19 epidemic, the Government of the Republic of Slovenia conducted its intensive legislative activity by Article 39 of the Communicable Diseases Act, which was in force at that time in the following form:

‘When measures prescribed by this Act are insufficient to prevent the spread of certain communicable diseases in the Republic of Slovenia, the Government of the Republic of Slovenia may also order the following measures:

1. Establish conditions for travel to countries where there is a risk of infection with a dangerous communicable disease and for entry from those countries;
2. Prohibit or restrict the movement of the population in infected or directly threatened areas;
3. Prohibit gatherings of people in schools, cinemas, public establishments, and other public places until the danger of spreading the communicable disease ceases;
4. Restrict or prohibit the movement of certain types of goods and products.

The Government of the Republic of Slovenia must immediately inform the National Assembly of the Republic of Slovenia and the public about the measures from the previous paragraph.’

It is important to note that the content of Article 39 changed with Article 7 of the Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy (Act Amending the Communicable Diseases Act, 2020). Prior to this change, the introductory clause referred to the minister responsible for health, and the second paragraph stipulated that the minister responsible for health must immediately inform the Government of the Republic of Slovenia, the National Assembly of the Republic of Slovenia, and the public about the measures outlined in the first paragraph (Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy, 2020)

This was found to be unconstitutional, as the Constitutional Court of Slovenia, in decision U-I-79/20 dated May 13, 2021, which will be further analysed later, determined that the second

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and third points of the first paragraph of Article 39 of the Communicable Diseases Act were inconsistent with the Constitution of the Republic of Slovenia due to a violation of the principle of legality (Constitutional Court of Republic of Slovenia, 2021a). Subsequently, in decision U-I-155/20 dated October 7, 2021, the Court found the inconsistency of the fourth point of the first paragraph of Article 39 of the Communicable Diseases Act for the same reason (Constitutional Court of Republic of Slovenia, 2021b).

To understand why the Constitutional Court reached such conclusions, we need to comprehend how the principle of legality is regulated in the Slovenian legal system and what the consequent relationship is between laws and subordinate regulations, including ordinances, which was well presented in Terzić's article, which is summarised below.

The law enacted by the National Assembly of the Republic of Slovenia is the only one that can originally introduce and regulate the rights and obligations of legal entities, provided that these rights and obligations are not already determined in the Constitution of the Republic of Slovenia. In this context, the term 'originally' means that rights and obligations can also be regulated by subordinate regulations issued by the Government of the Republic of Slovenia, but only based on the authorisation in the law. Regulations or ordinances issued by the Government of the Republic of Slovenia are considered delegated acts and must be based on or derived from an act. This principle, known as the principle of legality, is found in Article 153 of the Constitution. The principle of legality is also found in Article 120 of the Constitution, whose second paragraph specifies that administrative authorities perform their tasks independently, within the framework, and based on the Constitution and laws (Terzić, 2022).

In accordance with this, we can say that the relationship between a law and an ordinance is a relationship of authorisation, as the law authorises, while the ordinance regulates the details that change so rapidly that the legislator cannot timely address them through legislation (Terzić, 2022).

Although the ordinances issued by the Government of the Republic of Slovenia during the COVID-19 epidemic regulated a significant part of our lives and encroached upon many consti-

tutional rights, there would be nothing wrong if the ordinances were in line with the law, and the law with the Constitution of the Republic of Slovenia. Unfortunately, this was not the case, as confirmed by the Constitutional Court of the Republic of Slovenia with decision U-I-79/20 dated May 13, 2021, and decision U-I-155/20 dated October 7, 2021 (Terzić, 2022).

In the decision U-I-79/20 dated May 13, the Constitutional Court found that, by reason of the incompatibility of points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act with the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution of the Republic of Slovenia, five government ordinances were also found to be inconsistent with the Constitution (Constitutional Court of Republic of Slovenia, 2021a).

In the decision U-I-155/20 dated October 7, 2021, the Constitutional Court found that due to the inconsistency of point 4 of Article 39 of the Communicable Diseases Act with Articles 49 and 74 of the Constitution, another ordinance was found to be inconsistent with the Constitution (Constitutional Court of Republic of Slovenia, 2021b).

It is important to emphasise as constitutional Judge Dr. Šugman Štubbs did in her concurring opinion regarding decision no. U-I-79/20, dated 13 May 2021, joined by Judge Dr Rok Čeferin, wrote that decision U-I-79/20, dated May 13, 2021, and decision U-I-155/20, dated October 7, 2021, do not provide an answer to the question of whether the challenged ordinances were urgent, necessary, and proportionate. A positive answer to these questions could only be obtained if it was demonstrated that the law from which the ordinances derive their existence gives the latter a sufficiently clear, substantively determinate, and thus predictable substantive basis (Šugman Štubbs, 2021a).

#### 5.4. Response to Adopted Measures

The fact is that the COVID-19 epidemic has strongly affected not only Slovenia but also other countries across Europe and the world, as the number of deaths in all countries has been significant. Although countries, including Slovenia, initially sought to limit the spread of the COVID-19 epidemic by closing international, regional, and municipal borders, minimising interference with

human dignity and freedom as much as possible, unfortunately, it did not go without tightening measures, which also intruded into people's private lives (Letnar Čerňič, 2022).

However, responses across Europe varied from country to country despite comparable restrictive measures. It can be said that in Slovenia, the responses were not handled optimally. Additionally, the majority of the population had already eased their adherence to preventive measures long before their official lifting. Even the high mortality rate did not bring people together; instead, it created new conflicts or fuelled existing ones regarding constitutional values. Consequently, a significant societal division began in the country, leading to growing tensions in the socio-economic and political spheres and widespread resistance to restrictive and preventive measures, including vaccination. It is difficult to assess whether this was influenced by historical factors, opposition to the government at the time, or different interpretations of human rights, especially dignity and freedom. However, it is clear that the epidemic has shown us that we must not take values in our society for granted, as their existence depends not only on how the state understands and protects them but also on society itself (Letnar Čerňič, 2022).

## **6. Constitutional Court Decisions**

During the COVID-19 epidemic, life was largely regulated by subordinate regulations adopted by the Government of the Republic of Slovenia since March 2020, as the legislator, through the Communicable Diseases Act, delegated the fight against communicable diseases to the executive branch of government. This is generally appropriate due to the need for rapid and constant responses to new evolving circumstances. However, entirely different questions arise regarding whether the legal basis granting the Government of the Republic of Slovenia the authority to issue ordinances was clear, specific, and sufficient by the principles of legality and whether the measures adopted were proportionate or unduly encroached upon human rights and fundamental freedoms. It is worth mentioning that the Constitutional Court has repeatedly emphasised in its decisions that the state authorities faced a difficult task in adopting measures to contain the spread of COVID-19 infections due to a high degree of uncertainty, par-

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ticularly in the early stages of the virus, when it was scientifically and medically unexplored (Nerad, 2021).

### 6.1. Decision of the Constitutional Court Regarding the Prohibition of Movement Outside the Municipality Area of Temporary or Permanent Residence

The Constitutional Court reviewed the consistency of two ordinances adopted by the Government in order to contain and manage the risk of the COVID-19 epidemic, namely the Ordinance on the Temporary General Prohibition of Movement and Gatherings in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement outside the Municipality of One's Permanent or Temporary Residence and the Ordinance on the Temporary General Prohibition of Movement and Gatherings in Public Places and Areas in the Republic of Slovenia and the Prohibition of Movement outside the Municipality of One's Permanent or Temporary Residence (Constitutional Court of Republic of Slovenia, 2020).

The Constitutional Court conducted the review based on the test of legitimacy, which entails an assessment of whether the legislature pursued a constitutionally admissible objective, and on the basis of the strict test of proportionality, which comprises an assessment of whether the interference was appropriate, necessary, and proportionate in the narrower sense. The Constitutional Court assessed that by restricting movement to the municipality of one's residence, the Government pursued a constitutionally admissible objective, i.e., containment of the spread of the contagious disease and thus the protection of human health and life, which this disease puts at risk (Constitutional Court of Republic of Slovenia, 2020).

In the decision U-I-83/20 dated August 27, 2020, there is much summarizing of the positions of the Government of the Republic of Slovenia and little constitutional legal reasoning. The Constitutional Court, otherwise, carried out the review despite the fact that during the proceedings before the Constitutional Court, the ordinances ceased to be in force as it assessed that the petition raised a particularly important presidential constitutional question of a systemic nature on which the Constitutional Court had not yet had the opportunity to take a position and which could

also arise in connection with possible future acts of the same nature and with comparable subject matter.

Nevertheless, the judges were not unified in their decision. The lack of consensus within the Constitutional Court is reflected in the split between judges who supported the decision and those who disagreed with it. Despite this divergence of opinions, the Constitutional Court ultimately decided, by majority, decided to directly assess the content, namely, the proportionality of two ordinances issued by the Government of the Republic of Slovenia regarding the prohibition of movement between municipalities. In doing so, it deliberately left open the question of whether Article 39 of the Communicable Diseases Act, on which the contested ordinances were based, was in line with the principle of legality.

As it later turned out, this decision involved a methodologically flawed approach, which the Constitutional Court acknowledged in decision U-I-79/20 dated May 13, 2021, where it found that the ordinances were not in accordance with the Constitution because they were based on the unconstitutional Article 39 of the Communicable Diseases Act. The substantive assessment of subordinate acts that affect human rights and fundamental freedoms can only be carried out by the Constitutional Court after resolving the question of the legality of such an act. If there is doubt about the constitutionality of the law upon which the subordinate act relies concerning compliance with the principle of legality, the Constitutional Court is obliged to examine the constitutionality of the law. Only if the law is legally valid can the assessment proceed to determine whether the subordinate act remains within the framework of the law, and then with an assessment of its content in the specific case. If the Constitutional Court finds that the law violates the principle of legality, a substantive assessment of the subordinate act is not possible, as an illegal subordinate act has no legal effects. Therefore, the Constitutional Court should never avoid the legal norm on which the subordinate act is based.

### *6.1.1. Legal Experts' Responses to The Decision*

Constitutional Judge Dr Mežnar, in her concurring opinion regarding decision no. U-I-79/20, dated 13 May 2021, wrote that in the decision U-I-83/20, dated August 27, 2020, the Constituti-

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onal Court completely disregarded the significance and role of the legal basis, namely Article 39, and thereby ignored a series of constitutional legal axioms:

÷ regulations, ordinances, and other subordinate acts issued by executive bodies are not allowed to contradict the Constitution of the Republic of Slovenia or directly stem from it;

÷ subordinate acts are subordinate to laws, meaning they must derive from the provisions of existing laws. Executive bodies cannot adopt subordinate acts that exceed or contradict existing laws;

÷ the Constitution of the Republic of Slovenia empowers the legislator to regulate laws governing human rights and fundamental freedoms. Executive bodies do not have the appropriate authority to independently regulate human rights through the use of subordinate acts.

÷ laws must clearly define the frameworks and methods for regulating human rights and fundamental freedoms. Otherwise, such laws are unconstitutional and illegal.

÷ if subordinate acts are based on unconstitutional laws, they are unconstitutional or illegal. Such subordinate acts have no legal effect and must not be considered or executed (Mežnar, 2021).

Judge Mežnar also pointed out that, accordingly, it is difficult to assert that the content of a subordinate act, which is illegal because it is based on an unconstitutional law, is consistent with the constitutional principle of proportionality (Mežnar, 2021).

Dr Nerad, in his article wrote that it is important to emphasise that if a measure by the Government of the Republic of Slovenia is unconstitutional because it lacks a clear and specific legal basis or exceeds the legal framework, and therefore does not comply with the principle of legality, it does not necessarily mean that it is also excessive or disproportionate and therefore unconstitutional in terms of encroaching on human rights and fundamental freedoms. Conversely, a completely lawful subordinate measure may be impermissible due to its excessiveness or disproportionality in terms of encroaching on human rights and fundamental freedoms. In this case, questions regarding the constitutional compatibility of the legislative framework that envisages certain measures can be raised in terms of proportionality (Nerad, 2021).

At this juncture, it is appropriate to note that even the European Court of Human Rights in Strasbourg could not evade deci-

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sions regarding movement restrictions imposed by the COVID-19 pandemic, about which Skubic wrote in his article. In the case of *Terhes v. Romania*, the court addressed an issue, namely whether the fact that almost the entire population was subjected to strict movement restrictions could be considered a deprivation of liberty within the meaning of the European Convention on Human Rights (Skubic, 2021).

The European Court of Human Rights underscored in its assessment the need to initially determine whether the complainant is indeed subjected to measures that can be defined as a deprivation of liberty within the meaning of the first paragraph of Article 5 of the European Convention on Human Rights or merely as a restriction on freedom of movement within the meaning of Article 2, Protocol No. 4 to the European Convention on Human Rights. The difference between deprivation and restriction of individual freedom lies primarily in the degree or intensity of the measure rather than solely in its content (Skubic, 2021).

In the case of *Terhes v. Romania*, the European Court of Human Rights had to consider that the disputed restrictive measure was applied within the framework of the state of emergency declared in Romania for health reasons. It noted that there was no doubt that the COVID-19 pandemic has serious consequences not only for the health but also for the society, the economy and the functioning of the state (Skubic, 2021).

In light of this, the ECHR determined that the complainant was not subjected to an individualised restriction of movement, as it constituted a measure of general applicability. This measure, enacted based on legislation promulgated by various authorities in Romania, applied uniformly to the entire population (Skubic, 2021).

## 6.2. Decision of the Constitutional Court Regarding the Unconstitutionality and Illegality of the Communicable Diseases Act

The Constitutional Court reviewed, upon a petition submitted by multiple petitioners, points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act, which authorises the Government to ban or restrict the movement and gathering of people to prevent the introduction or spread

of a communicable disease in the state. It also reviewed several ordinances that were adopted by the Government based on the mentioned statutory provisions from April through October 2020 in order to contain and manage the threat of the COVID-19 epidemic (Constitutional Court of Republic of Slovenia, 2021a).

The Constitutional Court decided that the challenged statutory regulation does not fulfil constitutional requirements, as it allows the Government to choose, at its discretion, the types, scope, and duration of restrictions, which means that points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act are inconsistent with the second paragraph of Article 32 and the third paragraph of Article 42 of the Constitution. The challenged ordinances adopted by the Government were also inconsistent with the two mentioned provisions of the Constitution, namely, in the part where they were adopted based on an unconstitutional statutory regulation. The established unconstitutionality requires that the challenged statutory regulation be abrogated. Since the rights to health and life are fundamental constitutional values, the abrogation of the challenged statutory regulation could lead to an even worse unconstitutional situation than in the event the unconstitutional regulation remains in force for a certain period. Therefore, the Constitutional Court merely established that the challenged statutory provisions are inconsistent with the Constitution and that the National Assembly shall remedy this inconsistency within two months following the publication of this decision in the Official Gazette of the Republic of Slovenia (Constitutional Court of Republic of Slovenia, 2021a).

Although the Constitutional Court issued several important substantive decisions concerning restrictive measures, decision U-I-79/20 dated May 13, 2021 was the one that crucially defined the constitutional way of dealing with COVID-19 epidemic in Slovenia, which would subsequently predominantly revolve around the principle of legality.

In decision U-I-79/20 dated May 13, 2021, the Constitutional Court determined, namely, that points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act are inconsistent with the Constitution due to violations of the principle of legality, since, in the Constitutional Court's assessment, the

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Communicable Diseases Act does not provide sufficient, clear, and specific substantive basis for the adoption of government ordinances that restrict the right to movement and assembly. Nevertheless, even though the Constitutional Court did not annul the provisions, we can assert that it unequivocally established the unconstitutionality of points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act.

It is important to note that in decision U-I-79/20, dated May 13, 2021, the Constitutional Court focused solely on the principle of legality without addressing the substantive adequacy, necessity, and proportionality of the measures prescribed by the challenged ordinances.

### 6.2.1. Legal Experts' Responses to The Decision

In addition to the aforementioned provisions of the Communicable Diseases Act, the Constitutional Court also ruled on the constitutionality of five ordinances issued by the government, which pertained to prohibitions and restrictions on movement and assembly in public places and areas, as well as the prohibition of crossing between municipalities. Regarding these ordinances, which had all ceased to be in force during the proceedings, the Constitutional Court found them to be inconsistent with the Constitution, specifically in the part where they were adopted based on points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act. It is important to emphasise that the Constitutional Court did not conduct a separate and independent substantive assessment of the constitutionality and legality of the ordinances; rather, their unconstitutionality followed from the finding of unconstitutionality of the law that served as the legal basis for their adoption (Nerad, 2021), which is the subject of Dr Nerad's article, the content of which is presented below. In decision U-I-79/20, dated May 13, 2021, the Constitutional Court focused solely on the principle of legality, which is the subject of Dr Nerad's article, the content of which is presented below. It is important to note that the legality of subordinate regulations is not merely a technical constitutional law issue; rather, it constitutes a significant substantive concern, as legality is crucial for the rule of law and the principle of separation of powers (Nerad, 2021).

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Following this, we can say that legality and substantive adequacy, necessity, and proportionality constitute two distinct constitutional considerations, where the issue of legality precedes that of excessiveness. Therefore, only if the measure in our case has a legal basis should its permissibility be assessed in terms of proportionate encroachment on human rights and fundamental freedoms (Nerad, 2021).

As previously mentioned, the decision U-I-79/20, dated May 13, 2021, was declaratory, as the Constitutional Court merely established the unconstitutionality of points 2 and 3 of Article 39 of the Communicable Diseases Act without annulling them. However, such a decision is not without legal consequences. The Constitutional Court Act provides for determination in two cases:

1. if a law or other regulation is unconstitutional or unlawful because it fails to regulate an issue that it should regulate (unconstitutional regulatory gap) or
2. if a law or other regulation is unconstitutional or unlawful because it regulates an issue in a manner that prevents its annulment or correction.

In this regard, the court has interpreted the second option from the outset in a manner that allows for the preservation of the law if there are obstacles to its annulment due to linguistic or nomotechnical reasons and if annulment would result in an even more unconstitutional state (Nerad, 2021).

This is somewhat similar to annulment with a suspensive effect, but there are several significant differences between these types of decisions (Nerad, 2021).

A declaratory decision declaring a law unconstitutional does not automatically invalidate the law itself. Similarly, the expiration of the deadline set for rectifying the identified unconstitutionality does not affect the formal validity of the law. The legislature has a specific timeframe within which it must respond to the identified unconstitutionality and appropriately amend the law. Furthermore, the determination of the unconstitutionality of a law itself does not affect the validity of subordinate regulations, nor do they become unlawful as a result. The deadline for rectifying the identified unconstitutionality is intended for the legislature, which must respond within it and amend the law accordingly. Failure by the legislature to take action or comply with the deadline constitutes a serious violation of the principles of the rule of

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law and the principle of separation of powers, as established in the jurisprudence of the Constitutional Court (Nerad, 2021).

Accordingly, the unconstitutionality in the decision U-I-79/20 dated May 13, 2021, does not imply that points 2 and 3 of Article 39 of the Communicable Diseases Act were annulled or ceased to be valid. In this regard, the Constitutional Court conducted a balancing of various options regarding the legality of measures during the COVID-19 epidemic, emphasising the protection of important constitutional values such as life and health, which justified the declaratory decision (Nerad, 2021).

The choice of a declaratory decision is also sensible because the Communicable Diseases Act deals with a legal vacuum, which, according to the first paragraph of Article 48 of the Constitutional Court Act, is the first reason justifying the determination of unconstitutionality. The problem lies not in what points 2 and 3 of Article 39 of the Communicable Diseases Act stipulate but rather in the detailed content that is missing from the law. What is lacking in the law cannot be annulled (Nerad, 2021).

The essence of the declaratory decision in this matter is, therefore, that the unconstitutionality did not cause the content existing in the law, albeit insufficient and indeterminate, to cease to be valid. Therefore, the Communicable Diseases Act will continue to be valid in its incomplete content until legislative intervention by the National Assembly (Nerad, 2021).

On the other hand, Jurič claimed in his article that in the decision U-I-79/20 of May 13, 2021, the legislator was asked to establish a certain legal room for manoeuvre, without clear scientific guidelines. Namely, the Constitutional Court added a supplementary condition to the law. This condition requires that when granting legal powers to the executive authority to issue regulations, the law must define »sufficiently precisely« the permissible methods or types, scope and conditions for restricting freedom of movement and the right to assemble and assemble (Jurič, 2023).

The introduced imperative presents two significant flaws. First, it requires the legislator to adhere to a commitment that presupposes prior knowledge of entirely undetermined circumstances, effectively making the legality of executive acts contingent on this foresight. Second, it renders the issuance of by-laws redundant, as the full consideration of relevant factual bases is already embedded in the statutory provisions (Jurič, 2023).

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Nevertheless, Jurič emphasized that Slovenian constitutional jurisprudence clearly establishes a direct correlation between the severity of the intrusion into human rights and the degree of diligence required from the legislator in prescribing statutory guidelines for the issuance of restrictive regulations. Thus, the more significant the imposition by means of an executive act, the more precisely defined the statutory provisions must be to confer the authority for its issuance (Jurič, 2023).

### 6.3. Decision of the Constitutional Court Regarding the Unconstitutionality and Illegality of Implementing the Condition of Recovery and Vaccination in the State Administration

By decision U-I-210/21, dated 29 November 2021 the Constitutional Court decided on a request for constitutionality and legality of Article 10.a of the Ordinance on the Manners of Complying with the Recovered-Vaccinated-Tested Requirement to Contain the Spread of Infection with the SARS-CoV-2 Virus, which determined that to perform tasks at their workplace on the premises of their employer or the premises of another body of the state administration employees in the bodies of the state administration must fulfil the recovered-vaccinated requirement, with the alternative possibility of fulfilling the tested requirement no longer applying to them (Constitutional Court of Republic of Slovenia, 2021c).

The Constitutional Court emphasised that the determination of the recovered-vaccinated requirement entailed a condition under labour law to perform work in the state administration, and thus, the situation was essentially comparable to situations wherein a vaccination is determined as a condition under labour law to perform various types of work and professions. The legal basis for regulating such vaccination is Article 22, in conjunction with Article 25 of the Communicable Diseases Act, which regulates different types of mandatory vaccinations. However, this law does not prescribe vaccination against COVID-19 as a condition for performing the work of a certain group or groups of employees who are exposed to communicable diseases while performing their work and persons liable to transmit an infection to other persons while working. Therefore, it decided that Article 10.a of

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the ordinance was inconsistent with the second paragraph of Article 120 of the Constitution (Constitutional Court of Republic of Slovenia, 2021c).

In Slovenia, there are no issues with mandatory vaccination. The measure of mandatory vaccination is permissible under Slovenian law and the Constitutional Court has always generally supported it. Even though mandatory vaccination constitutes an interference with the individual's right, the Constitutional Court has so far determined that the measure is appropriate as the benefits it brings to the individual and the community outweigh the harm that possible side effects might cause.

With decision U-I-210/21 dated November 29, 2021, the Constitutional Court found that the ordinance on the Manners of Complying with the Recovered-Vaccinated-Tested Requirement to Contain the Spread of Infection with the SARS-CoV-2 Virus was inconsistent with the Constitution due to a violation of the principle of legality. Unlike previous cases, it was not due to an insufficiently specified legal basis but rather because the existing legal basis, which allows for mandatory vaccination for certain professional groups, was not utilised.

It is important to mention that in its decision, the Constitutional Court did not address the question of whether the measure would be constitutionally permissible if it were imposed on an appropriate legal basis and in accordance with the principles of proportionality and equality before the law. The Court also emphasized that the decision does not imply that vaccination of employees as a condition for performing certain activities or professions is a disproportionate measure; rather, the purpose of the decision is to ensure that the measure is regulated in accordance with the Communicable Diseases Act, which already establishes the rules and procedures for vaccination.

### 6.3.1. Legal Experts' Responses to the Decision

Although the issue of mandatory vaccination has been pertinent for many years, recent years have seen a particular focus on COVID-19 vaccination. In Slovenia, however, mandatory vaccination against COVID-19 was never implemented. Nonetheless, the legal framework, specifically the second paragraph of Article 22 of the Communicable Diseases Act, grants the legislator the au-

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thority to mandate vaccination during an epidemic, in line with the annual vaccination program, for communicable diseases that pose a significant threat to human life.

At this juncture, it is relevant to reference Dr. Novak's column, written prior to the Constitutional Court's decision, which addresses the intense anticipation surrounding the COVID-19 vaccine. Dr. Novak's column explores the anticipation surrounding the COVID-19 vaccine, which was viewed as a necessary measure for restoring normalcy. During the height of the pandemic, the vaccine, namely, was widely regarded as the only viable solution for returning to pre-pandemic conditions (Novak, 2020).

Tekavc M.Phil., in his article, pointed out that with the adoption of the ordinance and subsequent decision of the Constitutional Court, the issue of mandatory vaccination was indeed brought into question, as efforts in this direction were quite apparent. In the case of *Vavrička and Others v. Czech Republic*, the European Court of Human Rights ruled that sanctioning the refusal of mandatory vaccination under a child vaccination program does not constitute an interference with individual rights under the European Convention on Human Rights. This is because vaccination is standard and well-known to the medical community and because it protects individuals through so-called herd immunity, safeguarding those who, for health reasons, cannot or should not be vaccinated. Accordingly, it can be argued that in the case under consideration, the European Court of Human Rights emphasised the finding that the subject of assessment is standard and routine childhood vaccination against diseases well known to the medical science. In contrast, we have vaccination against COVID-19, which is not standard vaccination against a disease well known to the medical community. Because COVID-19 is relatively new, vaccines used in the European Union have only conditional marketing authorisations, as their development and approval have been faster and less extensive compared to other vaccines (Tekavc, 2021).

On the other hand, Bauk, in his article, discusses that there is no right not to vaccinate. The main aspects of the article are represented below The Republic of Slovenia, concerning individuals, not only has negative obligations, meaning to refrain from encroaching upon their human rights and fundamental freedoms, but it also has positive obligations toward its citizens, among

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which is ensuring health or a healthy living environment, This positive obligation of the state is defined in the Constitution of the Republic of Slovenia, particularly in Article 72. In connection with controlling and preventing the spread of communicable diseases, the constitutionally defined right to a healthy living environment is legislatively derived in the Communicable Diseases Act. The Communicable Diseases Act lists measures for the prevention and control of communicable diseases, known as epidemiological measures, among which vaccination is listed. (Bauk, 2021).

It is a fact that no one from the scientific or medical community has ever claimed that vaccines against coronavirus will not have side effects or adverse reactions, meaning that individuals cannot experience health issues after vaccination. The possibility of health issues in individuals after vaccination is undisputed, and in some cases, it can even lead to death. This possibility is also presupposed at the regulatory level by the Communicable Diseases Act, which in Article 53.a specifies that every individual who suffers serious and permanent impairment of life functions due to mandatory vaccination has the right to compensation (Bauk, 2021). It is not a matter of whether compensation represents sufficient financial compensation for permanent health consequences or death, but it is important to note that the Slovenian legal system, concerning mandatory vaccination, does not pretend and acknowledges that vaccines are not miraculous in the sense that they are absolutely and only beneficial and harmless (Bauk, 2021).

However, it is important to emphasise as constitutional Judge Dr Šugman Stubbs in her concurring opinion regarding decision no. U-I-210/21, dated 29 November 2021, wrote that the consideration of weighing the benefits and risks of individual vaccines, including those against COVID-19, is not left to the individual but to the system and processes of vaccine approval led by competent institutions (Šugman Stubbs, 2021b).

## 7. Conclusion

The COVID-19 epidemic has brought numerous challenges regarding the realisation of human rights and fundamental freedoms, particularly the right to life and the right to health or healthcare. The right to life was most obviously affected during the epidemic, as COVID-19 claimed the lives of over six million peo-

ple worldwide. In situations of such extraordinary circumstances, countries are obliged to provide adequate protection against the danger posed by communicable diseases, including, undoubtedly, COVID-19. Similarly, it is the duty and responsibility of states to take appropriate measures for the prevention and treatment of communicable diseases and to ensure access to adequate healthcare for all people. Consequently, countries faced the difficult task of striking a balance between fundamental freedoms and the principles of democratic decision-making on one hand and healthcare policy and the positive obligations arising from ensuring the right to life on the other (Spadaro, 2020).

The epidemic has also shown us how interdependent and, at the same time, contradictory human rights and fundamental freedoms can be, which can present a challenge in their realisation, as individual and collective interests may oppose each other. Public health measures, such as social distancing to prevent the spread of infections, primarily restrict freedom of movement, as well as other rights and freedoms of individuals. For instance, the prohibition of international travel and restrictions on movement within national or municipal borders, which may be perceived as an infringement on the right to personal freedom by individuals, clearly illustrates the challenge that countries faced in striking a balance between safeguarding the right to life and the right to health while respecting other constitutionally guaranteed human rights and fundamental freedoms (Spadaro, 2020).

The epidemic has also highlighted the strong connection between the right to life and the right to health or healthcare, as the spread of communicable diseases jeopardises not only the lives of those who become ill with the disease but also affects access to healthcare services for other patients who require treatment for other chronic or acute conditions. Accordingly, promoting the right to health is crucial for safeguarding other human rights and fundamental freedoms (Spadaro, 2020).

The right to life is well protected in both Slovenian and international legal systems. In the Slovenian legal system, it is found in the Constitution of the Republic of Slovenia and the Criminal Code. In connection with the right to health or healthcare, it is also found in the Communicable Diseases Act, the Patients' Rights Act, the Health Services Act and the Health Care and Health Insurance Act. In the international legal system, the right to life as one

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of the fundamental human rights is protected in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

While the explicit connection to the right to health or health-care is not specifically defined in all international legal instruments mentioned, except for the Charter of Fundamental Rights of the European Union and the African Charter on Human and Peoples' Rights, and indirectly in the European Convention on Human Rights due to decisions of the European Court of Human Rights in this field, it can still be argued that the right to life is well established in the international legal order.

As we have seen, countries were not prepared for the epidemic, making the implementation of containment measures a significant challenge, with Slovenia being no exception. The Government of the Republic of Slovenia faced the continuous dilemma of balancing the right to life, human dignity, and protection of health on the one hand and the limitations on freedom of movement, assembly, and association, alongside other human rights, on the other, in adopting measures to prevent the spread of the new virus. Furthermore, it encountered increasing non-compliance with basic preventive measures and significant resistance to vaccination, leading to a low level of vaccination coverage among the adult population (Letnar Čerňič, 2021).

Similarly, the Constitutional Court faced the task of balancing various human rights and fundamental freedoms when making its decisions regarding the adopted measures. However, in many cases, there was no assessment of the substantive adequacy, necessity, and proportionality because the Government of the Republic of Slovenia violated the principle of legality in adopting measures. Since the question of legality precedes the question of adequacy, necessity, and proportionality, there must be a clear and semantically definable legal basis that is in line with the Constitution if substantive assessment is to take place at all (Nerad, 2021).

In decision U-I-83/20, dated August 27, 2020, the Constitutional Court decided to directly assess the content and consequently ruled that the measures under review were proportional. How-

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ever, decision U-I-79/20, dated May 13, 2021, showed that this approach was methodologically flawed because the legal basis for the measures was unconstitutional. The second and third points of the first paragraph of Article 39 of the Communicable Diseases Act were not in line with the Constitution (Mežnar, 2021), and the issue was not what the points specified but rather the problematic lack of detailed content in the law (Nerad, 2021). The Constitutional Court made a similar decision regarding Article 39 of the Communicable Diseases Act in decision U-I-155/20 dated October 7, 2021, but in this case, the fourth point of the first paragraph was inconsistent with the Constitution (Constitutional Court of Republic of Slovenia, 2021b).

Furthermore, the violation of the principle of legality was also addressed by the Constitutional Court in decision U-I-210/20 dated November 29, 2021. However, in this case, it was not due to an inadequately specified legal basis, as in previously assessed cases, but rather due to the incorrect choice of legal basis. The Government of the Republic of Slovenia attempted to introduce the recovered-vaccinated requirement for employees in state administration bodies outside the existing legal framework that regulates various types of mandatory vaccinations, namely, by passing Articles 22 and 25 of the Communicable Diseases Act (Constitutional Court of Republic of Slovenia, 2021c).

The Constitutional Court has indeed found, in its decisions, that fourteen ordinances were inconsistent with the Constitution, resulting in their annulment:

÷ Five ordinances were annulled in part, where they were adopted based on the second and third points of the first paragraph of Article 39 of the Communicable Diseases Act (decision U-I-79/20 dated May 13, 2021).

÷ Five ordinances were annulled in part, where they prohibited or restricted gatherings to up to ten participants (decision U-I-50/21 dated June 17, 2022).

÷ One ordinance concerning the temporary prohibition of offering and selling goods and services to consumers in the Republic of Slovenia (decision U-I-155/20 dated October 7, 2021).

÷ Three ordinances were annulled in part, where they regulated the mandatory use of protective masks or other forms of protection for the mouth and nose area, as well as mandatory hand disinfection (decision U-I-132/21 dated June 2, 2022).

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Among these, eight ordinances were annulled due to violations of the principle of legality (Ministrstvo za pravosodje, 2022).

Although there were setbacks in the fight against the COVID-19 epidemic, it is crucial that the state, during times of emergencies such as an epidemic, operates in accordance with human rights as much as possible. This is because respecting human rights as a central principle in shaping and implementing measures to control the spread of communicable diseases enables the protection of fundamental rights and freedoms of all individuals (Spadaro, 2020).

The purpose of the article was to analyse the right to life in both Slovenian and international legal frameworks, providing an overview of legislation that protects this hierarchically highest human right in connection with the right to health or healthcare. The analysis of the legal basis presents possible ways in which the state can adopt containment measures in the event of fighting an epidemic, which is particularly important since the Constitutional Court's decisions revealed numerous violations of the principle of legality in the adoption of measures. This meant that the Constitutional Court mostly assessed the legality of the measures without addressing their substance. Therefore, the goal of the article was to raise awareness and highlight critical decisions and dilemmas faced by constitutional judges in decision-making, aiming to prevent similar issues from recurring in future situations.

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