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## **Political Rights during the COVID-19 Pandemic in the Slovak Republic<sup>1</sup>**

**Abstract:** Political rights are an essential part of modern states' constitutions as certain means through which power is exercised in the state. The article points to the existence and exercise of political rights in the Slovak Republic at the time of extraordinary circumstances related to the global COVID-19 pandemic. It analyses the options of their restriction within the sense of the Constitutional Law no. 227/2002 Statutes on State Security in Time of War, State of War, Extraordinary Circumstances and State of Emergency, and it also points to the decision-making activities of the Constitutional Court of the Slovak Republic related thereto.

**Keywords:** Constitutional Court of the Slovak Republic, COVID-19 pandemic, electoral law, political rights, state of emergency

### **Introduction**

As the rights of the first generation, political rights constitute a stable part of the fundamental human rights catalogues in every modern state. Exercising most

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1 The article is a result of the APVV-17-0561 project 'Human-legal and ethical aspects of cybersecurity'.

of them, especially the right to vote, is also monitored by relevant international organizations, as the path to their exercise has not been the same or straightforward in every country. In addition, this is a group of rights through which citizens are largely involved in the exercise of public authority in society. This aspect makes them the rights the exercise of which requires increased guarantees and a higher level of protection on the part of the state. At the same time, the extent to which they are restricted is monitored, especially in situations beyond the standard regime of state functioning.<sup>2</sup>

Since the end of 2019, states, including the Slovak Republic, have been exposed to a new serious acute respiratory illness, the SARS-CoV-2 coronavirus (COVID-19). As a result of its alarming spread and the consequences this brought about, on 11 March 2020, the World Health Organization (WHO) declared a coronavirus pandemic. Thus, for over two years now, global events have been mired by this pandemic to a greater degree in some, a lesser degree in other countries. As a result of ensuring the protection of society, the affected states applied a number of reactive and preventive measures to reduce the spread of this virus and enable its treatment. At the same time, the measures adopted required legal regulation, founded on, among other things, a change in the relevant legislation. This affected an enormously wide range of actors. In addition, in the Slovak Republic, the social situation was made more difficult by the natural process of government change as a result of regular parliamentary elections held on 29 February 2020.

The paper aims to analyse the exercise of individual political rights during the COVID-19 pandemic in the Slovak Republic, to identify unwanted interventions and restrictions of political rights, to synthesize polemical points and to propose possible solutions that would contribute to ensuring a balance is reached between the restriction of fundamental rights and the protection of life and health.

## **1. Political Rights in the Slovak Republic**

The Constitution of the Slovak Republic no. 460/1992 Statutes as amended (hereinafter referred to as the 'Constitution') regulates the issue of political rights in its second Article, in the third section, which also bears the same title – 'Political Rights'.

Thus, political rights include those defined by the Constitution in Articles 26 to 32, namely freedom of expression and the right to information (Art. 26), the petition right (Art. 27), the right to assemble peacefully (Art. 28 – hereinafter referred to as the 'right to assemble'), the right to associate (Art. 29), the right to establish political parties and political movements and to associate in the same (Art. 29 para. 2), the electoral right (Art. 30), the right to participate in the administration of public af-

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2 More details: Bílková, V., Kysela, J., Šturma, P. et al. (eds.), *Extraordinary circumstances and human rights*, Prague: Aditorium, 2016, p. 41 et seq.

fairs (Art. 30, para. 1), the right to free competition of political powers (Art. 31) and the right to protest (Art. 32). These are traditional political rights, corresponding to international law in the spirit of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Charter of Fundamental Rights of the European Union. The exercise of political rights is bound to be specified in the relevant laws, as each of them is regulated in the Constitution only as a framework.

The above-mentioned constitutional aspect identifies political rights at the time of regular operation of the country. Their exercise in crisis is governed by the Constitutional Law no. 227/2002 Statutes on State Security in Time of War, State of War, Extraordinary Circumstances and State of Emergency (hereinafter referred to as the 'Constitutional Law on State Security').<sup>3</sup> The last amendment to this Constitutional Law, passed on 28 December 2020 and effective since 29 December 2020 as Constitutional Law no. 414/2020, has become the subject of extensive expert discussion. In addition to the content of the aforementioned amendment, formal requirements consisting of the manner of adoption of this Constitutional Law have become controversial, as it passed in the National Council of the Slovak Republic in an expedited legislative procedure.

In its Art. 1 para. 4, the Constitutional Law on State Security specifies a 'crisis' as a period during which the security of the state is immediately threatened or impaired and to resolve the crisis, the constitutional authorities may, subject to satisfying the conditions laid down in this Constitutional Law, either declare war, declare a state of war, declare extraordinary circumstances or declare a state of emergency.

These are indeed exceptional situations where it is assumed they will not be invoked too frequently. Out of the four situations defined as a crisis, only the state of emergency has been declared in the Slovak Republic to date.

The Government of the Slovak Republic (hereinafter referred to as the 'Government') shall declare a state of emergency if one of the following alternative conditions is met:

- the life and health of persons or the environment is at real or imminent risk (this may be the causal consequence of the onset of a pandemic)
- or significant property values are at risk as a result of a natural disaster, a catastrophe or industrial, transport or other operational emergency.

A state of emergency may be declared in the affected or in the immediately endangered area only, which may also be the entire territory of the Slovak Republic.<sup>4</sup> To avoid abuse of the state of emergency, the provision of Art. 5 para. 2 of the Constitu-

3 This Constitutional Law has been amended five times so far by Constitutional Acts No. 113/2004; No. 566/2005; No. 181/2006; No. 344/2015; No. 414/2020.

4 Art. 5 para. 1 of the Constitutional Law on State Security.

tional Law on State Security has been included, according to which a state of emergency may be declared to the extent and time necessary, for no more than 90 days.

It was the last amendment that allowed the state of emergency to be extended by a maximum of another 40 days, even repeatedly, subject to satisfaction of a cumulative condition that it is declared due to threat to life and health of people in a causal consequence of the onset of the pandemic. The Constitutional Law states that this extension must also be declared to the extent and time necessary. Such an extension of the state of emergency must be subsequently approved by the National Council of the Slovak Republic within 20 days of the first day of the extended state of emergency. Should the National Council of the Slovak Republic fail to endorse it, the extended state of emergency shall cease on the day on which the Government's proposal to endorse the extension of the state of emergency does not pass in the Council. The consent of the National Council of the Slovak Republic is also required in the event of repeated declaration of a state of emergency provided less than 90 days have elapsed since the end of the previous state of emergency declared for the same reasons.<sup>5</sup> The solution conceived in this way, i.e. in which two constitutional bodies (the Parliament and the Government) participate in unison, makes a good impression at first glance. However, its credibility is undermined by the manner in which it was adopted, as well as by the fact that it was adopted both at the time of the state of emergency and just before the expiry of the 90-day period, which could not have been extended at that time.<sup>6</sup> The above facts thus put it in a different light and allow it to be assessed as serving a certain agenda. The gravity of the state of emergency also lies in the constitutional possibility of restricting fundamental rights and freedoms, which cannot be implemented at the time of regular operation of the society. The practice of declaring a state of emergency and restricting fundamental rights to date has shown that it would have been more effective had the Parliament endorsed the state of emergency before it was declared, since after the state of emergency had already been declared the Parliament took a rather formal approach to endorsing it, even in the absence of justification for its extension.

The Constitutional Law exhaustively determines which rights may be restricted and determines the possible scope of their restriction as well.

As far as the political rights are concerned, where it comes to the state of emergency, the Constitutional Law on State Security stipulates the respective restrictions only in two cases:

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5 Art. 5 para. 2 of the Constitutional Law on State Security.

6 The Parliament has resolved the above-mentioned fact through Art. 11a, where it provided for a transitional provision to govern the effective date of the declaration in the sense that it also allowed the state of emergency declared before this Constitutional Law came into force to be extended.

1. The Government may prohibit the exercise of the right to peacefully assemble or make gatherings in public subject to authorization.
2. The Government may restrict the right to freely disseminate information regardless of the borders of the state and freedom of expression in public (Art. 5 para. 3).<sup>7</sup>

Under the state of emergency, the President may, on a proposal of the Government, order extraordinary service to professional soldiers, soldiers in reserve called for regular training or tasks of the armed forces and soldiers of voluntary military training, or call into extraordinary service soldiers in reserve if necessary. We consider it important to add that the scope and time necessary for the restriction must be assessed separately in specific legal relations and differently in relation to their addressees.<sup>8</sup>

## 2. State of Emergency in the Slovak Republic in Application Practice

Despite the fact that the state of emergency belongs to those situations considered least risky under the Constitutional Law on State Security, and its regulation includes the least possible interference with human rights and freedoms, experience confirms that even in this state it is necessary to approach restrictions of fundamental rights and freedoms in a very cautious manner. Law, including the Constitutional Law, must reflect the crisis not as a para-legal exception, but as a normal occurrence subject to regulation.<sup>9</sup>

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7 In relation to other categories of fundamental rights and freedoms, the Government may limit the inviolability of a person and their privacy by forced stay in a dwelling or by evacuation to a designated place, impose a work obligation aimed at providing supplies, maintaining roads and railways, carrying out transport, operating water pipes and sewers, producing and distributing electricity, gas and heat, providing healthcare, providing social services, implementing measures of social and legal protection of children and social guardianship, maintaining public order or remedying damage, limit the exercise of property rights to real estate to deploy soldiers, members of armed forces, medical facilities, supply facilities, rescue services and release and other technical equipment, limit the exercise of property rights to movable property by prohibiting the entry of motor vehicles or limiting their use for private and business purposes, limit the inviolability of dwelling to accommodate evacuated persons, limit postal services, freedom of movement and stay, ensure the entry into radio and television broadcasting to make announcements for and inform the public, ban the right to strike and implement measures to address the situation of crude oil deficiency.

8 Great resentment was caused by the Government's Resolution No. 207 of 6 April, by which the Government restricted the freedom of movement and stay by a curfew from 8 April 2020, 0.00 a.m. to 13 April 2020, 11.59 p.m., exactly during the Easter holidays.

9 As pointed out by Nassehi, from a sociological standpoint, *'even in times of a crisis, modern society operates according to well-known models'* (Neue Zürcher Zeitung [NZZ], No. 99, 29 April 2020, p. 5).

In connection with the COVID-19 pandemic, the Government proceeded with declaring a state of emergency and with interfering with fundamental rights for the second time during the so-called first coronavirus wave. Effective as of 16 March 2020, the then Government imposed an obligation of work on healthcare employees of institutional healthcare providers located in the territory of districts in which a state of emergency was declared to ensure healthcare, and as of that date, it prohibited the exercise of the right to strike by persons under the imposed work obligation (Resolution no. 114 of 15 March, no. 45/2020 Statutes). This Government Resolution launched a series of 'Covid resolutions' of the Government, a high number of which, and sometimes the ambiguity of the legislation involved, caused at least confusion and doubts about the effect of the Government resolutions adopted.

Subsequently, the same Government extended the state of emergency and, taking effect on 19 March 2020, imposed an obligation of work on employees of the entities listed in the Annex to Resolution no. 115 (no. 49/2020 Statutes), for example on the employees of holders of a licence to operate a medical facility of institutional healthcare, holders of a licence to operate an emergency medical service ambulance, but also employees of funeral services, and prohibited them from exercising the right to strike.

Before Easter, on 6 April 2020, the already new Government<sup>10</sup> passed Resolution no. 207 (no. 72/2020 Statutes), which restricted the freedom of movement and stay by a curfew from 8 April 2020 starting at 0.00 a.m. to 13 April 2020 expiring at 11.59 p.m., with limited exceptions. From 8 April 2020, it also prohibited, without a similar time limit, the exercise of the right to peacefully assemble, with the exception of persons living in the same household. The track record of the second state of emergency that was declared is unflattering: four times imposition of the obligation to work, four times prohibition on the exercise of the right to strike, long-term restriction on freedom of movement and stay and long-term restriction of the exercise of the right to peacefully assemble. In neither case did the Constitutional Court of the Slovak Republic (hereinafter referred to as the 'Constitutional Court') have an opportunity to examine the constitutionality of the interference with these fundamental rights.

The state of emergency was declared for the third time taking effect from 1 October 2020 (Government Resolution no. 587 of 30 September 2020, no. 268/2020 Statutes), and kept being extended until 16 May 2021 (more than seven months). During this state of emergency, a motion was filed to initiate proceedings before the Consti-

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10 The new and current Government was appointed on 21 March 2020, then on 27 March it approved Resolution No. 169 (No. 64/2020 Statutes), which, with effect from 28 March 2020, imposed a work obligation on employees of residential social services facilities, which are facilities for seniors, care facilities, social services homes, specialized facilities, and on employees of social and legal protection facilities for children and social guardianship, which are centres for children and families. These persons, too, were prohibited from exercising their right to strike.

tutional Court pursuant to Art. 129 para. 6 of the Constitution. In its finding PL. ÚS 22/2020 of 14 October 2020, the Constitutional Court decided that the adopted Resolution no. 587 complies with the Constitution and the Constitutional Law.

The problem up for debate became the manner in which the measures were being adopted, directly restricting the fundamental rights and freedoms, or secondary rights and freedoms, under the state of emergency. This provided the ground for a broad expert discussion<sup>11</sup>, which culminated in the issue being addressed by the Constitutional Court.<sup>12</sup>

The Venice Commission<sup>13</sup> has already drawn attention to the risk of abuse of emergency powers and recommended that the legislation contained in laws and sublegal acts should be as detailed as possible and should not contain open clauses.<sup>14</sup> However, the Parliament adopted the opposite tack and in the amendment to the Public Health Protection Act, it enshrined an open competence clause with respect to the Slovak Republic Health Department and the Public Health Authority of the Slovak Republic.<sup>15</sup>

11 See e.g. M. Domin, What to do with an assembly held in violation of the state of emergency conditions? <https://comeniusblog.flaw.uniba.sk/2020/10/22/co-robit-so-zhromazdenim-konany-m-v-rozpore-s-podmienkami-nudzoveho-stavu/>; I. Slovák, A few remarks on criminal liability of persons spreading conspiracies during the COVID-19 pandemic, <https://comeniusblog.flaw.uniba.sk/2020/10/28/niekolko-poznamok-k-trestnej-zodpovednosti-osob-siri-acich-konspiracie-v-case-pandemie-COVID-19/>; Burda, E., State of emergency, restriction of the right to assemble and legal risks connected with disrespecting it, <https://comeniusblog.flaw.uniba.sk/2020/11/15/nudzovy-stav-obmedzenie-zhromazdovacieho-prava-a-pravne-rizika-spojene-s-jeho-nerespektovanim/>; R. Lysina, Imposing quarantine on Roma settlements – Fast and Furious Ride of the Regional Public Health Authorities?, <https://comeniusblog.flaw.uniba.sk/2021/02/26/karantenzacia-romskych-osad-rychla-a-zbesila-jazda-regionalnych-uradov-verejneho-zdravotnictva/>; G. Dobrovičová, A few notes on the measures of the Public Health Authority of the Slovak Republic, <https://comeniusblog.flaw.uniba.sk/2020/11/09/niekolko-poznamok-k-opatreniam-uradu-verejneho-zdravotnictva-slovenskej-republiky/>.

12 PL. ÚS 22/2021 of 14 October 2020, PL. ÚS 2/2021 of 31 March 2021, PL. ÚS 8/2021 of 26 May 2021, PL. ÚS 4/2021 of 8 December 2021.

13 Venice Commission, CDL (2020)018, Preliminary report on the measures taken in the Member States of the European Union as a result of the COVID-19 crisis and their impact on democracy, the rule of law, and fundamental rights, 8 October 2020, point 58.

14 For example, empowering the executive branch to adopt ‘any other measures that might be necessary to deal with the state of emergency’.

15 The Health Department and the Public Health Authority of the Slovak Republic were entitled to ‘impose further measures by which they could prohibit or order further activities to the necessary extent and for the necessary time.’ It is worth pointing out that the competence of the Health Department was limited to critical situations, but the competence of the Public Health Authority was determined without any limitation. In its finding PL. ÚS 4/2021 of 8 December 2021, the Constitutional Court of the Slovak Republic ruled on the unconstitutionality of the provisions governing open competence clauses.

Measures taken by the Public Health Authority during the state of emergency specifying behaviour of entities in the form of a ban or order due to the COVID-19 pandemic were largely involved in the restriction of fundamental rights and freedoms.<sup>16</sup> A serious problem is that individuals do not yet have effective tools with which they would be entitled to challenge, by judicial means, the constitutionality and legality of emergency measures. The measures are contained in sublegal legislation and the Constitutional Court Law<sup>17</sup> does not grant an individual an active procedural legitimacy to file a petition regarding non-compliance of a law of lower legal force with a law of higher legal force. This created wide room for the executive branch (Public Health Authority and Regional Public Health Authority) to issue emergency measures with only limited review by the Constitutional Court.<sup>18</sup> The question thus arises about who is to make essential decisions on Covid policy. The answer is not straightforward and is based on a traditional conflict of competence. It is not enough if the problem of substantive decisions is seen as a problem of 'power-sharing' between the Parliament and the Government. The Parliament is the place where decisions that correspond to democratic legitimacy are to be made. Clear laws must be enacted in Parliament to determine how much must be allowed and how much must be tightened up in order for measures to have effect. If the Parliament is passive, the focus shifts to the executive branch, from which help is sought. Yet, decisions of the executive branch pertaining to the issue examined are viewed negatively, because the Government cannot restrict fundamental rights and freedoms.<sup>19</sup>

The above facts have also been reflected to a considerable extent in the exercise of political rights. In general, fundamental rights and freedoms cannot be presented as a product of administration authorizations and failures because that is not what they are.

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16 For example, restrictions of freedom of movement and stay were reflected in the Public Health Authority measure that closed schools and restricted the right to education, or restrictions of the right to peacefully assemble were reflected in the Public Health Authority measure that restricted mass events and restricted the right to freely express one's religion or belief.

17 Act no. 314/2018 Statutes on the Constitutional Court of the Slovak Republic.

18 The consequence of this is the fact that so far there has been only one decision of the Constitutional Court issued on the basis of a petition filed by the Public Defender of Rights of the Slovak Republic, which ruled on the inconsistency of the provisions of the Public Health Protection Act regulating quarantine measures as a restriction of personal freedom guaranteed by Art. 17 para. 1 and 2 of the Slovak Republic Constitution. More details in the Finding of the Constitutional Court of the Slovak Republic PL. ÚS 4/2021 of 8 December 2021.

19 For more details: ZEH, W. Pandemie und Parlament, (In:) Ooyen, van R. Ch. and Wasserman, H. Recht und Politik. Beiheft 7. Zeitschrift für deutsche und europäische Rechtspolitik. Corona und Grundgesetz, Berlin: Duncker & Humboldt, 2021, p. 23.



### 3. Exercising Political Rights during the COVID-19 Pandemic

It should be noted at the outset that the natural decline in the exercise of certain political rights was related directly to the restriction of freedom of movement and stay and the curfew. The Slovak Republic was applying a state of emergency regime with which it had not had any extensive experience. The state focused on issuing measures to prevent the spread of the virus and the society went into a social downturn, although under the Constitutional Law on State Security, it was only possible to prohibit the exercise of the right to peacefully assemble or to make gathering in public subject to authorization, or to limit the right to freely disseminate information regardless of state borders and freedom of expression in public from the catalogue of political rights.

If we were to examine the exercise of political rights in terms of the constitutional structure, the restrictions probably least affected the first one in order, namely the freedom of expression and the right to information (Art. 26 of the Constitution). The Government did not make use of the option afforded thereto by the Constitutional Law on State Security of restricting the right to freely disseminate information regardless of national borders and freedom of expression in public, as the nature of this right and the purpose of the state of emergency did not require it to do so and was not necessary. In this context, it is important to remember that freedom of expression cannot be perceived individually and separately from other rights. This is because it is closely linked to some human rights, such as freedom of thought, conscience, religion or belief, or freedom of scientific research, but it is also linked to the petition right and the right to assemble or associate. 'Freedom of expression belongs to the realm of human freedom which is primarily connected with the inner sphere of consciousness and includes the attributes of this human freedom, which include freedom of conscience, freedom of thought and freedom to hold, disseminate, and receive opinions on all issues related to life of the society. Freedom of expression is practically inseparable from freedom of thought. No society in which these freedoms are not respected is free, no matter what form of government this society (state) has. Every person has an inalienable right to express their opinion in public, and prohibiting public expression means destroying freedom of expression.'<sup>20</sup> During the state of emergency and the so-called lockdown related thereto, the exercise of freedom of expression moved to the virtual environment. Multiple manifestations of a diverse nature, revealing a new dimension of freedom of expression and the right to information, appeared in particular on social networks.

The work of public authorities on the pandemic has also required intelligible communication, providing as much information as possible, developing streams of thought, opinions and argumentative models in the course of public opinion forma-

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20 Cf. finding in case no. II. ÚS 439/2016 of 27 October 2016.

tion. This limits the scope for presenting differing views by ‘corona deniers’ under the pretext of pluralism, the acceptability of which is problematic. The Government may not have chosen the most appropriate path in responding to the growing amount of false information that is produced and disseminated, especially in connection with the COVID-19 pandemic, by proposing a new crime in the forthcoming amendment to the Criminal Code titled ‘Dissemination of false information’. The Government’s move is evaluated by the professional public as also an attempt to introduce censorship of different views. This gives rise to concerns as to whether the introduction of the offence in question will not result in the suppression of debate, the gradual disappearance of arguments and counter-arguments and the criminalization of opinions that are not referred to as majority opinions, and in particular whether freedom of expression will not become suppressed. ‘The Constitutional Court has already stated that freedom of expression in all states that are built on democratic principles is one of the fundamental pillars of democracy and applies not only to information and ideas that are received favourably or are considered harmless or neutral, but also to those that offend, shock or disturb the state or a part of the population, which is the operation of the requirements of pluralism, tolerance, and openness, without which it is impossible to talk about a democratic society.’<sup>21</sup>

The right to petition (Art. 27 of the Constitution), as another of the political rights, is sometimes also perceived as the so-called support right, which usually allows those who enjoy this right to exercise their other rights. As to this matter, the Constitutional Court stated: ‘The right to petition thus acquires an information dimension guaranteeing the petitioner an informal communication channel, drawing the attention of a public authority to a problematic matter of public or other common interest. Consequently, the right to petition naturally also has an implementation dimension, consisting of the obligation of the public authority to investigate the petition, to process it and to communicate the result of its processing to the person designated in the petition as a representative acting towards a public authority. However, the content of the right to petition does not extend further towards naming the prescribed ways of handling the petition or even naming the only possible way of handling it.’<sup>22</sup> According to the Constitution, a petition may be presented in three alternative but equivalent forms – in the form of a petition, proposal or complaint.<sup>23</sup> The right to petition is very closely linked to freedom of expression. According to the jurisprudence of the Constitutional Court of the Slovak Republic<sup>24</sup>, it was even con-

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21 Finding in case no. II. ÚS 307/2014 of 18 December 2014.

22 Cf. finding in case no. PL. ÚS 4/2016 of 10 May 2017.

23 A special category are complaints which are assessed in accordance with the Act on Complaints no. 9/2010 Statutes, as amended.

24 In the event that the complainant contacts the competent public authority with correspondence in the public interest that the complainant does not disclose, the protection requirements pursuant to Art. 10 para. 2 of the Convention, in such a case, are not balanced against freedom of expres-

sidered a part of the freedom of expression – *‘The right to petition within the meaning of Art. 27 para. 1 of the Constitution may be understood as a special form of freedom of expression regulated in Art. 26 para. 1 of the Constitution.’*<sup>25</sup> Petitions may be drawn up in writing (in paper form) or electronically.<sup>26</sup> The above methods are equivalent in terms of the effects they cause, but the electronification of petition sheets has specific rules of their implementation for the management of the electronic portal. All content and formal requirements stipulated in the Petition Law<sup>27</sup> apply equally to petitions filed in writing as well as to petitions filed electronically. Therefore, the exercise of the right to petition in electronic form was also possible under the state of emergency, which was also used in the petition for the early parliamentary elections. At the beginning of 2021, the political parties constituting the opposition in Parliament initiated the activities necessary for holding a referendum based on the citizens’ petition in accordance with Art. 95 para. 1 of the Constitution. The Petitions Committee submitted the petition, with over 600,000 signatures, to the Presidential Palace Registry on 3 May 2021 calling for a referendum on early elections. Subsequently, pursuant to Art. 95 para. 2 of the Constitution, the President of the Slovak Republic (hereinafter referred to as the ‘President’) approached the Constitutional Court for it to assess whether the subject matter of the proposed referendum was in accordance with the Constitution of the Slovak Republic or not. Although at a closed hearing on 7 July 2021 the Constitutional Court ruled that the question under review in the referendum was unconstitutional, the exercise of the right to petition in the state of emergency was made possible.

The only political right that was restricted under the Constitutional Law on State Security was the right to peacefully assemble – the right to gather (Art. 28 of the Constitution). In terms of its importance, it is a fundamental political right, and we can also characterize it as a right enabling the exercise of the freedom of expression and other related political rights.<sup>28</sup> The right to assemble may be closely linked to the right to vote (in particular in connection with election campaigning), religious freedom, the right to own property, the right to judicial protection, or the protec-

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sion or discussion on matters of public interest, but with the complainant’s right to turn to the authorities competent to deal with such initiatives with their complaints about alleged irregularities in the procedure of public officials. Cf. Regulation (EU) 2019/788 of the European Parliament and of the Council on the European Citizens’ Initiative.

25 Cf. decision in case no. I. ÚS 38/94 of 27 February 1995.

26 The said change occurred in accordance with Act no. 29/2015 Statutes of 28 January 2015 amending the Act on the right to petition and, at the same time, supplementing Act no. 305/2013 Statutes on the electronic form of exercising the powers of public authorities as amended (the e-Government Act). With effect from 1 September 2015, the possibility of implementing the right to petition by electronic means was introduced.

27 Act no. 85/1990 Statutes on the Petition Right, as amended.

28 J. Drgonec, *Fundamental Rights and Freedoms under the Constitution of the Slovak Republic*, Volume 2, Bratislava: MANZ, 1999.

tion of the physical integrity of a person and the prohibition of discrimination.<sup>29</sup> On this basis, it can be characterized as a right that reaches beyond the scope of political rights. It should also be emphasized that the Constitution guarantees peaceful exercise of the right to assemble as a means of communication, thus implicitly excluding any forms of riot or violent or aggressive assembling. Due to the fact that the exercise of the right to assemble<sup>30</sup> requires a collective element and assumes gathering of people mostly in a limited (close) quarters, its restriction in the time of a pandemic made some sense. However, its restriction also interfered with the exercise of other rights, e.g. that of religious freedom. The restriction of the right to assemble was in place almost throughout 2020 and subsequently until 14 May 2021.

It is worth emphasizing that even in a state of emergency, fundamental rights and freedoms can be restricted only temporarily, i.e. the temporal dimension of proportionality (most often for a few weeks) is important. Restrictions that are initially considered to be admissible must be monitored and subsequently checked as to whether they are still appropriate.<sup>31</sup> As follows from the above, the long-term restriction of the right to assemble in the Slovak Republic was not subject to assessment and it was not checked as to whether it is still necessary and the test of necessity was not applied.

In the context of freedom to assemble, the courts in the Federal Republic of Germany recognized that an absolute ban on assembly, without introducing more lenient measures (in particular as regards distance regulations and other hygiene requirements to be observed at the gathering), was disproportionate.<sup>32</sup>

In the first wave of the pandemic, by its Resolution no. 207, the Government banned the exercise of the right to peacefully assemble as of 8 April 2020, with the exception of persons living in a common household, and this ban was lifted only with effect from 10 June 2020.

Subsequently, in the second wave, by its Resolution no. 645 of 12 October 2020 (no. 284/2020 Statutes), effective from 13 October 2020, the Government limited the right to peacefully assemble to six persons, except for persons living in the same household. This was followed by a substantial restriction of the freedom of movement and stay by a curfew with certain exceptions under Resolution no. 678 of 22 October 2020 (no. 290/2020 Statutes), Resolution no. 693 of 28 October 2020 (no. 298/2020 Statutes) and Resolution no. 704 of 4 November 2020 (no. 306/2020 Statutes). The

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29 J. Svák, and T. Grünwald, *Transnational human rights protection systems, Volume I, The structure of the systems and the protection of political rights*, Bratislava: Wolters Kluwer, 2019, p. 447 et seq.

30 Act no. 84/1990 Statutes on the Right to Assemble, as amended.

31 S. Rixen, *Grenzenloser Infektionsschutz in der Corona-Krise?* (in: van R.Ch. Ooyen and H. Wasserman (eds.), *Recht und Politik. Beiheft 7. Zeitschrift für deutsche und europäische Rechtspolitik. Corona und Grundgesetz*, Berlin: Duncker & Humboldt, 2.

32 See BVerfG, *Beschl. v. 15. 04. 2020 – 1 BvR 828/20* – ([www.bverfg.de](http://www.bverfg.de)).

right to peacefully assemble was almost completely banned for 38.52% of 366 days in 2020.<sup>33</sup> Nevertheless, several protest rallies took place in the Slovak Republic, namely on 17 October 2020 in Bratislava outside the Office of Government, which was dispersed by the police. Subsequently, on 17 November 2020, protest rallies were held in several cities in Slovakia against the measures introduced in connection with the COVID-19 pandemic and against the Government of Igor Matovič.<sup>34</sup> These were assemblies clearly held in violation of the rules resulting from the Government Resolution issued in connection with the declared state of emergency. There was no doubt that this was an exercise of a political right and that the number of participants that assembled was many times higher than six.<sup>35</sup>

On the other hand, it should also be noted that the restriction of the right to assemble was in place for a disproportionately long time, and these protests may not be limited to participation solely by ‘corona deniers’, but might have included concerned citizens who feared for their businesses, work or the advancement of their children, who came to oppose public authorities, as the latter did not seem to take their problems sufficiently seriously and had failed at creating at least some room for co-decision-making.

The right to associate (Art. 29) can be perceived in a way as a ‘continuation’ of the right to assemble. ‘Unlike assembling, which is only a limited form of association of natural persons (citizens) and ceases upon their parting, associating is the right to associate in a permanent form.’<sup>36</sup> At the same time, it is a specific constitutional formulation that simultaneously combines that right with freedom.<sup>37</sup> The right to associate is an individual subjective right granted to a natural person or legal entity, and it is also one of those fundamental rights the purpose of which can be achieved only by joint exercise of the right by multiple persons.<sup>38</sup> With respect to this, the Constitutional Court stated: ‘Regarding the political nature of the right to associate, it means the ambition to participate in the formation and creation of a political system. In this sense, the right to associate represents an important level of the process by which an individual coming from an atomized mass of individual legal entities integrates into

33 V. Bujňák, Prohibition to exercise the right to peacefully assemble during Christmas in the context of hitherto development, Comenius blog, <https://comeniusblog.flaw.uniba.sk/2020/11/12/zakaz-uplatnovania-prava-pokojne-sa-zhromazdovat-pocas-vianoc-v-kontexte-doterajsieho-vyvoja/>.

34 <https://www.teraz.sk/slovensko/sledujeme-protesty-na-slovensku/508408-clanok.html>.

35 <https://comeniusblog.flaw.uniba.sk/2020/10/22/co-robit-so-zhromazdenim-konanim-v-rozpore-s-podmienkami-nudzoveho-stav/>.

36 M. Čič et al., *Commentary on the Constitution of the Slovak Republic*, Bratislava: Eurokodedex, s.r.o., 2012, p. 216.

37 J. Drgonec, *Constitution of the Slovak Republic. Theory and Practice*. 2nd revised and amended edition, Bratislava: C.H. Beck, 2019, p. 715.; as to the definitions see also S. Košičiarová, *Right and duty to associate (public law aspects)*, Prague: Leges, 2019, pp. 12–17.

38 Act No. 83/1990 Statutes on Citizens Associating, as amended.

society for the purpose of promoting and transforming their own will and individual interests into the level of social interests. The above-mentioned process is constitutionally determined at the first stage by freedom of expression (Art. 26 para. 1 and 2 of the Constitution), the right to peacefully assemble at the second stage (Art. 28 of the Constitution), the right to freely associate at the third level (Art. 29 para. 1 of the Constitution) and culminates in the exercise of the right to associate in political parties and movements (Art. 29 para. 2 of the Constitution). Freedom of association plays a key role in the process outlined. Crucially dependent on it is the realization of democracy in a modern rule of law, as it bridges the imaginary gap between the state and the individual.<sup>39</sup> The second paragraph of Article 29 contains a combination of two rights – the right to form political parties and movements and the right to associate in political parties and movements. These rights are interrelated, but they can also be exercised separately.<sup>40</sup> No specific form of restriction of the above right occurred under the state of emergency.

The right to participate in the administration of public affairs (Art. 30), as one of the most important political rights, is regulated by the Constitution in three forms, namely in the form of direct exercise of power, in the form of direct democracy, in particular by a referendum (Art. 30, para. 1), in the form of the right to vote (Art. 30, para. 1, 2 and 3) and finally through the right of access to elected or other public office (Art. 30, para. 4). These forms must be understood only as rights, not duties. Citizens are, therefore, not obliged to run for a public office or to participate in direct exercise of democracy, neither does the Constitution provide for an electoral obligation.

Of the above-mentioned forms of this political right, we focus on the right to vote, as its exercise under the state of emergency requires a specific approach, even though it cannot be restricted under the Constitutional Law on State Security. Electoral law in the Slovak Republic is exercised in several forms – in the elections to the National Council of the Slovak Republic, in the presidential elections, in the elections to the European Parliament and in the elections to the local self-government bodies (municipalities and higher territorial units).<sup>41</sup>

A few comments are made on different types of elections in relation to the pandemic. The first case of COVID-19 was confirmed in Slovakia on 6 March 2020, which means only less than a week after the last elections to the National Council, which took place on 28 February 2020, were held. Had these elections been held even a week or two later, postponing them for reasons of public health protection would have very likely been on the table. There is no doubt that if several hundred people met

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39 Finding in case no. PL. ÚS 11/2010 of 23 November 2010.

40 J. Drgonec, Constitution of the Slovak Republic, *op. cit.*, p. 717.

41 The implementation of all types of elections is regulated by the so-called Electoral Code – Act no. 180/2014 Statutes on Conditions for Exercising the Voting Right, as amended.

in almost 6,000 polling stations throughout the territory of the Slovak Republic, that would almost guarantee the further spread of infectious disease.<sup>42</sup>

A different situation occurred in relation to municipal elections, where new and supplementary elections were held twice during the pandemic, on 3 October 2020<sup>43</sup> and 15 May 2021<sup>44</sup>. The first of these took place in 48 municipalities in Slovakia, where it was necessary to finish voting for mayors and local council members. Pursuant to Act no. 180/2014 Statutes on Conditions for Exercising the Voting Right, as amended (hereinafter referred to as the 'Voting Right Act'), a barrier to exercising one's right to vote is the restriction of personal freedom provided for by law for the protection of public health. Thus persons who were ordered to isolate at home could not exercise their right to vote, even by means of a portable ballot box.<sup>45</sup> It was essential that district electoral committees be able to identify a voter with a barrier to the right to vote, which was only possible in liaison with the relevant regional public health authorities. Thus, on the election day, the district election committees had a list of voters marked with a note about having a barrier to their voting right under § 4 of the Voting Right Act which concerned voters who were ordered to isolate.<sup>46</sup> For this reason, telephone hotlines were established for the election committees and the election day was jointly monitored by the Home Department, the State Commission for Elections and Control of Political Parties Funding, as well as the Public Health Authority of the Slovak Republic. The case of the elections of 15 May 2021 was similar. Fortunately, in both cases the elections took place without major complications. Due to the nature of municipal elections, additional elections to municipal offices were scheduled for 23 October 2021<sup>47</sup> in 20 municipalities in Slovakia. Other types of elections did not happen during the state of emergency as their periodic schedule did not coincide therewith.

Article 31 of the Constitution contains no specific right and rather establishes a constitutional principle; it is of a general nature<sup>48</sup>, according to which the statutory regulation of the rights provided for in Art. 30 must allow and facilitate free

42 See M. Domin, Elections at the time of the pandemic (constitutional view), <https://comeniusblog.flaw.uniba.sk/2020/03/18/volby-v-case-pandemie-ustavnopravny-pohlad/>.

43 Declared under the decision of the Chairman of the National Council of the Slovak Republic no. 187/2020 Statutes of 4 July 2020.

44 Declared under the decision of the Chairman of the National Council of the Slovak Republic no. 54/2021 Statutes of 9 February 2021.

45 33 mayors and 28 municipal councillors were to be elected in the supplementary municipal elections. More than 32,000 voters were expected to arrive at the polling stations in 55 precincts.

46 M. Domin, Isolation in the home environment and exercise of the voting right, [https://comeniusblog.flaw.uniba.sk/2020/07/28/izolacia-v-domacom-prostredi-a-vykon-volebnego-prava/#\\_ftn1](https://comeniusblog.flaw.uniba.sk/2020/07/28/izolacia-v-domacom-prostredi-a-vykon-volebnego-prava/#_ftn1).

47 Declared under the decision of the Chairman of the National Council of the Slovak Republic no. 235/2021 Statutes of 8 June 2021.

48 M. Čič, et al., Commentary on the Constitution of the Slovak Republic, Bratislava: Eurokodex, s.r.o., 2012, p. 230 et seq.

competition of political forces in a democratic society. This principle does not apply to free competition between political parties and movements only. Free competition between political forces is also guaranteed within individual political parties and movements, among all citizens exercising the constitutional right of access to elected office.<sup>49</sup>

The right to protest (Art. 32 of the Constitution) closes the category of political rights in terms of the constitutional system. In order for any mass protests of citizens of a peaceful or less peaceful nature to be regarded as the exercise of the right to protest and not an anarchy, the mandatory material conditions of a cumulative nature laid down in the Constitution must be satisfied. Within the meaning of the Constitution, one of them is the fact that the democratic order of fundamental human rights and freedoms in the country, referred to in this Constitution, is being scrapped. The second essential condition that must be met for constitutional exercise of the right to protest is the fact that the constitutional bodies are obstructed in carrying out their activity and, simultaneously, the use of legal means has proved ineffective, or was effective, but subsequently blocked. With respect to this matter, the Constitutional Court stated that: 'The right to protest is the ultimate means for the citizens to resort to only if the democratic order of fundamental rights and freedoms is threatened in the territory of the Slovak Republic and the public authorities cannot or do not want to ensure it.'<sup>50</sup> Hopefully, it will not be necessary to exercise this right in the Slovak Republic either under a state of emergency or during regular operation of society.

## Conclusion

Based on legal analysis and empirical experience, several conclusions can be drawn with respect to the issue examined:

- Experience with a long-lasting state of emergency shows that the society is sufficiently rational and adaptable.
- In the Slovak Republic, both the Parliament and the Government have largely failed in handling the coronavirus crisis. This is evidenced by long-lasting restrictions of fundamental rights and freedoms, the non-reviewability of emergency measures by the judiciary and somewhat lacking emergency legislation.
- It seems necessary to adopt a law that would regulate measures aimed at controlling epidemics caused by infectious diseases and respect constitutional complexity in restricting fundamental rights and freedoms (Art. 13 of the Constitution of the Slovak Republic).

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49 Finding in case no. PL. ÚS 15/98 of 11 March 1999.

50 Decision in case no. II. ÚS 105/07 of 24 May 2007.



- Due to the fact that anti-pandemic measures were entrusted to the executive authorities (Health Department, Public Health Authority of the Slovak Republic), the boundaries of fundamental rights and freedoms due to internal competence of these authorities were not systematically taken into account and there was no room for them to be balanced. The protection of fundamental rights is thus spread thinly in the division of competencies.
- The requirements for the content of the law which restricts fundamental rights and freedoms must be more stringent in terms of certainty, taking into account also the intensity of intervention and the scope of intervention, because what is not regulated and compensated for in the law can no longer be remedied at the level of sublegal norms. This was clearly demonstrated in the experience from the Slovak Republic, that fundamental rights and freedoms cannot be restricted through Public Health Authority decrees. These must be implemented by law.
- In relation to political rights, it is important to regulate more specifically the options, scope and intensity of restrictions of the right to assemble, as this right was restricted the most and disproportionately. Interferences with the right to assemble were unprecedented in nature and must not be repeated. This is all the more so given that the interpretation of the restrictions associated with it also touched upon the exercise of other, mostly personal rights and freedoms. In addition, this is a sensitive political right, through which in the territory of the Slovak Republic almost all fundamental social changes related to the establishment of democratic processes in the state have taken place.
- The exercise of the right to vote may also be a problem. This was not the case during the past pandemic, as the regular elections schedule did not coincide therewith. However, it is necessary to supplement the legislation with such form of exercising the right to vote that would foresee similar situations (pandemic, terrorism).
- If an option of electronic voting in elections or referendums is introduced, it is important to strictly guard the avenues of such voting, especially in the context of frequent cyberattacks. This also applies to the conditions of electrification in the case of the exercise of the right to petition.

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