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Proceedings before Courts: the domestic courts' experience

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I. Introduction

Like many courts around the world during the epidemic, the Slovenian Constitutional Court (hereinafter referred to as "the Court") has faced unforeseen challenges in deciding on the constitutionality of measures related to Covid-19. The epidemic caught us relatively unprepared. The main statutory basis for dealing with epidemics is the Communicable Diseases Act (CDA), adopted in 1995. On the basis of this statute the government began adopting numerous regulations with the purpose of limiting the epidemic. Very soon after the first regulations came into force, numerous individuals and legal persons started filing petitions with the Court. At times the Court was literally flooded with petitions to initiate a review of the constitutionality or legality of regulations.[1]

In this presentation I will first provide an overview of the relevant Slovenian constitutional framework, then present and critically assess a few of our Constitutional Court's landmark cases and the methodological thinking behind them, and then put this case-law into a comparative perspective.

II. Constitutional framework

a. Principle of legality

According to the understanding shared by numerous continental European countries[2], the checks and balances of the different branches of State powers are implemented by means of the principle of legality. As expressed by Besselink, Pennings and Prechal, the principle of legality prescribes that: "the exercise of public authority over the citizens, whether in the form of administrative acts or as a form of binding regulation, requires a basis in an act of Parliament."[3] Some authors see legality as pivotal in

[1] After the government introduced a measure making proof of vaccination or recovery mandatory for employees in State administration, the Court received 250 petitions to initiate a review procedure in less than a week. See: Že 250 pobud za presojo ustavnosti pogoja PC v državni upravi - N1 (n1info.si)

[2] The UK is a specific example, where, despite the fact that the branches of power share all the functions of legality, the principle of legality is not recognised as a ruling principle. L. Besselink, F. Pennings, S. Prechal, "Introduction: Legality in Multiple Legal Orders", in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds)), Kluwer, Alphen aan den Rijn, 2011, p. 5-6.

[3] *Id*, p. 6.

maintaining the rule of law, alongside three other crucial elements on which modern society depends; the others in this quartet being democracy,[4] separation of powers,[5] and respect for human rights.[6]

The principle of legality, as a firm constitutional principle in numerous countries,[7] stems from the idea of the hierarchal organisation of legal norms. At the top there is the Constitution; underneath are the statutes (containing norms of statutory rank), adopted by a democratically elected parliament; and on the lowest level there are the so-called "sub-statutory" acts, that is to say, those legal acts which can be adopted by different authorities, among others by the executive branch (e. g. regulations, ordinances).[8]

Such organisation is built on the doctrine of the precedence of statute law, meaning (1) that both the executive branch and the judiciary[9] are bound by statute law[10] and (2) the acts of the executive have to conform with the statutes. This imposes a number of obligations on the executive branch: (1) actions of administrative authorities must be based on statute law (legislative branch);[11] (2) those authorities must act within boundaries set by the legislator. As a consequence, if the executive branch's acts violate any of the higher-ranking acts (the Constitution or statutory norms) they are considered null and void. In other words, legal acts adopted by the executive branch, the government included, do not have a life of their own. Their legal existence is dependent on their legal basis, which is a given statute (and, at a higher level, the Constitution). If any sub-statutory act is deemed unconstitutional (for whatever reason) it will cease to exist. As a consequence, no court can base its decision on a sub-statutory act which is not in accordance with its relevant statutory basis and/or the Constitution (*exceptio illegalis*).[12] Governments may not, therefore, exercise any powers that are not provided for and specified by the legislator. By these means the legal system seeks to prevent the government from exercising arbitrary power.

The Slovenian legal system adheres to that doctrine, since Article 120 of the Slovenian Constitution demands that administrative authorities perform their work independently but within the framework and on the basis of the Constitution and laws. Article 153 of the Constitution (Harmonisation of legal acts) requires that implementing regulations and other general acts conform with the Constitution and

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[4] M. Verhoeven, R. Widdershoven, "National Legality and European Obligations", in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds.)), Kluwer, Alphen aan den Rijn, 2011, p. 57.

[5] The idea of the separation of powers originates in the Age of Enlightenment, beginning with Locke, who was amongst the first to criticise the idea of the king's power originating from God, and conceptualised the separation of powers (with power ultimately inhering in the people) to the executive and legislative branches. The key idea of the separation of powers was further developed by Montesquieu in his book *The Spirit of Laws* (from 1748). Not only did Montesquieu draw a distinction between the legislative, executive (one can also say administrative), and judicial branches of power, but he also formulated the requirement that these functions must be distributed between different State authorities that are independent of one another. See, e.g., Sharon Krause, "The Spirit of Separate Powers in Montesquieu", *The Review of Politics*, Vol. 62, No. 2, 2000, pp. 231–265, Céline Spector, *Montesquieu, Encyclopedia of the Philosophy of Law*, Sorbonne, hal-03149778.

[6] U. De Vries, L. Francot-Timmermans, "As Good as it Gets: On Risk, Legality and the Precautionary Principle", in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds.)), Kluwer, Alphen aan den Rijn, 2011, p. 25.

[7] *Id*. See also M. Verhoeven, R. Widdershoven, "National Legality and European Obligations", in: T*he Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds.)), Kluwer, Alphen aan den Rijn, 2011, p. 57. The authors claim that this principle is also recognised as a general principle of European law by all member States.

[8] See, regarding a similar concept in German law in G. Jurgens, M. Verhoeven, P. Willemsen, Administrative Powers in German and English Law, in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds.)), Kluwer, Alphen aan den Rijn, 2011, p. 38-40.

[9] In this paper we are focusing on the relationship between the executive and legislative branch and will therefore neglect the role of the judiciary.

[10] G. Jurgens, M. Verhoeven, P. Willemsen, "Administrative Powers in German and English Law", in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds.)), Kluwer, Alphen aan den Rijn, 2011, p. 38-40.

[11] *Id*, p. 38.

[12] See similar solutions in German law, *id*, p. 39.

laws (statutes). The Court has stated in numerous judgments that the principle of legality also binds the government as the highest authority of the State administration.[13]

In general, the legislature is free to choose in which areas it will adopt legislation; however, the Constitution requires that it be the exclusive body to legislate in the area of human rights.[14] The manner in which human rights and fundamental freedoms are exercised may only be regulated by law of a statutory nature. This holds true all the more so with regard to any limitations of human rights.[15] The principle of legality is therefore even more strictly applied to the acts of the executive branch when human rights are concerned: the competence to interfere with human rights must never be transferred to the executive branch.[16]

b. Methodological questions

The major constitutional problem facing the Court in Slovenia was how to assess the constitutionality of governmental regulations regarding epidemic-related measures. During the Covid epidemic, the whole reality of government changed and, in consequence, so did the nature of the petitions lodged with our Court to initiate a review procedure. Firstly, the predominant norm-creator became the government (instead of Parliament). We faced a weekly production of different regulations,[17] which were massively challenged in the Court by different petitioners.[18] Secondly, for the first time in modern history, human rights and freedoms were infringed in an extensive and long-lasting fashion and were thus curtailed, above all, by governmental regulations.

In this respect the Court received two sorts of petitions to initiate a review of the constitutionality of regulations, most of which (1) challenged directly their constitutionality (proportionality) without challenging their statutory basis (claiming that, for example, the right to freedom of movement had been disproportionally breached); while only a few (2) actually challenged the statutory basis of those regulations (that is to say, their legality). In this second and smaller category of petitions, it was crucial to frame the challenge in the methodologically correct way. Since our constitutional system is, as presented above, based on the premise that sub-statutory acts (including governmental regulations) do not have a legal life of their own, but must always be based on a statute, it seems only logical to assess the constitutionality of their statutory legal basis first and consider their possible

[13] See, e.g., Decision of the Constitutional Court No. U-I-73/94, Para. 17 of the reasoning, and No. U-I-84/09, dated 2 July 2009 (Official Gazette RS, No. 55/09, and OdlUS XVIII, 31), Para. 8 of the reasoning.
[14] See Decision no. U-I-79/20 below, pt. 71.
[15] See, e.g., Decision of the Constitutional Court No. U-I-25/95, dated 27 November 1997 (Official Gazette RS, No. 5/98, and OdlUS VI, 158), Paras. 30 and 31 of the reasoning, Decision No. U-I287/95, dated 14 November 1996 (Official Gazette RS, No. 68/96, and OdlUS V, 155, Para. 8 of the reasoning), Decision No. U-I-346/02, dated 10 July 2003 (Official Gazette RS, No. 73/03, and OdlUS XII, 70), Para. 10 of the reasoning, and Decision No. Up-1303/11, U-I-25/14, dated 21 March 2014 (Official Gazette RS, No. 25/14, and OdlUS XX, 21), Para. 10 of the reasoning.
[16] The only exception is a state of emergency (Articles 92 and 108 of the Constitution). In such an event, when the National Assembly is unable to convene due to a state of emergency or war, the President of the Republic may, on the proposal of the government, issue decrees with the force of law. Also in such an instance decrees with the force of law cannot be adopted directly by the government, and even when they are adopted, the President of the Republic must submit them to the National Assembly for confirmation immediately upon its next convening.
[17] This was not only a result of a changing reality of epidemic, but also of the Court decision no. U-I-83/20 (from 16. 4. 2020) on suspension of regulations which required the government to assess on a weekly basis the need for covid-related measures.
[18] Because of the short longevity of the regulations, the Court was *ab initio* faced with the challenge of how it could review legal acts that were no longer in force. Accordingly, the Court began by establishing an exception to the rule that it could only review legal acts still in force (under the second paragraph of Article 47 of the Constitutional Court Act). It carried out its review despite the fact that the ordinances it was considering had lapsed or expired during the Court's proceedings. It did so by deciding that the petition before the Court raised a particularly important precedential constitutional question of a systemic nature on which the Court had not yet had the opportunity to take a position. The same question, the Court determined, could also arise in connection with possible future acts (ordinances or regulations) of a similar nature.

disproportionality later. However, when faced with those new challenges, the Court made what was, in my opinion, a methodological slip in its first important case.

III. Case-law[19]

a. Prohibition of movement and gatherings in public places and movement outside the municipality of one's residence (case no. U-I-83/20, August 27, 2020, adopted 5:4)

Chronologically, the first important case was one adopted after the first wave of the epidemic, at the end of August 2020. The Court reviewed the consistency with the Constitution of two regulations adopted by the government, both prohibiting movement and gatherings in public places and movement outside the municipality of one's residence. The question at issue was whether such prohibition of movement was consistent with the first paragraph of Article 32 of the Constitution, which guarantees freedom of movement to everyone.

The Court conducted the review (i) on the basis of the legitimacy test, which entails an assessment of whether the legislature pursued a constitutionally admissible objective, and (ii) on the basis of the strict test of proportionality, which comprises an assessment of whether the interference was appropriate, necessary, and proportionate in the narrow sense. The Court assessed that by restricting movement to the municipality of one's residence the government was pursuing a constitutionally admissible objective, i.e. containment of the spread of the contagious disease Covid-19 and thus the protection of human health and life, which this disease put at risk. The Court also assessed that the measures were proportionate: the demonstrated level of probability of a positive impact of the measure on the protection of human health and life outweighed the interference with freedom of movement.[20]

b. Landmark case: restrictions on freedom of movement and of assembly and association (case no. U-I-79/20, May 13, 2021, adopted 5:3)

The petitioners challenged multiple governmental regulations restricting freedom of movement (Article 32 of the Constitution) and freedom of assembly and association (Article 42 of the Constitution) during the epidemic. They challenged the statutory basis of those regulations by alleging that Article 39 of the CDA was inconsistent with the Constitution, because the criteria for interfering with those two rights were too general and imprecise. Since the ruling on this petition established a new way of thinking, one which was later on confirmed by numerous other Covid-related cases, I will present the case in some detail here.

The statutory basis of the challenged regulations was Article 39 of the CDA, which reads as follows:

[19] The vast majority of cases challenging Covid measures were not accepted by the Court. There were however some other interesting cases apart from those presented here, on the merits of which the Court decided. One example is the Court's decision that the Minister of Education had acted unconstitutionally in ordering that educational work generally, and more specifically educational work for children with special needs, be conducted remotely. These orders were deemed unconstitutional because of their vague legal basis and because of the Minister's failure to obtain expert advice before issuing these orders (case no. U-I-8/21, from 16. 9. 2021).

[20] The Court decided this without actually assessing the statutory basis of the assessed regulations, which was a major point of the objections made by four judges in their dissenting opinions.

> "(1) When the measures determined by this Act[21] cannot prevent the introduction of certain communicable diseases into the Republic of Slovenia and the spread thereof, the Government of the Republic of Slovenia can also impose the following measures:
> 1. the determination of the conditions for travelling to a state in which there exists a possibility of infection with a dangerous communicable disease and for arriving from these states;
> 2. the prohibition or limitation of the movement of the population in infected or directly jeopardised areas;
> 3. the prohibition of the gathering of people in schools, cinemas, bars, and other public places until the threat of the spread of the communicable disease passes;
> 4. the limitation or prohibition of the sale of individual types of merchandise and products.
> (2) The Government of the Republic of Slovenia must immediately notify the National Assembly of the Republic of Slovenia and the public of the measures determined by the previous paragraph."

As we can see, the Article is rather general. The statutory basis it supplied acted as an "umbrella" that subsequently covered the great majority of later Covid regulations.

The Court, in assessing the case, firstly based the decision on the principle of legality, stating: "The principle of legality determined by the second paragraph of Article 120 of the Constitution contains two requirements: (1) implementing regulations and individual acts of the executive branch of power ... can only be adopted on the basis of the law, which means that they must be based on a (sufficiently precise) substantive basis in the law ... in accordance [with the first requirement] ... the executive power may only function on the basis of a substantive and sufficiently determinable regulation in the law. ... [the executive power] does need a sufficiently clear and precise statutory regulation of those questions whose regulation falls within the exclusive competence of the legislature, i.e. questions that are key, fundamental, and central for a certain legal system, but that are also not so important as to be regulated already by the Constitution. The executive power must not regulate these questions in an originary manner. ... Whenever the legislature authorises the executive branch of power to adopt an implementing regulation, it must first by itself regulate the foundations of the content that is to be the subject of the implementing regulation, and determine the framework and guidelines for regulating the content in more detail by the implementing regulation. ... A blanket authorisation granted to the executive branch of power (i.e. an authorisation not containing substantive criteria) entails the legislature's failure to legislate statutory subject matter, which is inconsistent with the constitutional order"[22].

Later on it stressed the importance of the precise statutory basis where human rights are at stake. "The requirement of the precision of the statutory basis where a restriction of human rights and fundamental freedoms is at issue is even stricter. ...the Constitution determined that human rights and fundamental freedoms may be limited (the third paragraph of Article 15 of the Constitution), but limitations must be exceptional in nature and determined as precisely as possible. It follows from the second paragraph of Article 15 of the Constitution that the manner in which human rights and

[21] The Articles preceding Article 39 describe in detail certain measures that may be taken in order to prevent the introduction or spread of certain communicable diseases: e. g. disinfection, special medical check, quarantine.
[22] Pt. 69 of the Decision. All the quoted passages are from the official Constitutional Court translation, accessible at u-i-79-209.pdf (us-rs.si).

fundamental freedoms are exercised may only be regulated by law. This holds true all the more so regarding limitations of human rights." [23]

"...When ... human rights and fundamental freedoms are directly interfered with by a general act, i.e. an act that refers to an indeterminable number of individuals, that act must be a law. In fact ... the legislature can leave the more detailed regulation of less important and technical questions regarding the limitation of a certain human right or fundamental freedom to the executive branch of power, but – in view of the constitutional importance of human rights and the formulation of limitation clauses in the Constitution – in the law it must determine sufficiently precise criteria for such a regulation. ... The Constitutional Court has already adopted the position that the statutory authorisation granted to the executive branch of power must be all the more restrictive and precise the greater the interference with or effect of the law on individual human rights and fundamental freedoms. It must always be sufficiently precise in order to not allow the executive power to regulate in an original manner a limitation of human rights and fundamental freedoms... From the viewpoint of the state administration being bound by the Constitution and the law, a sufficiently precise statutory basis entails a key safeguard against arbitrary interferences by the executive power with human rights and fundamental freedoms.." [24]

"In accordance with the Constitution, state authorities have the duty to appropriately protect the health and life of people in the event a communicable disease occurs; if necessary, also such that they limit the freedom of movement and the right of assembly and association. However, in doing so they must take into consideration that these limitations must essentially be determined already in the law, and the possible authorisation granted to the executive branch of power to regulate these limitations in more detail must be sufficiently precise..." [25].

The Court also made a reference to ECHR case law, stating: "... With respect to a number of Convention rights, the ECHR stresses that from the provisions of the European Convention, in accordance with which interferences with human rights must be prescribed by law, there follows not only the requirement that interferences be regulated by national law, but also that this law correspond with the principle of a state governed by the rule of law, which entails that it attains some quality criteria. The statutory regulation of interferences with human rights must be sufficiently clear, formulated with sufficient precision, accessible, and foreseeable.[26]" [27] "The freedom of movement is ensured by Article 2 of Protocol No. 4 to the Convention, which in its third paragraph expressly determines that in the exercise of the rights under this Article there must be no limitations except those determined by law. The freedom of assembly and association is ensured by Article 11 of the Convention, with regard to which it follows from the second paragraph of this Article that the exercise of these rights may only be limited by law. In order to assess whether there exists a sufficient statutory basis for an interference, the ECHR applies equal quality criteria as when assessing interferences with other Convention rights." [28]

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[23] Pt. 71 of the Decision.

[24] Pt. 72 of the Decision.

[25] Pt. 76 of the Decision.

[26] See, e.g., the ECHR Judgments in *Roman Zakharov v. Russia*, dated 4 December 2015, Para. 228 et seq. of the reasoning; *Stafford v. the United Kingdom*, dated 28 May 2002, Para. 63 of the reasoning; *Dragin v. Croatia*, dated 24 July 2014, Para. 90 of the reasoning; and *Chumak v. Ukraine*, dated 6 March 2018, Para. 39 of the reasoning. See also S. C. Greer, "The Exceptions to Articles 8 to 11 of the European Convention on Human Rights", Human Rights Files No. 15, Council of Europe, Strasbourg 1997, pp. 9–13; J. Viljanen, *The European Court of Human Rights as a Developer of the Legal General Doctrines of Human Rights Law: Study of the Limitation Clauses of the European Convention on Human Rights*, Acta Universitatis Tamperensis 965, Tampere University Press, Tampere 2003, pp. 185–208.

[27] Pt. 77 of the Decision.

[28] Pt. 78 of the Decision..

On the basis of all the above, the Court concluded that the challenged statutory regulation (points 2 and 3 of the first paragraph of Art. 39 of the CDA) did not fulfil the constitutional requirement of *lex certa*. In this respect it failed to provide legal certainty by allowing the government to choose, within its own discretion, the types, scope, and duration of restrictions which would interfere with residents' freedom of movement. The regulation permitted the government to freely assess in which instances, for how long, and in how extensive an area the gathering of people in public places might be permitted.[29]

The Court decided that Parliament must remedy the established inconsistency within two months of the publication of the Decision. Until the inconsistency is remedied, points 2 and 3 of the first paragraph of Article 39 of the Communicable Diseases Act still apply. The Court therefore allowed for the use of the unconstitutional statutory basis for another 2 months. This decision was based on the wish to protect the life and health of people that, due to the absence of the statutory basis, could be at risk and to prevent an even graver unconstitutional situation. It also established that the challenged ordinances adopted by the government were inconsistent with the Constitution, namely in the part where they were adopted on the basis of an unconstitutional statutory regulation. It decided that the establishment of such inconsistency had the effect of abrogation.[30]

We can therefore see that the Court adopted a different strategy when assessing the challenged regulations in the present case from the one it had followed in case U-I-83/20. It firstly assessed the statutory basis, Article 39 CDA. After ruling that it was not precise or specific enough, it concluded that the regulations based on it were unconstitutional as well. The fact that the regulations were deemed unconstitutional is an automatic result of the fact that the statutory basis was assessed as unconstitutional. As pointed out above, no sub-statutory act may exist without a valid statutory basis. The Court did not subsequently assess the proportionality of the challenged regulations, since it had already deemed them unconstitutional in any case.

c. Prohibition of public protests (case no. U-I-50/21, adopted on 17 June, 2021, adopted 6:2)

In this Decision the Court assessed the proportionality of multiple provisions of the governmental regulations in the parts which completely prohibited public protests between 27 February and 17 March[31] and between 1 April and 18 April 2021, and then limited public protests to up to ten participants between 18 March and 31 March, as well as between 23 April and 14 May 2021. It established that due to their length and effects they severely interfered with the right of peaceful assembly and public gathering (Article 42(1) of the Constitution). It therefore went on to assess the proportionality of those measures despite the fact that already in case no. U-I-79/20 adopted a month earlier it had assessed that the statutory basis of those regulations was unconstitutional.

The Court explained that the two measures had been adopted in order to prevent the spread of a communicable disease, which was a constitutionally admissible objective for limiting the above-mentioned human right. In this respect, it stressed that when balancing the right to health and life, on the one hand, and the right of peaceful assembly and public gathering, on the other, the two rights are

[29] The dissenting judge criticised the decision above all for not giving sufficient consideration to the value of human life, claiming that times of epidemic were exceptional and that the CDA provided a sufficient statutory basis in such times.
[30] The Court can either annul (*ex tunc*) or abrogate (*ex nunc*) regulations when they are deemed unconstitutional or not to be in accordance with the statute (Article 45(1) Constitutional Court Act).
[31] Before that point, public protests were completely prohibited from 20 October 2020 onwards, therefore for more than 4 months before the first assessed regulation.

in opposition, and they both enjoy a high level of constitutional protection. The Court then decided that the two measures were not necessary because in comparative law there existed a whole set of measures by which it was possible to prevent the spread of communicable diseases at public protests and which interfered to a lesser extent with the right of peaceful assembly and public gathering than the complete prohibition of public protests or the limitation thereof to a maximum of ten people (e.g. the distribution of face masks and hand sanitisers to protesters, or the closing of public spaces and roads to ensure sufficient space for maintaining an appropriate interpersonal distance between protesters). Prior to the entry into force of the challenged measures, the government had not ascertained whether the objective of ensuring public health could be attained by milder measures and had not taken into consideration the positive duty of the State to ensure to a reasonable degree, in view of the circumstances, the exercise of the right of peaceful assembly, or the duty to cooperate with organisers of public protests.

d. Prohibition on the carrying-out of services (no. U-I-155/20), October 7, 2021 adopted 5:3)

A number of legal entities carrying out services challenged multiple governmental regulations restricting the rights to freedom of work and free enterprise (Articles 49 and 74 of the Constitution) during the epidemic. The petitioners claimed that the fact there was no statutory basis for the prohibition on carrying out services (since point 4 of the first paragraph of Art. 39 of the CDA only allowed for the limitation or prohibition of the sale of individual types of merchandise and products) allowed the government to act according to its own discretion and to decide on limitations of constitutional rights of its own volition, which was not in accordance with the legality principle.

Heavily drawing on the reasoning of case U-I-79/20, the Court concluded that the statutory basis failed to provide legal certainty by allowing the government to choose, within its own discretion, the duration and the restrictions which interfered with freedom of work and free enterprise. The statutory basis, moreover, did not provide for guarantees which would limit the discretion of the government, such as a duty to consult the professionals and duty to inform the public. The most important part of the decision was the ruling that the statutory basis (point 4 of the first paragraph of Art. 39 of the CDA) did not even provide for the grounds on which to prohibit services; only the grounds for prohibiting the sale of individual types of merchandise and products. In this respect the government did not have any statutory basis for acting at all.

e. Regulation making proof of vaccination or recovery mandatory for employees in State administration (case no. U-I-210/21, November 29, 2021, adopted 6:3)

The last important decision of the Court was taken on a request to review the constitutionality and legality of Article 10a of the Regulation on the Manners of Complying with the Recovered-Vaccinated-Tested Requirement, which determined that employees in the bodies of the State administration must fulfil the recovered-vaccinated requirement to perform tasks at their workplace. The Court established that this was a condition under labour law to perform work in the State administration and thus the situation was essentially comparable to situations where a vaccination was required as a condition under labour law to perform various types of work. The legal basis for regulating such a vaccination was Article 22 in conjunction with Article 25 of the CDA, which regulated different types of (mandatory) vaccinations. The Court assessed that the challenged measure, which the government had adopted by the Regulation and which applied to employees of the State administration, had not been adopted in conformity with the statutory requirement. It ruled that there was already an established statutory

basis for regulating a mandatory vaccination and the government had bypassed it by regulating this question with a Regulation. The Court therefore decided that Article 10a of the Ordinance was inconsistent with the second paragraph of Article 120 of the Constitution.

By this Decision, the Court did not adopt a position as to whether the assessed measure – had it been ordered on the correct statutory basis – would be constitutionally admissible from the viewpoint of the principle of proportionality and the principle of equality before the law. Hence, the Decision does not entail that the vaccination of employees as a condition for performing certain activities or professions is necessarily a disproportionate measure. The ruling of the Court entails that the measure at issue should have been regulated in conformity with the law that determines the rules and conditions for all vaccinations, i.e. the CDA.

f. Regulations regarding the proof of recovery, vaccination or negative test result (case no. U-I-793/21, U-I-822/21, February 17, 2022 (9:0))

The Court unanimously ruled that the Regulation on Temporary Measures for the Prevention and Control of Infectious Disease, Infections COVID-19, by which an individual was required to fulfil one of the conditions (present proof of recovery, vaccination or negative test) in order to be able to access (certain) public spaces was not incompatible with the Constitution. The Court clarified that the Regulation provided for the fulfilment of any one of the conditions, as alternatives. The option of testing was widely available. Therefore, such Regulation did not have the effect of compulsory vaccination.

Under Article 32(1) in conjunction with Article 31(1) and (2) of the CDA, compulsory targeted health and hygiene examinations may be ordered in the event of an imminent risk of the spread of a communicable disease. Targeted health and hygiene checks on persons can also include the collection of human biological samples for laboratory examination. In the Court's view, there was a sufficient legal basis in the CDA for imposing the requirement of testing. The regulation under review also remained within the defined legal framework. It was therefore not incompatible with Article 120(2) of the Constitution.

The Court ruled that the testing did constitute an interference with physical integrity (Article 35 of the Constitution), therefore it carried out the assessment of this measure on the basis of a strict proportionality test. It concluded that in the existing circumstances, the interferences passed all three aspects of this test and were therefore compatible with the Constitution. The measure of testing was therefore appropriate to achieve the constitutionally permissible objective (to prevent spreading the contagious disease), and it was also proportionate in the strict sense (the benefits of the measure outweighed the intensity of the interference with the body).

g. Summary

The Court ruled that most of the above-presented measures (except for the proof of recovery, vaccination or negative test) were unconstitutional due to the vagueness, absence or evasion of an established statutory basis. In one case (U-I-50/21) the Court also assessed the proportionality of the regulation. The foundation of the Court's reasoning in all those decisions was the following: it is against the principle of legality (and also contrary to the principles of democracy and the separation of powers) for governmental regulations to infringe on human rights unless there is a clear and sufficiently

elaborated statutory basis which authorises the executive branch to act in full and sufficiently reasoned conformity with the said statutory basis.

This is true even in times of epidemic, because the principle of legality is the milestone of a democratic society. In order for the government to adopt the necessary legislation, the Court allowed the unconstitutional statutory basis to remain in force for another 2 months after the first decision (13 May 2021). The previous legislature did not amend the law in this respect for nearly 2 years.[32] However, after the election in April 2022 the new government took immediate action to amend the CDA. The Amendment is now in the Parliamentary procedure.

IV. DISCUSSION

A. Legality v. proportionality

As we can see from the Decisions presented above, the Court was at first hard set to find an appropriate approach in handling Covid-related cases. In the first case that it considered, it tackled the problem of assessing the constitutionality of regulations by reviewing the proportionality of a challenged regulation directly (case no. U-I-83/20). It assessed that the regulation was proportionate. Later on, in the landmark case no. U-I-79/20, it assessed that the statutory basis of the challenged regulation, which was exactly the same as that in case no. U-I-83/20, was unconstitutional. It is obvious that those two decisions are logically inconsistent. How could the regulations assessed in case no. U-I-83/20 have been in accordance with the Constitution if the later decisions found that their statutory basis was unconstitutional?

There is, therefore, a very important methodological lesson to be drawn from those decisions with respect to systems based on the legality principle. The key point to be made here is that assessment of the constitutionality of the statute or statutory basis of a legal act of lower hierarchical status (e. g. a regulation) must always precede an assessment of the proportionality of that legal act (be it a statute or regulation). In other words: the proportionality of a sub-statutory act interfering with a human right cannot be assessed before one decides whether the statutory basis of that act is constitutional. In the language of the European Convention, the standard of whether interference with a certain Convention right is “in accordance with the law” or “prescribed by law” has to come first. Only after assessing that a certain interference was in accordance with the law, can the court decide whether such interference was “necessary in a democratic society.”[33] Such a test includes the elements of what Slovenian legal doctrine understands as a proportionality test.

The meaning of the term "in accordance with the law" may differ from one specific legal system to another. The fact is that in legal systems influenced by Germanic law, as the Slovenian system is, every restriction of a human right may only be regulated by statute and not by a legal act of sub-statutory status, such as a governmental regulation. So far as such systems are concerned, “in accordance with the law” means only “on the basis and in the framework of the relevant statute”. Yet, as ECHR case-law teaches us, the law must be of certain “quality”. Among other criteria, the law must be formulated in a clear enough way, which enables citizens to foresee its exact scope or meaning.[34] The phrase has

[32] Minor changes to the statute were adopted twice (in October 2020 and in May 2021) but the essential part, which the Court found unconstitutional, remained unaltered. An attempt to amend the statute was made in July 2021, but failed because the second house of the Slovenian Parliament vetoed it. At the second attempt, the government did not get the majority required for the statute to pass through Parliament.

[33] “... the 'necessity' implies the existence of a 'pressing social need'. This means that the interference must be proportionate to the legitimate aim pursued.” Y. Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, Intersentia, Antwerp, 2002, p. 11.

[34] *Id*, p. 9-11.

implications of a procedural nature as well (e. g. with regard to a statute being adopted by a certain procedure in Parliament).

If a statute is inconsistent with the Constitution, then the regulations adopted on the basis of such a statute cannot remain in force, regardless of their content. Even if such ordinances completely fulfilled all the criteria that a complete and constitutional law would need to satisfy, they would still not have an independent legal life. In other words: since implementing acts derive their existence from a law, they fail in the absence or inadequacy of a law, even if they are otherwise perfect in terms of their content.[35] The legal logic behind this reasoning is not in any way formalistic: it is deeply substantive, since it pertains directly to the principles on which a modern democratic State is founded.

B. Comparative differences

As pointed out above, not every legal system, not even in Europe, applies the principle of legality in exactly the same way. Different national legal systems understand the separation of powers principle and the connection between it and the principle of legality in different ways.[36] In some countries, acts of the executive can be a valid basis for restricting human rights, since in their systems such a solution is "in accordance with the law"[37].

Aware as they were of the legality problems, parliaments around Europe as a rule reacted swiftly by adapting the statutory bases of legal acts related to the epidemic. Kössler reports of "a rather extraordinary episode" in Austria, since there Parliament adopted the Covid-19 measures within less than 24 hours, on March 15, 2020[38]. The governmental legal acts (ordinances) were from there on adopted on the amended statutory basis. Germany reacted in a similar fashion. The Federal Parliament declared an "epidemic situation of national importance" on 25 March 2020 and, two days later adopted the Law to Protect the Population during an Epidemic Situation of National Importance[39]. In France as well, the Law on Public Health was amended already in March 2020 to allow for Covid-19-related measures.[40] This statutory basis allowed the Prime Minister and other Ministers to adopt certain measures provided by the statute to fight the Covid-19 epidemic. We can see that in all those countries the legislators reacted very quickly, realising that it was necessary to adapt the statutory basis for governmental measures in order to address the demands of the epidemic.

In some countries, a declaration of a state of emergency was permitted by their Constitution. In Italy, for example, the Council of Ministers declared a six-month state of emergency on 31 January 2020[41]. The Council of Ministers adopted decrees that introduced various measures with the purpose of preventing the spread of Covid-19. Later on the executive (e. g. Minister of Health and the Minister for

[35] The question, of course, is whether they can actually be perfect without statutory criteria. In fact, if a law is empty to such a degree that it does not contain clear limitations on and directions for the executive branch of power, the question arises as to which criteria could be used in the assessment of, for instance, the proportionality of an implementing act.

[36] "The Executive – central and local – acquires its powers from Acts of Parliament. English legal doctrine however shows relatively little concern with the nature and the scope of the statutory basis." G. Jurgens, M. Verhoeven, P. Willemsen, "Administrative Powers in German and English Law", in: *The Eclipse of the Legality Principle in the European Union* (L. Besselink, F. Pennings (eds.)), Kluwer, Alphen aan den Rijn, 2011. p. 46. However, at the end of the day, the *ultra vires* doctrine, serves a similar purpose. *Id*.

[37] Typically in the US legal system.

[38] K. Kössler, "Managing the Covid-19 pandemic in Austria: From National Unity to a de facto unitary state?" In *Comparative Federalism and Covid-19*, (N. Steytler, ed.). Routledge, Abingdon, 2022, p. 75.

[39] *Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz - IfSG).* See as well G. Färber, "Germany's fight against Covid-19, The tension between central regulation and decentralised management", In *Comparative Federalism and Covid-19*, (N. Steytler, ed.). Routledge, Abingdon, 2022, p. 52. Later on, in November 2020 a wider reform of the law took place.

[40] *Loi d'urgence pour faire face à l'épidémie de Covid-19.*

[41] Article 77 of the Italian Constitution.

the Interior) started issuing ordinances[42]. It is obvious that the Italian legal system allows for a state of emergency to be declared in such public health crises. In the Slovenian system, however, such a solution is only available when a great and general danger threatens the existence of the State (Article 92 of the Constitution) and this Article was at no time invoked during the epidemic.

Keeping all those differences in mind, the utmost care should be taken before one compares the seemingly similar measures and decisions taken by different national courts.

a. Reception and governmental reaction to the Court's case-law

Unfortunately, neither a swift legislative reaction, nor the national and political unity required to support it, was seen in Slovenia. As pointed out above, neither the Slovenian Parliament nor the government reacted to the Court's decision by amending the CDA (until the new government was appointed in June 2022). As is clear from the case-law above, the Court had no choice but to repeat the same message again and again. With little effect.[43]

All of the Court's decisions received extensive media coverage and were subject to massive professional, public and political debate. The reactions ranged from positive and supportive responses and gestures (e. g. in professional commentary and symbolic public demonstrations of support) to numerous critical polemic, and in some cases extremely insulting, invective. The Court was criticised for underestimating the value of life, not understanding the urgent situation and even accused of being responsible for numerous Covid-related deaths (a charge levelled by leading members of the government and associated politicians).

The failure to amend the statutory basis of the relevant legislation for more than two years after the epidemic started and nearly 2 years after the landmark decision was a very sad reflection on the legal culture in the previous political situation in Slovenia. Such a situation led to a state of permanent governance by means of unconstitutional regulations based on unconstitutional law. This state of affairs undermined efforts to tackle the epidemic by means of necessary and appropriate measures. It also eroded trust in the judiciary. A very sad result for the rule of law...

[42] A. Malandrino, E. Demichelis, "Conflict in decision making and variation in public administration outcomes in Italy during the Covid 19 crisis", *European Policy Analysis*, 2020, no. 10, 10.1002/epa2.1093.

[43] As pointed out above, the newly elected government acted immediately and the amendment of the CDA is now in the Parliamentary procedure.